EMPLOYMENT TRIBUNALS

Claimants:	**(1) Ms P. Mntonintshi** **(2) Ms U. Jama**
Respondents:	**(1) Barking Havering & Redbridge University Hospital NHS Trust** **(2) Ms C. Beck**
Heard at:	**East London Hearing Centre**
On:	**5 June 2023; and** **in chambers on 6 and 21 June and 12 July 2023**
Before:	**Employment Judge Massarella**
Members:	**Mrs B.K. Saund** **Mr J. Webb**

Representation

For the Claimants:	Ms S. Knight-Webb (Solicitor)
For the Respondents:	Ms H. Patterson (Counsel)

RESERVED JUDGMENT ON REMEDY

Except where stated otherwise, the awards are made against the First Respondent only.

The Tribunal's judgment on remedy in Ms Mntonintshi's case is as follows.

1. **Ms Mntoninthsi is entitled to awards of:**

   a. **£31,000 for injury to feelings;**

   b. **£8,000 for aggravated damages;**

   c. **£4,000 for personal injury;**

   d. **£8,600 by way of ACAS uplift;**

   e. **£12,617.82 interest on these sums.**

2. **The total award is £64,217.82.**

The Tribunal's judgment on remedy in Ms Jama's case is as follows.

3. Ms Jama is entitled to awards of:

a. £29,000 for injury to feelings; the Second Respondent shall be jointly and severally liable for £5,000 of that sum;

b. £5,000 for aggravated damages;

c. £6,000 for personal injury;

d. £8,000 by way of an ACAS uplift;

e. £10,632.06 interest on these sums.

4. The total award under these heads of loss is £58,632.06.

5. The Tribunal awards the following sums by way of compensation for past loss of earnings:

a. the full amount of pay lost during a period of sick leave between 3 August 2020 and 19 October 2020;

b. the full amount of pay lost from on-call shifts not worked from August 2020 up to the calculation date (12 July 2023);

c. compensation for 18 days loss of pay between 1 January and 31 May 2023 owing to the Claimant's working four days a week;

d. an ACAS uplift of 15% on the sums at (5)(a)-(c);

e. interest on the sums at 5(a)-(d) above at 8% from 26 October 2021 to the calculation date.

6. The Tribunal awards the following sums by way of compensation for future loss of earnings:

a. 50% of pay lost through on-call shifts not worked between 7 June and 30 September 2023;

b. 50% of pay lost between 7 June and 30 September 2023 owing to the Claimant's working four days a week;

c. an ACAS uplift of 15% on the sums at (6)(a) and (b).

7. In relation to the awards set out in principle above at paras 5 and 6, the parties shall agree the applicable sums, based on net figures, calculate the final (grossed-up) total to offset any tax liability to Ms Jama, and notify the Tribunal.

REASONS

Procedural history

1. By a judgment on liability sent to the parties on 24 February 2023, the Tribunal upheld the following:

    1.1. in Ms Mntonintshi's case: three claims of direct race discrimination, three of harassment related to race, and three of victimisation;

    1.2. in Ms Jama's case: eleven claims of direct race discrimination, five of harassment related to race, seven of victimisation, and eight of whistleblowing detriment.

2. Both Claimants are still employed by the Respondent. The Tribunal listed the case for a one-day remedy hearing. We were provided with an agreed bundle of documents of 334 pages. Both Claimants provided witness statements and were cross-examined; the Respondent did not call any witnesses. Both Counsel had prepared helpful written submissions, which the Tribunal read before hearing further oral submissions, limited by agreement to 45 minutes each.

3. Each Claimant submitted a detailed schedule of loss; the Respondent submitted counter-schedules, in which it accepted some of the Claimants' figures in principle, while disputing their entitlement to the awards in the amount claimed or at all.

4. Both Claimants sought awards for injury to feelings, aggravated damages, damages for personal injury, an ACAS uplift and interest. Ms Jama also sought an award for loss of earnings, claiming that she had been unable to work the same number of shifts because of the discrimination.

5. The loss of earnings figures had been calculated in the schedules as gross, rather than net, figures.

6. The Tribunal spent three days in chambers, carefully working through the evidence and submissions. We made the following findings of fact, and reached the following conclusions, on the balance of probabilities.

7. We apologise to the parties for the delay in sending out this judgment, which was caused in part by the amount of time required for deliberation and in part by the competing demands of other cases.

The law

<u>Compensation for acts of discrimination</u>

8. Compensation for discrimination is assessed on tortious principles (ss.119(2) and s.124(6) Equality Act 2010 ('EqA')). The aim is to put the Claimant in the position, so far as is reasonable, that she would have been in, had the tort not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23). The sum is not determined by what the Tribunal considers just and equitable in the circumstances, as would be the case for an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422).

9. In assessing compensation for discriminatory acts, it is necessary to ask what would have occurred had there been no unlawful discrimination. For example, in a dismissal case, if there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss (*Chagger v Abbey National PLC and another* [2010] IRLR 47).

Injury to feelings

10. The matters compensated for by an injury to feelings award include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102).

11. In *Vento* the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

> **'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. … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **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.**
>
> **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.'**

12. In recent years the bands have been increased annually by Presidential Guidance. When Ms Mntonintshi issued her case and Ms Jama issued her first case, they were as follows

    12.1. lower band: £900 to £9,000;

    12.2. middle band: £9000 to £27,000;

    12.3. top band: £27,000 to £45,000.

13. When Ms Jama issued her second case, they were as follows:

    13.1. lower band: £900 to £9,100;

    13.2. middle band: £9,100 to £27,400;

    13.3. top band: £27,400 to £45,600.

14. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the

award. 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 be seen as the way to untaxed riches (*Prison Service v Johnson* [1997] IRLR 162, EAT at [27]).

15. The Tribunal must focus on the impact of the discrimination on the individual concerned; unlawful discrimination may affect different individuals differently (*Essa v Lang* [2004] IRLR 313).

16. Where an individual has suffered a number of acts of discrimination, some caused by one protected ground, e.g. race, others by another protected ground, e.g. disability, the tribunal should make separate awards for each protected ground, as each is a separate wrong giving a right to damages (*Al Jumard v Clywd Leisure Ltd* [2008] IRLR 345). However, where the discriminatory acts overlap as they arise from the same set of facts, such as where a dismissal is on grounds of both race and disability, a tribunal will not be expected to separate the injury to feelings and attribute parts to each form of discrimination. This may not necessarily result in an increased award compared to the situation where all the acts of discrimination are caused by one protected characteristic, as the tribunal must always have regard to the proportionality of the overall figure awarded for injury to feelings.

17. Awards for injury to feelings unrelated to termination of employment are tax-free (*Moorthy v HMRC* [2018] EWCA Civ. 847).

<u>Personal injury</u>

18. Claimants can claim damages for personal injury caused by unlawful discriminatory acts (*Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481 and *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268). Provided a direct causal link between the act of discrimination and the loss is made out, there is no need to show that the injury in respect of which the claim was made was reasonably foreseeable (*Essa v Laing* [2004] ICR 746).

19. It is not always easy to identify where injury to feelings ends and physical and psychiatric injury starts and there is a risk of double counting.

20. The Judicial College has published guidelines for the assessment of general damages in personal injury cases. The latest 16th edition was published in April 2022. Its sets out the factors which need to be taken into account when valuing claims of psychiatric injury and identifies the categories of award: Less Severe, Moderate, Moderately Severe and Severe.

21. According to the guidelines, the factors to be taken into account in valuing claims of this nature are as follows:

> ‘(i) the injured person’s ability to cope with life, education and work;
>
> (ii) the effect on the injured person’s relationships with family, friends, and those with whom he or she comes into contact;
>
> (iii) the extent to which treatment would be successful;

(iv) future vulnerability;

(v) prognosis;

(vi) whether medical help has been sought.'

22. The guidelines on the Less Severe and Moderate categories are as follows:

'(c) Moderate - £5,860 to £19,070

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good. Cases of work-related stress may fall within this category if symptoms are not prolonged.

(d) Less Severe – £1,540-£5,860

The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter.'

23. In *Hampshire County Council v Wyatt*, UKEAT/0013/16/DA, 13 October 2016, the EAT (Simler P presiding) considered the appropriateness of making an award for personal injury in a discrimination case. The following principles emerge.

23.1. It is for a claimant to establish by evidence on the balance of probabilities that the act or acts of unlawful discrimination found proved caused or materially contributed to a physical or psychological injury or to an exacerbation of the claimant's existing condition. The evidence should address as best as reasonably possible the effects of the injury or exacerbation and how long they have and will last. What evidence is likely to be sufficient to discharge that burden will inevitably vary with and depend on the facts of the particular case [22].

23.2. A tribunal may have to address the question whether the injury complained of is simultaneous with the first discriminatory act found proved. It may have to consider whether the injury persisted during intervals between discriminatory acts and whether each separate act added to the injury suffered, but how far a tribunal deals with each question must depend, at least in part, on how far they were separately addressed in the evidence and argument laid before the tribunal. Where the evidence and argument is general, tribunals cannot be criticised for a rather general response to it [24].

23.3. 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 [25].

23.4. In cases where there are issues as to the cause or divisibility of psychiatric or psychological harm suffered by a claimant, it is advisable for medical evidence to be obtained. Although there is no absolute requirement for expert medical evidence, there is a real risk that failure to produce such evidence might lead to a lower award or to no award being made [28-29].

23.5. It is likely to be particularly important in a case where there are competing causes for a tribunal to address the question whether the injury or harm suffered is divisible or is indivisible. Whether or not any particular harm, state of health or injury is divisible or indivisible is a question of fact [26].

24. In *BAE Systems (Operations) Ltd v Konczak* [2018] ICR 1 at [32], the Court of Appeal held:

> **'[…] broadly speaking the law is that apportionment of the kind endorsed in *Thaine* is legitimate where injury is 'divisible' but not where it is not.'**

At [71] it held:

> **'I would emphasise […] that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong: not whether it can assess the degree to which the wrong because the harm.'**

<u>Aggravated damages</u>

25. In *Commissioner of Police of the Metropolis v Shaw* [2012] ICR 533, Underhill P summarised the correct approach to aggravated damages at [20-24], from which the following principles emerge:

25.1. an award is compensatory, rather than punitive;

25.2. aggravated damages are an aspect of injury to feelings and are awarded on the basis that the aggravating features have increased the impact of the conduct on the claimant;

25.3. an award may reflect the manner in which the wrong was committed; the phrase 'high-handed, malicious, insulting or oppressive' is often referred to; this is not an exhaustive list, an award may reflect any exceptional or contumelious conduct;

25.4. an award may reflect the motives of the wrongdoer, provided the claimant is aware of it; discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity;

25.5. it may reflect conduct subsequent to the wrong complained of, such as the manner in which the employer conducts the proceedings, or where the employer rubs salt in the wounds by plainly showing that he does not take the complaint seriously; a failure by the employer to apologise may come into this category;

25.6. the dividing line between the award for injury to feelings on the one hand and the award of aggravated damages on the other will always be very blurred, and tribunals must beware of the risk of unwittingly compensating Claimants under both heads for what is in fact the same loss; the ultimate question must be whether the overall award is proportionate to the totality of the suffering caused to the Claimant;

25.7. as a matter of broad common sense, the more heinous the conduct the greater the impact is likely to have been on the Claimant's feelings; nevertheless this should be applied with caution, because a focus on the Respondent's conduct can too easily lead a tribunal into fixing compensation by reference to what it thinks is appropriate by way of punishment;

25.8. tribunals should always bear in mind that the ultimate question is 'what additional distress was caused to this particular Claimant, in the particular circumstances of this case, by the aggravating feature in question?', even if in practice the approach to fixing compensation for that distress has to be to some extent 'arbitrary or conventional'.

26. Underhill P observed that the large majority of the awards had been in the range £5,000 to £7,000. Uprated for inflation this equates to £6,850 to £9,580 in 2023.

ACAS uplift

27. An award for compensation can be increased or reduced, by up to 25%, if the employer/employee (but not worker) has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s207(A) TULRC(A) 1992). At present ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) is the only relevant code of practice.

28. In *Slade v Biggs* [2022] IRLR 216 EAT at [77], Griffiths J set out the correct approach.

> **'In future, when considering what should be the effect of an employer's failure to comply with a relevant Code under s 207A of TULRCA, tribunals might choose to apply a four-stage test, in order to navigate the various points which I have been considering in this appeal:**
>
> **(i) Is the case such as to make it just and equitable to award any ACAS uplift?**
>
> **(ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?**
>
> **Any uplift must reflect 'all the circumstances', including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.**
>
> **(iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?**
>
> **This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise. The EAT must be reluctant to second guess**

> **the ET's decision either to adjust or not adjust the percentage in this respect, or the amount of any adjustment, because it is quintessentially an exercise of judgment on facts which can never be as fully apparent on appeal as they were to the fact-finding tribunal. The EAT will certainly not substitute its own view for the judgment of the ET in the absence of an obvious error.**
>
> > **(iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?**
>
> **Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is 'just and equitable in all the circumstances', and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is 'just and equitable' by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested. Indeed, the reduction by Parliament in the range from 50% to 25%, after the decision in Wardle may be taken to be a reconsideration of what is proportionate in the most serious cases, and, therefore, a strong indication on that aspect.'**

Interest

29. The Tribunal must consider whether to award interest on the sums awarded without the need for any application by a party, but an award of interest is not mandatory: reg 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[1]

30. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[2] The interest rate now to be applied is 8%.

31. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs). For all other sums interest is awarded from the mid-point of the date of the act of discrimination complained of and the date of calculation (reg 6(1)(b)).

32. Where a tribunal considers that serious injustice would be caused if interest were to be calculated according to the approaches above, it can calculate interest on such different periods as it considers appropriate (Reg 6(3) IT(IADC) Regs 1996).

33. In *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833 the EAT held at [38-41] that whether or not it is right to depart from the approach to interest set out in the regulations is a matter of discretion for the Tribunal.

Recoupment and grossing up

34. Recoupment does not apply to compensation for discrimination.

[1] SI 1006/2803
[2] SI 1996/2803

35. All sums awarded by the Tribunal should be grossed up to offset any liability the Claimants will have for tax on the award.

Findings and conclusions: Ms Mntonintshi

Damages for psychiatric injury

36. The Claimant claims £10,000 in respect of damages for psychiatric injury. Such an award would fall into the 'moderate' band of the Judicial College Guidance. We were not addressed by either representative in respect of either Claimant as to whether the injury complained of was simultaneous with the first discriminatory act found proved; submissions tended to be generalised on both sides.

37. Although there had been time to commission an expert medical report, Ms Mntonintshi did not do so. The medical evidence before the Tribunal was as follows.

38. We had Ms Mntonintshi's GP records, covering the period between 19 June 2020 and 17 May 2022, consisting of one and a half pages, which contained the following.

    38.1. On 19 June 2020, the Claimant had a telephone consultation with her GP. The problem was described as stress at work. The records specifically record her saying 'on 18th May falsely accused of doing something she did not do'. The notes referred to her being worried about the outcome, only able to sleep 1 to 2 hours a night and problems with eating. At the Claimant's request, she was prescribed 50 mg sertraline (one a day) and counselling (which she was able to access through her church).

    38.2. On 3 July 2020, there was a further telephone consultation, which recorded that the Claimant was feeling a lot better; sleep was still an issue but had improved since the previous consultation; she had had some side-effects with the medication but these improved.

    38.3. On 17 July 2020, the Claimants mood was 'a lot better'.

    38.4. On 11 September 2020, the Claimant 'feels well in self, no issues with meds, stopped last week, would like to stop us feeling better in herself now'.

    38.5. On 19 November 2020, the Claimant was prescribed sertraline again due to 'stress/anxiety at work'.

    38.6. On 25 January 2021, the Claimant still felt 'very stressful at work as feels on edge at present, would like to continue with meds'.

    38.7. The Claimant must then have stopped taking the medication because on 17 May 2022, she consulted her GP again, saying that she felt 'under pressure', referring to the tribunal hearing in August and saying that she 'feels needs meds again'.

39. We also had a short letter from Mrs Mntonintshi's GP, dated 27 June 2022:

> 'I am writing in support of Princess who has been a patient of ours for several years now. She first presented to me on 19 June 2020 with issues of stress at work. She was having difficulties with her appetite, sleep and mood. As her symptoms were severe enough we started her on antidepressant medication (Sertraline) and also offered a counselling. Since then, I have consulted with her seven times regarding these issues. The medication has helped slightly with her symptoms, but she has during these appointments reported ongoing stresses to her mental health due to the challenges with her workplace. If you have any further questions, please do not hesitate to contact us.'

40. We reminded ourselves that the discriminatory acts took place between February and July 2020. The first act occurred on 13 February 2020 (Ms Zadorozny throwing the pleural fluid sample). In May 2020 Ms Valera-Larios accused Ms Mntonintshi of wrongdoing by working a late shift and inviting the Roche representative to attend during lockdown. On 19 May 2020, Ms Valera-Larios persuaded Mr Cockfield to extend Ms Mntonintshi's probationary period with the threat that her employment may be terminated, on the basis of a malicious report which Mr Cockfield accidentally forwarded to the Claimant on 28 May 2020. In July 2020, Ms Valera-Larios questioned why Ms Mntonintshi should be allowed to raise a grievance and again suggested to Mr Cockfield that she ought to be dismissed.

41. There is no suggestion that Ms Mntonintshi suffered from any mental health difficulties before 19 June 2020. We are satisfied that the events in the month before this consultation caused her to consult her GP. The conditions referred to in the records are stress and anxiety at work; there is no formal diagnosis of depression, but she was prescribed antidepressants. We think it implicit from this and the reference to anti-depressants in the GP letter that the GP considered that she had symptoms of depression.

42. Doing the best we can on the available medical evidence, read together with Ms Mntonintshi's statement, we think she probably suffered from depression between June and September 2020 and that this was caused by the discriminatory acts. There was then a recurrence of the depression from November 2020 and part way (we do not know how far) into 2021. Ms Mntonintshi was off work with stress between 19 November 2020 and 23 December 2020, during which time she was awaiting and then received the grievance outcome letter from Mr Ellender, which rejected the majority of her complaints. We think it likely that the recurrence was caused by the stress of that process.

43. The need for medication in January 2021 is described as being because of 'stress at work'. There were no new acts of discrimination at that point, but this was the period when Ms Mntonintshi's appeal against the grievance outcome was being dealt with and we think it likely that the relapse was caused by the stress of that process.

44. At some point in 2021, Ms Mntonintshi stopped taking antidepressants. She started again in May 2022 as the Tribunal hearing approached. We think it likely that the prospect of the hearing caused the relapse.

45. But for the discrimination, there would have been no stressful grievance/appeal process or tribunal proceedings. We are satisfied that the discrimination to which Ms Mntonintshi was subjected to between February and July 2020 was a material cause of the Claimant's initial depression and of the subsequent relapses.

46. We do not consider that Ms Mntonintshi has shown that the depression fell into the moderate category. There is insufficient medical evidence to support such a conclusion. Apart from a single period of absence, she continued to attend work. There were substantial periods when she was able to stop taking the medication. We have concluded that Ms Mntonintshi was able to manage the symptoms of depression through proportionate interventions from her GP and counselling from her contacts at church. We have concluded that it is more likely that the depression fell into the 'less severe' category of the Judicial College guidelines.

47. In the circumstances, we consider an award of £4,000 for psychiatric injury is appropriate.

Divisibility

48. The Respondent raised the issue of divisibility, but only very broadly in a single sentence in the written submissions and some brief oral submissions, making the point that, Ms Jama's case there were 24 pleaded acts of discrimination, of which the Tribunal only upheld 16. It was submitted that 'we have to assume she was sufficiently bothered by all of them'; no attempt was made to identify a particular part of the harm which was said to have been caused by the acts which we have found to be lawful. Insofar as it is relevant, we observe that the acts which we have not upheld tended to be the acts which were the less serious complaints.

49. For the Claimants, Ms Knight Webb argued that the harm in both cases is indivisible: it is not possible to divide the harm caused by the acts which we have found to be lawful and those we have found to be unlawful.

50. We prefer Ms Knight Webb's submissions. In neither case do we consider it possible, on the basis of the facts and evidence before us, to distinguish between a part of the injury which is due to the Respondent wrong and a part which is due to other causes. In the circumstances, we find that the injuries are truly indivisible and the Claimants should be compensated for the whole of the injury.

Injury to feelings: direct race discrimination, harassment related to race and victimisation

51. We make the following findings of fact as to the injury to feelings suffered by Ms Mntonintshi.

52. Before resuming employment with the Respondent in January 2020, she had worked for the Trust for over ten years without problems. She was highly regarded and enjoyed her work. Yet within four months of starting work under the management of Ms Valera-Larios she had been made the subject of false allegations and her probation had been extended.

53. In relation to the first health and safety incident on 13 February 23 we accept that Ms Mntonintshi was scared and shocked by Ms Zadorozny's conduct. She feared working with her alone after that date; she regarded her as a risk; she tried to swap on-call shifts with her colleagues to avoid working with Ms Zadorozny, not always successfully; she found this very stressful.

54. As for Ms Valera-Larios's accusations in relation to Ms Mntonintshi working a late shift, she had never previously been questioned about covering a shift that nobody else would cover. This was quickly followed by the accusation that she was responsible for the attendance of Ms Horshe at the laboratory, Ms Mntonintshi was fearful as to the consequences, which she thought might include a disciplinary sanction - or even a criminal sanction for breaching lockdown rules. She wrote to Mr Cockfield that she felt 'personally scrutinised and torn into individually by Iris'. She experienced palpitations, lack of sleep, stress, anxiety and problems with her appetite.

55. When Mr Cockfield told her that her probation period would be extended, with the threat of termination of her contract, the Claimant was extremely distressed. She found herself holding the bench at work, shaking; she would then go to the toilet and cry. When Ms Valera-Larios's probation statement was accidentally forwarded to her she realised the full extent of the accusations against her, which included potential fraud. She found this extremely offensive and upsetting; this was an attack on her character. Given the focus of Mr Valera-Larios on the black women in the department, Ms Mntonintshi was certain that race was a factor. This brought back the treatment she experienced during apartheid in South Africa, when black people were accused of criminal acts they had not done and monitored for the colour of their skin.

56. The fact that Mr Cockfield supported Ms Valera-Larios, without investigating the allegations, brought home to Ms Mntonintshi the fact that she might be dismissed. If she was dismissed, she would face deportation to South Africa with no means to support herself or her family back home. At the time there was a national lockdown and there were no flights. If she lost her job, she would not be able to pay the rent on her flat in the UK. She was also responsible for paying the mortgage on her family home in South Africa. She was especially concerned that her children, who depended on her salary to pay school and university fees, should not find out about what was happening. All this caused her extreme worry, anxiety and stress.

57. It was at this point that Ms Mntonintshi went to her GP, as recorded above.

58. The situation became worse on 13 July 2020, when the meeting between her, Ms Valera-Larios and Mr Cockfield took place, at which Ms Valera-Larios said that Ms Mntonintshi should not have been allowed to raise a grievance, that she would be a problem for the next two years and that her probation should be terminated. She also falsely accused her of bullying and harassing Ms Zadorozny and Ms Beck. We have already found (J227) that it was 'a hostile meeting which was shocking and upsetting for Ms Mntonintshi'. Ms Mntonintshi said, and we accept, that she found the experience sickening.

59. Although we did not uphold the failure to confirm the Claimant's probation as completed as an act of discrimination, there can be no doubt that the fact that this threat was left hanging over her meant that the Claimant's worries about

the situation were never properly resolved, certainly not through the inadequate grievance and grievance appeal processes.

60. Before setting out our conclusions as to the award for injury to feelings, we remind ourselves that we have already made an award of £4,000 in respect of the personal injury caused by the discrimination. The figure set out below represent the sums which we consider it appropriate to award in addition to that figure.

61. We had regard to the guidance in the *Jumard* case (at [49-55]). We concluded that in neither Claimant's case would it be appropriate to make separate awards in relation to the claims which succeeded by reference to more than one cause of action. They arose out of the same factual matrix and the detriment was the same. In terms of the impact on the Claimants, it would not be possible to identify separate sums in relation to each of cause of action. The parties did not make submissions on the basis that separate awards should be made; all their figures were global.

62. In Ms Mntonintshi's case, we have concluded that, although the acts of discrimination/victimisation were few in number, they were very serious indeed. It is plain that they had a more than usually grave impact on this Claimant, given her experience of apartheid in South Africa. The impact on Ms Mntonintshi of Ms Valera-Larios's attempts to secure the termination of her employment had a very great impact on Ms Mntonintshi sense of security as an employee and as a resident in the UK. We had no doubt that they belonged in the highest of the three *Vento* bands.

63. We considered that an award of £31,000, towards the lower end of the top band, was proportionate.

64. For the avoidance of doubt, we consider that £40,000, which the Claimant sought would be excessive; although this was a very serious case, it did not fall into the top end of the top band, in particular having regard to the fact that the Claimant retained her employment. On the other hand, the £15,000 which the Respondent proposed was, in our view, manifestly insufficient.

<u>Aggravated damages</u>

65. We consider that some of the claims we have upheld do not have features which might attract an additional award for aggravated damages:

    65.1. as for Issue 2, Ms Zadorozny's conduct was highly reprehensible, but it was reckless rather than deliberate;

    65.2. as for Issue 4, Ms Valera-Larios's conduct was harsh and accusatory, but not calculated and spiteful as it later became;

    65.3. as for Issue 5, we think Ms Valera-Larios's conduct was close to the threshold but did not pass it; the evidence was insufficiently clear that she was acting vindictively, rather than behaving ignorantly.

66. The position is different in relation to Issues 7, 8 and 10. We have no doubt whatsoever that the attempts by Ms Valera-Larios to have the Claimant's probation extended, and ultimately to secure her dismissal was malicious and

vindictive. Mr Cockfield's total failure to ensure that she was treated fairly, or to protect her in any way, contributed to the oppressive nature of the conduct. The attempt further to penalise her for raising a grievance was high-handed and oppressive. We accept that Ms Mntonintshi was horrified by the manner in which these are very serious allegations, which had the potential for such serious consequences, were pursued, especially as she knew them to be completely groundless. The absence of any managerial support exacerbated her distress.

67. In addition to these aspects of the claims which we upheld, the Claimant also invited us to take into account what the Respondent did after the conclusion of the Capsticks grievance. In her witness statement she described the fact that Ms Valera-Larios was asked to prepare a report on her current reporting line, the result of which would be that Ms Mntonintshi would continue to be managed by her or alternatively be transferred elsewhere. We are satisfied that the decision to put into Ms Valera-Larios's hands the task of reviewing Ms Jama's reporting arrangements, in circumstances where there were serious allegations of discrimination by Ms Jama against her pending in the employment tribunal proceedings, was high-handed and perverse. We understand Ms Mntonintshi's sense of outrage.

68. Ms Mntonintshi asked us to make an award of £10,000 for aggravated damages. The Respondent contended that no award was merited. For the reasons given above, we are satisfied that it is appropriate to make an award under this head because the matters we have identified increased the impact of the conduct on the Claimant. Having regard to Underhill P's guidance as to the usual range of such awards, we consider that an award of £10,000 would be excessive. We think that an award of £8,000, which is in the middle of the range, is proportionate in the circumstances.

69. Our total award under these three heads of loss is £43,000, comprising £31,000 for injury to feelings, £8,000 for aggravated damages and £4,000 for personal injury. Standing back and looking at the totality of the award, we are satisfied that there is no double-counting as between the three elements and that the overall sum is not disproportionate in light of the very significant adverse impact on Ms Mntonintshi of the Respondent's conduct.

ACAS uplift

70. Ms Knight Webb relies primarily on a breach of the requirement in the ACAS code to deal with grievances and appeals against grievance outcomes impartially and unreasonable delay.

71. In our judgment, both the Claimants' grievances were dealt with incompetently. Mr Ndongwe's investigation report was of poor quality. That was not Mr Ellender's fault but he in turn dealt with it improperly in our view: although he was entitled to ask supplementary questions to Mr Ndongwe to achieve clarity, we have already found in our judgment on liability (J244) that he went further and was responsible for key points being omitted from the final investigation. Mr Wishart later reprimanded Mr Ellender for this (J269), concluding that Mr Ellender had failed properly to reflect Mr Ndongwe's conclusions. He said that the Trust should apologise to the Claimants for 'lack of transparency'. We are

satisfied that Mr Ellender did not act impartially. That was a breach of the ACAS code.

72. Mr Wishart recognised that the result was so flawed that it could not stand. We think that was the right conclusion but nonetheless, by that point, there had already been unreasonable delay. We accept that Covid, and Mr Ndongwe's professional commitments, played a part in that delay but, as we observed in our judgement on liability, we do not accept, even taken together, this excused the delay.

73. The Respondent then instructed Capsticks to restart the process. The Tribunal was surprised by that decision since, by that point, Capsticks was representing the Respondent in the ongoing ET proceedings, the substance of which was the same as the Claimants' grievances. We think that was a serious error of judgment and was likely to undermine the Claimant's confidence in the impartiality of the new process. Nonetheless, we accept that, strictly speaking, there was no conflict, as the grievance was not handled by Capsticks' litigation department. The Tribunal has reached a completely different conclusion than that which Capsticks reached. However, no detailed submissions were made to us which could form the basis of a finding that Capsticks reached that conclusion improperly or acted without impartiality.

74. There is no doubt, however, that the Capsticks process also took a very long time. The delay overall from the point at which the grievances were lodged is, in our judgment, inexcusable.

75. We are satisfied that it is just and equitable to award an ACAS uplift. Taking together the excessive, unreasonable delay and the lack of impartiality on Mr Ellender's part, we consider that the default was serious and merits an uplift at the top end of the scale. However, we also acknowledge Ms Patterson's point that there was not a wholesale lack of process: investigations were carried out, meetings took place and outcomes were provided. Balancing these factors against each other, we have concluded that an uplift of 20% is appropriate as a starting-point.

Uplift in Ms Mntonintshi's case

76. In Ms Mntonintshi's case, there would be no overlap between an ACAS uplift and any of the other general awards we have made, which do not arise out of the conduct of the grievance process.

77. The uplifts in relation to each award are as follows:

    77.1. injury to feelings: £6,200 (£31,000 x 20%), giving a total of £37,200;

    77.2. aggravated damages: £1,600 (£8,000 x 20%), giving a total of £9,600;

    77.3. personal injury: £800 (£4,000 x 20%), giving a total of £4,800.

<u>Interest</u>

Dispute as to the basis of calculation

78. Ms Knight Webb submitted that interest should be calculated for the injury to feelings and aggravated damages awards from the date of the first act of

discrimination, which is 11 February 2020 in the case of Ms Jama (the failure to consider her for Roche training) and 13 February 2020 in the case of Ms Mntonintshi (the first health and safety incident). It was argued on their behalf that there was no justification for departing from the normal rule.

79. Ms Patterson shifted her position somewhat, initially inviting the Tribunal to make an award from the date of the first act of discrimination, then (in an email after the hearing) submitting that 'where a Tribunal decides that there is a continuing discriminatory act the awards should reflect an assessment of the proper amount to be paid at the end of the period covered' and inviting the Tribunal to exercise its powers under reg 6(3) of the 1996 Regulations to award interest on injury to feelings 'from the midpoint'. Unfortunately, she did not identify which midpoint was meant.

Conclusion as to the period for which interest be awarded

80. In both cases, we concluded that a serious injustice would be done if we awarded interest on the awards of injury to feelings from the date of the first act of discrimination: in both cases, the earlier acts were the less serious and would not, in themselves, have attracted awards at the level we have made; in both cases the impact on the Claimants was cumulative; they would be substantially over-compensated, if interest were awarded from the date of the first act of discrimination.

81. In all the circumstances, we have concluded that it is just to award interest on the awards for injury to feelings in both cases from the mid-point of the course of discriminatory conduct.

82. We have taken a slightly different approach in relation to aggravated damages, awarding interest from the first of the acts which we concluded merited the award. We consider it would be wrong to award interest by reference to the dates of discriminatory acts which we concluded did not attract an award under this head.

83. Neither party made submissions as to the correct approach to interest on the awards for personal injury (in both cases) and past financial losses (relevant to Ms Jama's case only). We have decided that it should be awarded, in accordance with the regulations, from the midpoint between the first act of discrimination and the date of calculation (12 July 2023).

<u>Interest on Ms Mntonintshi's awards</u>

84. In relation to the uplifted award for injury to feelings:

    84.1. the award is £37,200;

    84.2. the discriminatory acts took place between 13 February 2020 and 15 July 2020;

    84.3. the mid-point of that period is 29 April 2020;

    84.4. the calculation date is 12 July 2023;

    84.5. number of days = 1170 days;

84.6. the interest rate is 8%;

84.7. interest is 1170 x 0.08 x 1/365 x 37,200 = £9,539.51

85. In relation to the uplifted award for aggravated damages:

85.1. the award is £9,600;

85.2. the first act which merited aggravated damages took place on 18 May 2020;

85.3. the calculation date is 12 July 2023;

85.4. number of days = 1151 days;

85.5. the interest rate is 8%;

85.6. interest is 1151 x 0.08 x 1/365 x 9,600 = £2421.83.

86. In relation to the uplifted award for personal injury:

86.1. the award is £4,800;

86.2. the first act of discrimination was on 13 February 2020;

86.3. the calculation date is 12 July 2023;

86.4. the midpoint is 27 October 2021;

86.5. number of days from midpoint to calculation date = 624 days;

86.6. the interest rate is 8%;

86.7. interest is 624 x 0.08 x 1/365 x 4,800 = £656.48.

87. The total amount of interest payable is £12,617.82.

88. This produces a global award of £64,217.82. We do not consider that to be disproportionate in absolute terms; in our judgment, no further adjustment is required.

Findings and conclusions: Ms Jama

Damages for personal injury

89. Ms Jama claims an award for psychiatric injury in the amount of £10,000.

90. Like Ms Mntonintshi, Ms Jama has not commissioned an expert medical report, nor has she produced a complete run of her medical records; we saw only extracts from them.

91. In her witness statement, Ms Jama made a number of references to matters which are not supported by medical evidence, for example that her GP told her on 30 July 2020 that she was ‘going to have a mental breakdown’ and at another appointment on 3 August 2020 her GP said that her symptoms ‘sounded like PTSD and anxiety’. There is no reference in any of the contemporaneous documents to a mental breakdown or to PTSD. We make no finding that Ms Jama suffered those consequences.

92. Towards the end of her statement (paragraph 47), the Claimant summarises her symptoms as 'appetite loss, loss of confidence and concentration, acid reflux, panic attacks, nightmares, low mood, insomnia, stress and anxiety'. She identified the worst symptom as insomnia, which has left her reliant on medication to fall asleep. She did not mention depression.

93. We summarise the contemporaneous medical evidence available to the Tribunal, which consists of the following:

    93.1. there are a series of fit notes, signing Ms Jama off work between August and October 2020 for stress at work;

    93.2. an OH report dated 8 October 2020 recommended a phased return returning to normal contractual hours by week five and says that she should not undertake any on-call duty during the phased return;

    93.3. a fit note on 3 November 2020 indicated she may be fit for work with altered hours (half days), identifying stress at work;

    93.4. a letter from Tower Hamlets Talking Therapy dated 12 November 2020, referred to the fact that she had been having 'psychological therapies from Tower Hamlets talking therapy to recover from mental health difficulties that has been caused by her work situation'. The letter made two recommendations for reasonable adjustments: that she should not work with the two individuals who had been identified as her stressors as this would impact on her well-being and heighten her anxiety; and regular supervisions addressing her well-being by an appropriate trusted manager or senior member of staff in the workplace';

    93.5. a fit note dated 20 November 2020 signed her off for post-Covid recovery until 10 December 2020;

    93.6. a fit note dated 6 January 2021 recommended a phased return to work identifying the condition as stress at work;

    93.7. a fit note signed her off from 17 February 2021 until 27 March 2021 for stress at work, recommending altered hours and that she 'continue with Wednesdays off as has done previously';

    93.8. the recommendation that she continue having Wednesdays off was repeated in a note of 29 March 2021, identifying stress at work;

    93.9. another letter from Tower Hamlets Talking Therapies dated 13 March 2021 referred to the failure of all three phased returns as the adjustments of not been adhered to as per the OH, GP and Talking Therapies advice. Further recommendations were made: that Ms Jama should not work with the two individuals who had been identified as her stressors; and that she continue to have Wednesdays off to manage symptoms as per GP and Talking Therapies advice; regular supervisions addressing well-being by an appropriate trusted manager; the implementation of the adjustments should be managed by Mr Patten;

    93.10. a fit note dated 25 June 2021, cited stress at work recommending that Ms Jama continue to have Wednesdays off;

93.11. a fit note from September 2021 recommended a continuation of the same adjustments;

93.12. an OH report dated 31 August 2022, referred to 'symptoms of anxiety and stress', recommended the adjustments continue and referred to the fact that 'she takes medication to help her sleep, which consequently leaves her feeling drowsy in the morning'. A slightly later start was recommended;

93.13. further OH reports in January and February 2023 advised that the Respondent continue with the adjustments, including allowing her to have Wednesdays off 'to allow her to attend counselling in relation to workplace events over the past two years'.

94. There was also the following letter from the Claimant's GP, dated 31 March 2023:

> 'Ubah was first seen by the GP on 3rd August 2020 with work related stress and was signed off work for this reason for eight weeks (3/8/20-28/9/20). She then started on phased return which was initially too fast and she needed another period off work completely for three weeks (20/11/20-10/12/20) but was able to restart her phased return more slowly. She was never able to increase back up to full time work and continued working four days a week amended duties, with Wednesdays off, from 17th February 2021 until now. The day off in the middle of the week was initially to provide time for talking therapy and also to allow her to catch up on sleep as her sleep has remained poor due to stress throughout this time. She has taken amitriptyline at night intermittently for sleep. She was unable to do on calls or work antisocial hours during this time, partly due to the stress of these and partly due to the fact she was still not on full hours or duties. The amended duties did involve being protected from the people who caused her stress in the first place, and this will be an ongoing issue as she will hopefully get back to full time working and duties. It is impossible to predict how long it will take for her to recover from such a prolonged period of stress and this will be partly dependent on how she is facilitated to go back to normal working and protected from further stress. If all goes well I would expect her body and mind to recover in approximately six months.'

95. The following additional evidence was put before the Tribunal.

95.1. There was an extract from Ms Jama's GP records dated 31 May 2023 recording her consultation on that date by telephone. It records the problem as 'mixed anxiety and depressive disorder'. It says that the 'trauma from racial discrimination at work and victimisation as a result of this is ongoing'. It refers to 'emotional trauma leading to depression and anxiety which has been for over a year and taking a long time to respond to treatment'. It also records changing Ms Jama's medication from amitriptyline to mirtazapine 'to help sleep'.

95.2. We then had a letter from the Claimant's GP, dated 1 June 2023, saying that Ms Jama has been treated for: 'anxiety and low mood since July 2020, triggered by stress at work. At first it was diagnosed as stress at

work as this was the underlying cause, but as the time of stress continued the symptoms of anxiety with panic attacks and the low mood with poor sleep have become embedded. Whilst the underlying stress is now resolving the enduring effect of anxiety and depression have remained. This has been treated over many months of talking therapy and lifestyle modifications which have not been sufficiently effective and so she is now starting antidepressant medication.'

95.3. With respect, these are somewhat confused account of the Claimant's condition; what they do suggest is that there had been no diagnosis of depression before 31 May 2023.

95.4. Ms Jama then provided a document summarising her sickness absence from work. She invites us to find that the colds and flu for which she took time off from work were caused by stress at work. There is no medical evidence to support that link. There are some references to 'anxiety' being the cause of the absence; there is no reference to depression.

96. Doing the best we can, in the absence of an expert medical report, we have concluded that the evidence suggests that the Claimant suffered from workplace stress intermittently between August 2020 and the present, which manifested itself in intermittent periods of anxiety, low mood and insomnia. There is no evidence that she had any mental health difficulties before the discrimination which we have found she was subjected to.

97. We are satisfied that these health difficulties were caused, or materially contributed to, by the discrimination. There is a brief prognosis in the GP letter of 31 March 2023, suggesting that she will recover fully by the end of September 2023.

98. We are not satisfied that there is sufficiently cogent evidence, from which we could confidently conclude that the Claimant suffered from depression, other than in respect of a very short period. The only references to that period are retrospective, contained in the documents which date from the period after the Tribunal's judgment on liability was promulgated, which we treat with some caution.

99. In the circumstances, we have concluded that an award for personal injury in the Moderate category would be appropriate. On the evidence we have heard, we have concluded that the symptoms were not the most serious but they recurred, albeit intermittently, over a long period. The prognosis for a full recovery is good. On that basis we have concluded that an award for psychiatric injury towards the bottom of the Moderate category is appropriate, in the amount of £6,000.

<u>Injury to feelings: findings and conclusions</u>

100. We make the following findings of fact as to the injury to feelings suffered by Ms Jama.

101. The first act of discrimination was the failure in February 2020 to offer her the opportunity to attend the Roche training course. We accept that the fact that she had been treated less favourably than her white colleagues in this respect made Ms Jama feel undervalued and sidelined. It also caused her professional

embarrassment because there were some tasks she was unable to do because she had not received the training.

102. As for the first health and safety incident (Ms Zadorozny throwing the sample on 13 February 2020), we have already found (J376) that it created a hostile environment for Ms Jama and that she was shocked by the incident. She was worried by what else Ms Zadorozny might do.

103. As for Ms Valera-Larios's handling of this incident, and in particular her attempt to downplay Ms Zadorozny's conduct while seeking to implicate Ms Jama, we accept that Ms Jama felt threatened, rather than protected, for making a legitimate complaint; this made her feel vulnerable in the workplace and affected her ability to concentrate.

104. As for the failure to involve Ms Jama in the impromptu training on 28 February 2020, this made Ms Jama feel even more marginalised, especially against the background of the earlier failure to offer her training.

105. Then there was the second health and safety incident (Ms Zadorozny banging the storage rack against the bin on 17 March 2020), which left Ms Jama fearing for her safety, especially as nothing had been done about the previous incident. She felt unable to work alone with Ms Zadorozny.

106. Ms Jama then returned from a period of sick leave on 20 April 2020 to find an email from Ms Valera-Larios purporting to require her to work while on that leave. She was troubled by this discovery; it further affected her ability to focus while at work; by now, she was certain that she was being targeted for raising complaints.

107. This was compounded by being told on 22 April 2020 by Mr Cockfield that Ms Valera-Larios wanted her to be transferred to King George Hospital. Ms Jama felt that she was essentially being branded as a troublemaker; she felt helpless and trapped.

108. There was then the incident on 1 May 2020, when Ms Valera-Larios failed to consult Ms Jama before allowing staff to go home early. Although not a particularly serious incident in itself, it undermined Ms Jama's authority in front of the team and contributed to her sense of being sidelined. The same can be said of Ms Valera-Larios's failure to consult her on 14 May 2020 about the table of tasks for staff for the whole year before releasing it to the group.

109. The failure to give Ms Jama sufficient time in June 2020 to complete her work was plainly retaliatory and exacerbated the Claimant's sense of being treated differently from her colleagues. This was then compounded by Ms Valera-Larios's failure to action Ms Jama's request for time off to work on her research project, her ignoring Ms Jama's warning about the incorrect reagent (both of which happened in June 2020) and the inexplicable failure to communicate important information to Ms Jama about the liver function test in an appropriate way (in early July). Ms Jama felt very vulnerable, both professionally and personally, working in an environment where she was being subjected to what was now plainly a pattern of adverse treatment by her manager.

110. There was then the 'paininarse' incident in January 2021. We accept the Claimant's evidence that, when she discovered it, she was deeply upset;

because it was on a system which was generally accessible, she experienced it as a kind of public humiliation. Mr Cockfield's inadequate response and his report on Ms Valera-Larios's cancelling of the Roche engineer further undermined her confidence in management's willingness to support her.

111. Before setting out our conclusions as to the award for injury to feelings, we reminded ourselves that we have already made an award of £6,000 in respect of the personal injury caused by the discrimination. The figure set out below represent the sum which we consider it appropriate to award in addition to that figure, setting aside for these purposes the specific impact of the conduct on Ms Jama's health.

112. Dealing first with the nature of the conduct, some of the acts are not in themselves of the most serious kind, for example failing to offer the Claimant a particular type of training or not asking her for input into a document. Some of the acts are far more serious, such as the two health and safety incidents and the 'paininarse' incident.

113. However, taken as a whole, we have concluded that the award for injury to feelings belongs in the top *Vento* band because the length of time over which these incidents occurred, and their cumulative effect on Ms Jama brings this within the category of the most serious cases. This was, or more accurately, evolved into a campaign of criticising, sidelining and diminishing Ms Jama over a period of some fourteen months. When she turned to senior management for support, she met with further adverse treatment.

114. This insidious campaign was deeply upsetting to Ms Jama: it seriously affected her confidence within the workplace; it undermined her authority within the team; and it deeply affected her ability to trust the organisation in which she was working.

115. Ms Patterson contends that an award of £25,000 would be appropriate. We think an award at that level, towards the top of the middle band, would not adequately recognise the seriousness of this case. Ms Knight Webb argues that this merits an award towards the top end of the top *Vento* band; she argues for an award of £40,000. We disagree: there are more serious cases that this, in particular those cases which lead to loss of the employment, either by dismissal or resignation.

116. We consider that an award of £29,000 - at the lower end of the top *Vento* band - is proportionate in all the circumstances.

<u>Injury to feelings in relation to the incident relating to Ms Beck</u>

117. Dealing with Issue 34 (Ms Beck deliberately failing to remove the 'paininarse' tag from Ms Jama's documents), we upheld the claim of victimisation against Ms Beck as a named Respondent. We must identify a specific sum for injury to feelings in relation to this act alone, for which Ms Beck and the First Respondent will be jointly and severally liable. To be clear: this is not an additional award of injury to feelings; it is a separately-identified part of the overall award for injury to feelings; it is the only part of that award for which Ms Beck will be liable.

118. We think that an award in the bottom *Vento* band is appropriate to reflect the fact that it was a one-off act, but an award towards the top of that band is proportionate because it was a deliberate act which had the serious impact on Ms Jama we have described above.

119. We conclude that £5,000 is an appropriate figure.

Aggravated damages

120. As for aggravated damages, Ms Knight Webb identifies a number of specific matters which justify an award. We agree with her that Ms Valera-Larios's attempt to shift the blame to Ms Jama in relation to the first health and safety incident, both to her face and in her email to Ms Babb (J93) was high-handed and oppressive. Further, in a later email to Ms Babb (J153), Ms Valera-Larios went a step further and made a generalised, entirely baseless allegation against Ms Jama.

121. We are also satisfied that the failure by Ms Beck to ensure that the 'paininarse' tag was removed from Ms Jama's documents was malicious and vindictive.

122. As for the matters which Ms Knight Webb relies on which postdate the issuing of the claims, we are unable to make reliable findings in relation to some of them on the evidence presented. However, for the reasons we have already given (para 67), we understand the distress caused to Ms Jama by the decision in May 2022 to put into Ms Valera-Larios's hands the task of reviewing her reporting arrangements. It was high-handed and perverse.

123. We accept Ms Jama's evidence that these matters caused further hurt and distress to her and we are satisfied that an award of aggravated damages in the amount of £5,000 is appropriate in the circumstances.

124. Having reached these conclusions, the Tribunal then stood back and considered whether the total award was proportionate. Having regard to the seriousness of the conduct, and the seriousness of the impact on the Claimant, we concluded that it was.

ACAS uplift on non-financial losses

125. We have already given our reasons why an uplift of 20% is appropriate in relation to both Claimants (paras 70-75).

126. In Ms Jama's case, there would be no overlap between an ACAS uplift and the general awards we have made, which do not arise out of the conduct of the grievance process.

127. The uplifts in relation to each award are as follows:

    127.1. injury to feelings: £5,800 (£29,000 x 20%), giving a total of £34,800;

    127.2. aggravated damages: £1,000 (£5,000 x 20%), giving a total of £6,000;

    127.3. personal injury: £1,200 (£6,000 x 20%), giving a total of £7,200.

Interest on these sums

128. In relation to the uplifted award for injury to feelings:

128.1. the award is £34,800;

128.2. the discriminatory acts took place between 11 February 2020 and 12 March 2021;

128.3. the mid-point of that period is 26 August 2020;

128.4. the calculation date is 12 July 2023;

128.5. number of days = 1051 days;

128.6. the interest rate is 8%;

128.7. interest is 1051 x 0.08 x 1/365 x 34,800 = £8,016.39.

129. In relation to the uplifted award for aggravated damages:

129.1. the award is £6,000;

129.2. the first act which merited aggravated damages took place on 20 February 2020;

129.3. the calculation date is 12 July 2023;

129.4. number of days = 1239 days;

129.5. the interest rate is 8%;

129.6. interest is 1239 x 0.08 x 1/365 x 6,000 = £1,629.37.

130. In relation to the uplifted award for personal injury:

130.1. the award is £7,200;

130.2. the first act of discrimination was on 11 February 2020;

130.3. the calculation date is 12 July 2023;

130.4. the midpoint between those two dates is 26 October 2021;

130.5. number of days = 625 days;

130.6. the interest rate is 8%;

130.7. interest is 625 x 0.08 x 1/365 x 7,200 = £986.30.

131. The total amount of interest payable is £10,632.06.

132. This produces a global award of £58,632.06. We do not consider that to be disproportionate in absolute terms; in our judgment, no further adjustment is required.

Financial losses

Loss of basic pay during sick leave

133. Ms Jama took sick leave between 3 August 2020 and 19 October 2020. She went to her GP and was signed off with stress. Having regard to Ms Jama's evidence at paragraph 24 of her statement, and the paragraphs in her

statement leading up to it, we are satisfied that this was directly caused by the cumulative effect of the discrimination we have found she had experienced; it had built up over the previous months and she was no longer able to cope with being at work in the toxic environment we have described.

134. The Claimant was not entitled to full pay after two months' sickness absence. Because she had already had three weeks' sickness absence because of Covid in March 2020, her pain dropped below pay during this eight week absence.

135. A figure of £1,480.89 was agreed in principle by the Respondent in respect of the loss pertaining to this period, but this is a gross figure. We will require to the parties to agree the net figure so that, once the total loss is established, they can calculate and agree the grossed-up figure.

Past loss of remuneration due to loss of on-call shifts

136. Ms Jama claims loss of earnings in relation to the fact that she did not work any on-call shifts from August 2020 onwards.

137. We had Ms Jama's payslips from 2019 onwards. From these it was clear that she had been doing seven or eight on-call shifts per month. She was plainly a hard-working employee who was prepared to work very significant additional hours. It is also clear that this stopped from August 2020 onwards. We had all the payslips for the material period in the bundle and they confirmed that Ms Jama worked no on-call shifts after that date. Her income dropped by over £20,000 a year.

138. The Respondent disputes that the Claimant has proved a link between the discrimination and these losses. We have concluded that it is overwhelmingly likely that Ms Jama stopped doing additional shifts because she was finding the discriminatory environment at work so intolerable that she decided to work only her core hours – and for most of the time she was advised not even to do that. We regard that decision as entirely reasonable. There was no evidence of any other plausible explanation for this sudden change in her working pattern.

139. We accept her evidence that she was not well enough, or strong enough, to do an on-call shift after a full day at work, a weekend long day or what was referred to as a 'Harold Wood shift' which required her to do a weekend shift followed by being on-call for the rest of the day and overnight, because it would have been too tiring for her. We also had regard to the fact that in relation to at least some of the period for which she is claiming, she was taking medication for insomnia which made it impracticable to do any on-call shifts at night. We have already found that her insomnia was a consequence of the discrimination. Even if she were not on medication, from what we know about Ms Jama's state of mind and state of health during this period, we think it improbable that it would have been appropriate for her to do any night work at all, whether or not she was on medication.

140. Although the Respondent disputed the link between the discrimination and the change in Ms Jama's pattern, it did not dispute the number of shifts for which she is claiming nor her calculation of the financial loss, albeit again that was expressed in gross rather than net figures.

141. We award the Claimant the full amount of her losses in relation to on-call shifts not worked from August 2020 up to the date of calculation (12 July 2023).

142. The parties shall agree the net sums to which she is entitled by reference to that period.

Past deductions from wages in relation to Wednesdays

143. We are also persuaded that there is sufficient evidence that the Claimant required Wednesdays off, in part because of the stress she experienced as a result of the discrimination and in part so that she could attend therapy sessions.

144. From around February 2021, a practice began of Ms Jama taking paid leave on Wednesdays. This practice was endorsed both by the Respondent's OH, Ms Jama's therapist and her GP. The principal reason why this was adopted was to allow Ms Jama to engage in therapy once a week. We note that on her own account her therapy lasted an hour and she was not in receipt of therapy for the entirety of the period. Nonetheless that is what was agreed. We accept that this was not the sole reason why the practice was agreed: Ms Jama also explained that day in the middle of the week gave her a chance to recuperate from the stressful environment at work; it helped her to manage her anxiety. We found that explanation credible. We have no difficulty in concluding that, but for the discrimination, the Claimant would have been more than capable of working five days a week, as well as the additional shifts we have referred to above.

145. The Respondent then decided - and there was no evidence before us as to why the decision was taken, or by whom - to continue to allow Ms Jama to take Wednesdays off but not to pay her for them. The lack of clarity as to what the Respondent's position was such that Ms Patterson did not have instructions at the hearing as to whether the Respondent proposed to maintain this position. It was only confirmed in correspondence after the hearing that it did.

146. Accordingly, in order to continue to take Wednesdays as leave, Ms Jama was either required to take unpaid leave or the days taken by her were offset against her holiday entitlement, thereby reducing it. She claims the losses consequent on that decision from 1 January to 31 May 2023, which is 18 days.

147. The full extent of that claim was not finally clarified by Ms Knight-Webb until very late in the day, by an email of 8 June 2023 (after the hearing but before the Tribunal completed its deliberations). Although that is unsatisfactory, we are persuaded by Ms Knight-Webb, for the reasons given in her email, that it was always sufficiently clear from Ms Jama's witness statement that she was seeking to claim these losses, past and future, in full; in our judgment, the Respondent is not prejudiced by the late clarification because it must always have known from its own records what those losses consisted of.

148. Accordingly, we award the Claimant the full amount of these losses.

149. Again, gross figures were used in both parties' calculations. The parties shall agree the net sums.

ACAS uplift on financial losses

150. In Ms Jama's case, given the size of the award we have made in relation to financial losses, in our judgment an uplift of 20% would produce a total award which, looked at in the round, would be excessive. Consequently, we have decided to award an uplift of 20% on the non-financial losses and 15% on the financial losses (including future loss below).

Interest

151. Once the net figures have been calculated and agreed, and the 15% uplift applied, the parties shall calculate the interest to be applied which (see para 83 above) shall run from the midpoint between the first discriminatory act and the calculation date: 26 October 2021.

Future loss of earnings

152. The Claimant's GP letter of 31 March 2023 states that Ms Jama will recover fully within six months, i.e. by 30 September 2023. The Respondent has confirmed that it will not continue to pay her for Wednesdays and so those losses will continue.

153. In light of the GP's estimate, and in circumstances where the litigation has concluded and the principal stressors, in the form of Ms Zadorozny, Ms Valera-Larios, Ms Beck and Mr Cockfield no longer work with Ms Jama, our best estimate is that the Claimant will return to her full hours, including Wednesdays and on-call shifts by the end of September and that the process will be gradual.

154. It is not an exact science to calculate how precisely that will impact on her earnings, but doing the best we can, and absent any alternative basis being contended for by either party, we award Ms Jama 50% of the financial losses claimed in relation to the period 7 June 2023 to 30 September 2023.

Agreement of net totals and grossing up

155. Where the Tribunal has given its decision in principle above, the parties shall agree the totals based on net figures and the sum to be awarded by way of grossing-up to offset any tax for which Ms Jama will be liable having regard to her earnings in the relevant year, which the Tribunal understands to be 2023/2024, when the compensation will be received by her.

156. The parties shall notify the Tribunal of the agreed sums and the Tribunal will incorporate them into a judgment by consent.

Recommendation

157. Ms Knight Webb, at paragraph 89 of her written closing submissions, seeks a recommendation on behalf of Ms Jama that the Respondent arrange for her to attend the Roche CITM administration course as soon as is reasonably practicable and in any event within six months. No submission opposing the recommendation was made on behalf of the Respondent. Ms Patterson indicated that the Respondent had already made an undertaking along these lines, but it seems that, as at the date of the remedy hearing, no practical steps had been taken.

158. Given our conclusion that the failure to consider Ms Jama for this training in January 2020 was an act of direct race discrimination, we are satisfied that

such an arrangement would reduce the effect of the Respondent's discriminatory conduct on Ms Jama and we make the recommendation.

Employment Judge Massarella

12 September 2023