Appeal No. UKEAT/0125/11/ZT

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 31st August 2011
Judgment handed down on 29 November 2011

Before

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

MRS R CHAPMAN

MR H SINGH

COMMISSIONER OF POLICE OF THE METROPOLIS — APPELLANT

MR H SHAW — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON CHEETHAM (of Counsel) Instructed by: Metropolitan Police Service Legal Services New Scotland Yard Broadway London SW1H 0BG
For the Respondent	MR LAWRENCE DAVIES (Solicitor) Equal Justice Solicitors Ltd. 15 Southampton Place London WC1A 2AJ

SUMMARY

VICTIMISATION DISCRIMINATION - Remedy

The Claimant, an officer in the Metropolitan Police, reported dishonest conduct by a colleague. As a result of his complaint, the colleague and his superior officer had him suspended on unfounded disciplinary charges, which were collusively supported by a more senior officer. The charges were in due course dropped, but the Claimant was unable to return to his old department and had to move to a new role which he found less congenial and suffered lasting distress and disillusionment at the way he had been treated. At the liability hearing the Commissioner was held to have subjected the Claimant to an unlawful detriment by reason of his having made a protected disclosure, contrary to Part IVA of the **Employment Rights Act 1996**. At the remedy hearing the Tribunal awarded compensation in the sum of £37,000 – comprising £17,000 for injury to feelings and £20,000 for aggravated damages. (There was no claim for injury to the Claimant's health.)

On the Commissioner's appeal against the amount of the award:

Held:

(1) Compensation for "whistleblower" claims should be assessed on the same basis as awards in discrimination cases - **Virgo Fidelis Senior School v Boyle** [2004] ICR 1210 followed

(2) An award of £20,000 for aggravated damages was outside the recognised range for such awards, and it was also anomalous that an award of aggravated damages should exceed the award for injury to feelings. The Tribunal had made various particular errors in arriving at that figure, including focusing entirely on the seriousness of the Appellant's conduct rather than on the impact on the Claimant and thus in practice introducing a punitive element: aggravated damages are compensatory only and represent an aspect of compensation for injury to feelings rather than a wholly separate head of damages - **Alexander v Home Office** [1988] ICR 685, **Prison Service v Johnson** [1997] ICR 275, **McConnell v Police Authority for Northern Ireland** [1997] IRLR 625; **ICTS (UK)**

Ltd. v Tchoula [2000] IRLR 643, and **HM Prison Service v Salmon** [2001] IRLR 425 referred to. Dictum of Slade J. in **Ministry of Defence v Fletcher** [2010] IRLR 25 disapproved.

(3) More fundamentally, the overall figure of £37,000 was likewise excessive. The right overall award was £30,000, of which £7,500 would (if necessary) be identified as aggravated damages.

Guidance given as to the nature of aggravated damages and the principles governing their award.

The EAT questioned whether the current practice of distinguishing between awards for injury to feelings and aggravated damages was desirable and suggested that the better course would be to include the aggravating features without separate quantification in the overall award, as is done in Scotland (see **D. Watt (Shetland) Ltd. v Reid** (EAT/424/01)) – **McConnell** (above) and dicta of Keene LJ in **Reid v British Telecommunications plc** [2004] IRLR 27 and Smith LJ in **Martins v Choudhary** [2008] 1 WLR 617 referred to. However, it acknowledged that the practice was too well-established to be changed at this level.

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

INTRODUCTION

1. The Claimant is a police officer. He joined the Metropolitan Police in 1972 and has been a Detective Sergeant since 1982. He has a long record of exemplary service, mostly specialising in the detention and prevention of fraud. From 2007 he was seconded to assist in the creation of the Police Central e-Crime Unit ("PCeU"), a new national unit. On 6 October 2010 he was appointed to the Unit on a permanent basis. However, on 27 October he was suspended from his position with the PCeU – in police terminology, "subjected to local restrictions" – pending a disciplinary enquiry; and the following day he was served with a "Form 163", in effect a notification of disciplinary charges. He had for some time been interested in starting his own business as a fraud investigator, for which clearance would be needed. He had applied for clearance but no decision had been made on his request. The charge against him was that, although the request had been refused, he had gone ahead and started the business regardless. It was eventually accepted that, as he had maintained throughout, no decision had in fact ever been made on his request for clearance but that in any event he had not started the business; and the charges were withdrawn in June 2009. The Appellant remains a police officer. After the withdrawal of the charges against him, he returned briefly to the PCeU, but he felt that he could not stand the atmosphere and he left after a few weeks. He now works in the Extradition Unit.

2. The Claimant brought proceedings in the Employment Tribunal alleging, to put it broadly, that the initiation of the disciplinary proceedings against him was a response to the fact that he had raised concerns about misconduct on the part of D.I. Kevin Williams, who also

worked in the PCeU, and about the failure of the Head of the Unit, D. Supt. McMurdie, to take action in relation to that misconduct; and that he had accordingly been subjected to an unlawful detriment contrary to Part IVA of the **Employment Rights Act 1996** (the so-called whistleblower provisions). The claim was initially brought against not only the Commissioner but also D.I. Williams and D. Supt. McMurdie; but the claims against the individual respondents were later dismissed. The details of the misconduct which he had alleged are not important for present purposes. Very broadly, it was as follows. D.I. Williams was said to have tried to find out in advance what questions he was going to be asked at the forthcoming interview for the number two position in the PCeU. This came to the attention of the Claimant. He regarded what D. I. Williams was trying to do as dishonest (as, if the allegation was true, it was) and he told D. Supt. McMurdie, as the Head of the PCeU, about it, saying that he should be "busted". D.I. Williams was, however, her favoured candidate for the position, and she took no action. The interviews proceeded, and D.I. Williams got the job.

3. The case was heard by an Employment Tribunal sitting at Central London, chaired by Employment Judge Pontac, over ten days in May last year. By a Judgment and Reasons sent to the parties on 27 July 2010 the claim was in large part upheld. The Tribunal found that the disciplinary proceedings against the Claimant had indeed been initiated by D. Supt. McMurdie and D.I. Williams, acting in concert, in order to get him out of the PCeU because they believed that he was about to put his complaints about them on a formal basis. It found, at paragraph 109, that they acted in "wilful disregard of the facts and the law and of the claimant's welfare ... [and] ... on the basis of allegations which they knew or ought to have known were untrue".

4. That was of course in itself a finding of a most serious kind, but the Tribunal also made other findings of discreditable conduct against those two officers and others. The findings relevant for present purposes can be summarised as follows:

(1) In her evidence to the Tribunal D. Supt. McMurdie denied that the Claimant had ever reported to her his concerns about D.I. Williams. The Tribunal did not accept her denial. Separately, though to similar effect, it did not accept that she had heard nothing from anyone else about D.I. Williams' attempts to find out the interview questions in advance, which had become common knowledge "around the water-cooler".

(2) It recorded that D.I. Williams had himself subsequently accepted that he had gained access to the relevant drive in the computer system and found and looked at the interview questions there. Remarkably, when this came to light by another route, the only action taken was that the interviews were re-run using different questions. D.I. Williams was again successful, though by a much more modest margin, and his appointment was confirmed.

(3) It found that at the start of the disciplinary process against the Claimant, a D.C.S. Mawer, D. Supt. McMurdie's superior, had made an entry in the documentary record purporting to show that the Claimant's request for clearance to conduct his business had been refused. The entry was wholly wrong. There is no clear finding that D.C.S. Mawer knew that it was wrong (that is, it is possible that he was belatedly recording something which he believed had happened); but it was on any view highly irregular to make such a record many months after the conversation that it supposedly recorded, without any indication that it was not contemporary and without any proper basis for the matters stated in it. The Tribunal rejected the explanation which D.C.S. Mawer gave for his actions in his evidence to it.

There has been no appeal against the Tribunal's decision on liability. The picture of cronyism and lack of integrity among the officers principally concerned which it paints is a disturbing one, quite apart from the specific injustice to the Claimant. It is right to record that the Tribunal did not accept every aspect of the Claimant's case, or indeed of his evidence; but it made no findings which in any way impugned his honesty.

5. A remedy hearing was held before the same Tribunal on 13 October 2010. The Claimant remains in the Metropolitan Police and has suffered no financial loss as a result of the events of October 2008; so his claim was only for non-pecuniary loss. By a Judgment (described as an Order) and Reasons sent to the parties on 20 October the Commissioner was ordered to pay £37,000 by way of compensation, together with a further £1,000 by way of costs. The £37,000 was broken down in the Judgment as "Injury to Feelings: £17,000" and "Aggravated Damages: £20,000". The Claimant had also sought £2,000,000 by way of exemplary damages, but the Tribunal declined to make any award under this head.

6. The Commissioner appeals against the award of compensation: specifically, he contends that the award for aggravated damages was manifestly excessive. He has been represented before us by Mr. Simon Cheetham of counsel. The Claimant has been represented by Mr. Lawrence Davies, of Equal Justice Solicitors. There is no appeal against the refusal to award exemplary damages.

THE TRIBUNAL'S REASONS

7. The Reasons for the Tribunal's decision on liability were detailed and quite lengthy. Its Reasons for the remedy decision are, by contrast, comparatively short, although of course they must be read in the context of the findings already made. They can be summarised as follows.

8. Paragraphs 1-3 of the Reasons are purely introductory. We should note, however, that they record that the Claimant "will pursue his claim for damages for personal injury in another court". It had been part of the Claimant's evidence that he had suffered injury to his mental health as a result of his treatment by the Commissioner, and he put before the Tribunal a report from a consultant psychiatrist. However, the agreed position before the Tribunal was that any compensation in respect of such injury was not a matter to be reflected in its award. We did not seek to explore the reasons why that course was taken, but we should note that it is very unusual. Employment tribunals have jurisdiction to make awards for personal injury (typically, of course, in the form of injury to mental health) caused by unlawful discrimination (see **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1991] ICR 1170)[1], and it will almost always be better if claims for such injury are dealt with in the same forum as the other losses for which compensation is sought – not least because, even though injury to feelings and injury to mental health are formally distinct, there is in practice an overlap between them[2] and it will be difficult for the tribunal hearing whichever claim is decided second to assess to what extent the claimant has already received compensation for what is in substance the same suffering.

9. Paragraphs 4-7 deal with the claim for compensation for injury to feelings. We should set these out in full, as follows:

> **"4. Compensation for injury to feelings is awarded in "whistle blowing" cases on the same basis as for cases of "very serious breach" of the discrimination legislation (Virgo Fidelis Senior School v Boyle [2004] IRLR 268). The claimant submitted that such a breach "would normally mean" an award in the top band of compensation set out in the guidance**

[1] It was accepted before us that compensation for unlawful detriment under Part IVA should be compensated on the same basis: see paragraph 13 below.

[2] Cf. **H.M. Prison Service v Salmon** (below), at para. 29 (p. 430).

in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102.

5 However, in Vento it was said that awards in the top band should be for the "most" serious cases, such as where there has been a lengthy campaign of discriminatory harassment against the claimant. No such campaign was waged against this claimant, although the respondent took some eight months to clear him of the unwarranted disciplinary matters, and that time was certainly very stressful for him. Yet, as we found, the claimant expected to be exonerated in due course, because he was confident he had not offended as charged, and thus he did not resign when served with form 163. In the tribunal's view this was not a "most serious" case, and the tribunal did not take Virgo to mean that every "very serious" case should attract an award in the top band.

6 When the tribunal considered what would be just and equitable compensation for the injury to the claimant's feelings, we took into account the following:

6.1 The information provided by DI Williams to the DPS, and which formed the basis of the false charges set out in form 163 was, to the claimant's knowledge, false.

6.2 The claimant's complaint about DI Williams was never, in the claimant's view, properly dealt with, in that Mr Williams did not lose his posting to the PCeU, although he had cheated in the selection process, whilst the claimant did lose his posting to the unit.

6.3 It was Mr Williams who effected the claimant's removal from the PCeU, which "added insult to injury".

6.4 The claimant's removal from the PCeU represented a loss to the claimant of status and reputation.

7 The tribunal concluded that the right award would be at the top end of the middle Vento band. We accordingly awarded the claimant £17,000 for the injury to his feelings."

The reference at paragraph 6.3 to D.I. Williams "effecting the claimant's removal" is to the fact that it was he who took charge of the mechanics of the Claimant's suspension – removing his pass, mobile phone etc., and escorting him off the premises. We should also record, since it is referred to by the Tribunal elsewhere, that following the removal of the Claimant D.I. Williams without authority conducted a search of his desk.

10. The claim for aggravated damages is dealt with at paragraphs 8-13. Again we should set these out in full:

"*Aggravated damages*

8 No one reading the tribunal's reasons for our decision on the merits could understand otherwise than that we found DI Williams and DSU McMurdie had colluded against the claimant, had indeed "ganged up" on him for an unlawful reason, and by dishonest means had ensured his immediate removal from the PCeU. The reader would understand that we found DCS Mawer had turned a blind eye to the machinations of Mr Williams and Ms McMurdie without once considering whether or not what was being done to the claimant was warranted. The reasons made clear furthermore that we found he may have tampered with documentary evidence, and then "recollected" in oral evidence to the tribunal an explanation we rejected.

9 Aggravated damages are awarded, in addition to the award for injury to feelings, where the respondent has acted in a high-handed, malicious, insulting or oppressive manner in committing the unlawful act(s) that caused detriment to the claimant. The tribunal concluded that this was such a case and that the malicious and high-handed aspects of the respondent's treatment of the claimant were not reflected in the award we made for the injury to his feelings. Accordingly, we took those aspects into account when determining the award, and ensured there would not be double compensation for the same wrong. We considered there was some distinction, although not at all precise, between the conduct which was oppressive and conduct which was high-handed.

10 The tribunal took the following aspects of the officers' conduct to be oppressive:

10.1 The instigation of unwarranted disciplinary proceedings against the claimant;

10.2 Mr William's and Ms McMurdie's collusion against the claimant with unlawful intent;

10.3 The unwarranted haste with which Mr Williams and Ms McMurdie acted against the claimant;

10.4 Ms McMurdie's failure to tell the claimant on 27 October 2008 that he was to be served with a form 163, although she knew it to be the case. She thus knowingly denied him the opportunity to take advice from the Police Federation, and to consider carefully and set out fully his reply to caution;

10.5 The unwarranted manner in which Mr Williams removed the claimant from the PCeU.

11 We took the following aspects of the officers' conduct to be high-handed:

11.1 The failure of the respondent to offer an apology to the claimant for the unlawful acts of Ms McMurdie and Mr Williams;

11.2 DCS Mawer's wholly indifferent attitude and approach to Mr Williams's and McMurdie's actions against the claimant;

11.3 Mr Williams's breach of the Standard Operating Procedures, and in particular Mr Mawer's disregard of the breaches as "not uncommon";

11.4 Mr Williams's failure to examine the Company House accounts of the claimant's business in the circumstances found by the tribunal;

11.5 Mr Williams's unlawful search of the claimant's desk after he escorted the claimant out of the building.

12 The tribunal considered the wrongful acts set out above to be significantly more serious than those that caused injury to the claimant's feelings. We took into account in particular that the oppressive and high-handed acts were those of police officers. In our view police officers, working in a hierarchical structure in which honesty and integrity are expressly the foundation stone, must always conduct themselves, and be seen always to conduct themselves, in accordance with their obligations to be honest and to act with integrity. Here Ms McMurdie, a very high-ranking officer, and Mr Williams, contrary to their obligations, knowingly did wrongful acts calculated to damage or even destroy the career of an upright and dedicated colleague.

13 We concluded that it was just and equitable to award the claimant £20,000 as aggravated damages."

The reference at paragraph 11.4 is to the fact that, as the Tribunal had found in its liability decision (paragraph 89), a companies search carried out, at D.I. Williams' instigation, as part of the investigation prior to the bringing of charges against the Claimant had failed to obtain the accounts for the company which he had established, which were clearly important in establishing whether it had started to trade.

11. Paragraphs 14-20 of the Reasons deal with the claim for "exemplary punitive damages". This part of the reasoning is not directly in issue, but we should set out paragraphs 14-17, which read as follows:

> **"*Exemplary/punitive damages***
>
> **14 Exemplary damages may be awarded in "the very worst cases" of oppressive, arbitrary or unconstitutional use of power by servants of government, where the compensations awarded is insufficient to punish the respondent for its conduct against the claimant (Ministry of Defence v Fletcher [2010] IRLR 25). Such damages are punitive, not compensatory, and are intended to deter (ibid).**
>
> **15 The tribunal's view was that this case was not such as defined in Fletcher.**
>
> **16 Here, the claimant was exonerated through the disciplinary process. He is still a Detective Sergeant, and his pay and pension were unaffected by the events in issue in the case. He is due to retire in two years, when he can begin to undertake his business interest if he wants to do so.**
>
> **17 Next year the claimant will be rotated to a borough police station in accordance with a force-wide policy of periodically rotating Detective Constables and Detective Sergeants, and the claimant feels he will thus '… end up back where I started'. He was not able to say, however, that he would not have been rotated if he had remained in the PCeU. We could not find that his rotation to a police station was a consequence of the respondent's unlawful acts against him. In any event, although his posting to the unit was expressly for three years, yet at any time he could have been posted elsewhere upon a direction by the Commissioner."**

12. Paragraphs 21-24 deal with the Claimant's claim for costs. They are immaterial for the purposes of this appeal.

THE LAW

INTRODUCTORY

13. We should start with a preliminary point. In **Virgo Fidelis Senior School v Boyle** [2004] ICR 1210 this Tribunal (Judge Ansell presiding) held that the approach to the award of compensation for unlawful detriment under Part IVA of the 1996 Act should be the same as is applied in cases of unlawful discrimination, notwithstanding the differences in the relevant

statutory provisions: see paras. 43-45 (pp. 1222-5). The subjecting of the claimant to the detriment is to be treated as a statutory tort, attracting an entitlement to compensation for so-called "injury to feelings" and, in an appropriate case, aggravated damages. It was not contended before us that **Virgo Fidelis** was wrongly decided on this point, and we are content to follow it.[3] We will henceforth for convenience use the term "discrimination" to cover cases both of discrimination *stricto sensu* and of detriment such as that with which we are concerned here.

14. The issue in the present appeal concerns the award of aggravated damages. Although such awards are a commonplace in discrimination claims, their conceptual basis, and their relationship with the award for injury to feelings which is invariably also made, is not straightforward, and we think it desirable to re-state some points of principle.

HISTORY

15. The origins of the concept of "aggravated damages" as a distinct head of compensation lie in the English common law. It is debatable how valuable a part of the law it has been, but it is a fact of legal history. There is no such concept in Scots law – a point which is not without significance and to which we return below. The meaning and function of aggravated damages are helpfully discussed in Part II of the Law Commission Report (no. 247) on *Aggravated, Exemplary and Restitutionary Damages* (for which Professor Andrew Burrows QC was principally responsible): this represents the clearest and most comprehensive guide to the law

[3] A concession to the equivalent effect was made in **Massey v UNIFI** (below), which was concerned with the statutory right of a trade union member not to be unjustifiably disciplined. See also **London Borough of Hackney v Adams** [2003] IRLR 402.

up to 1997 and is a surer resort than simply going to the old authorities when confronted with a difficult point.[4] At para. 1.1 of Part II of the Report the Commission says:

> **"Although the precise meaning and function of aggravated damages is unclear, the best view, in accordance with Lord Devlin's authoritative analysis in *Rookes v Barnard* [1964] AC 1129, appears to be that they are damages awarded for a tort as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional *compensatory* sum. Unfortunately, there is a continuing confusion in the case law, reflected in some of the substantive and procedural preconditions of an award of aggravated damages, about whether they in fact serve a different function, which is punitive in nature."**

16. We draw attention to three features of that summary, based as it is on Lord Devlin's analysis in **Rookes v Barnard**:-

(1) Aggravated damages are compensatory in nature and not punitive.

(2) The features that may attract an award of aggravated damages can be classified under three heads - (a) the manner in which the defendant has committed the tort; (b) the motive for it; and (c) the defendant's conduct subsequent to the tort but in relation to it.

(3) The features enumerated at (2) above affect the award of compensation because they aggravate the distress caused by the actual wrongful act.

17. The Report goes on to point out that Lord Devlin's statement of the law in **Rookes v Barnard** represented an attempt to impose order on a mass of previous authority which had not

[4] The Report is available both on the Commission's website and on BAILII. It should be noted that the paragraph numbering re-starts in each section of the Report, which is liable to confuse the unwary.

clearly recognised the distinction between awards of aggravated damages in the sense explained by him and awards with a punitive element; and, as already trailed in para. 1.1 quoted above, that some confusion persisted in the case-law.

18. Turning to the employment law context, once it was recognised that cases of discrimination should be treated for the purpose of compensation as statutory torts, it was natural for practitioners to seek, and tribunals to award, awards of aggravated damages in cases which met the criteria for such an award at common law. The point was taken for granted in two early cases under, respectively, the **Race Relations Act 1976** and the **Sex Discrimination Act 1975** – **Alexander v Home Office** [1988] ICR 685 and **Noone v North West Thames Regional Health Authority** [1988] ICR 813; but it was decided as a matter of ratio by this Tribunal, Smith J. presiding, in **Prison Service v Johnson** [1997] ICR 275 (more often referred to as **Armitage v Johnson**, under which name it is reported at [1997] IRLR 162) – see at pp. 285-7. Awards of aggravated damages have been made in very many cases since then in the employment tribunals in England and Wales, and treated as uncontroversial in principle by this Tribunal and the Court of Appeal (though not without dissentient voices – see below). However this Tribunal sitting in Scotland has ruled that awards of aggravated damages should not be made by Scottish employment tribunals. Lord Johnston put the point with characteristic brevity at para. 11 of his judgment in **D. Watt (Shetland) Ltd. v Reid** (EAT/424/01):

> **"On the other hand, the award for aggravated damages is inappropriate inasmuch that it is inept by the law of Scotland. Damages for injury to feelings can include an element which reflects the way the victim was treated but [it] cannot be a separate head of damage. This position is clearly supported by the authorities."**

It should be noted that Lord Johnston does not say that the features which might in England lead to an award of aggravated damages must in Scotland go uncompensated: rather, his point is

that those features should be reflected in the overall award for injury to feelings and not as a separate head of compensation.

PRINCIPLES

19. It is important to appreciate that in the employment law field the approach to aggravated damages based on **Rookes v Barnard** and endorsed by the Law Commission has been authoritatively adopted.[5] At the risk of repetition, we should spell out some key points and identify some problem areas relevant to the present appeal.

20. *Compensatory only.* The starting-point is that the only purpose of aggravated damages is compensatory. They should not be awarded in order to punish the respondent for his conduct, however heinous: that is the province (and only in a very limited class of case) of exemplary damages, which are a wholly different creature. This is clear from the observations of May LJ in **Alexander** (above), where he says that "compensatory damages may and in some instances should *include* … an element of aggravated damages [our emphasis]" (see at p. 692F); and the point has been made repeatedly since then – see, e.g., **McConnell v Police Authority for Northern Ireland** [1997] IRLR 625, per Sir Robert Carswell LCJ at paras. 16-18 (p. 629); **ICTS (UK) Ltd. v Tchoula** [2000] IRLR 643, per HH Judge Peter Clark at para. 13 (7) (p. 649); **HM Prison Service v Salmon** [2001] IRLR 425, per Mr Recorder Underhill QC at para. 23 (p. 429). This point needs to be made because the facts in cases which attract an award of aggravated damages will be likely to be such that the tribunal is rightly indignant, if not positively outraged, at the way the employer has behaved: but (save in a case properly

[5] There are still some difficult questions in the context of some of the common law torts. But we need not be concerned with those problem areas here: it is to be noted that one of the more controversial common law decisions - **AB v South West Water Services Ltd** [1993] QB 507 - was expressly distinguished by Smith J. in **Armitage** (above, at pp. 285-7).

attracting exemplary damages) the right vehicle for such indignation is in what it chooses to say about the employer's conduct rather than in a punitive award. Our attention was drawn to a passage in the judgment of Slade J. in this Tribunal in **Ministry of Defence v Fletcher** [2010] IRLR 25, at para. 52 (p. 31), where she says:

> **"That there can be a penal element in the award of aggravated damages is referred to in the Law Commission Report *Aggravated, Exemplary and Restitutionary Damages* (1993) (Consultation Paper No. 132) para. 2.17 et seq mentioned in *Thompson and Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at p. 512D."**

We respectfully believe that that observation, which was obiter, is out of line with the consistent trend of the other authorities. The Law Commission report referred to is not the final Report to which we have referred above but the consultation paper which preceded it; and Sir Robert Carswell in **McConnell** (to which Slade J. was not referred) expressly disapproved the suggestion made in that paper – see at para. 18.

21. *Aggravated damages are an aspect of injury to feelings.* It is a necessary corollary of the point made in the previous paragraph that:

> **"... aggravated damages are awarded only on the basis, and to the extent, that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings ..."**

(see **Salmon** (above), *loc. cit.*, summarising the effect of **McConnell** and **Tchoula** and also unwittingly echoing the Law Commission's summary). Keith J. recently made the same point in **Wardle v Credit Agricole** (UKEAT 0535/09), at para. 36[6]. Aggravated damages are thus

[6] **Wardle** went to the Court of Appeal ([2011] ICR 1290), but not on the issue of aggravated damages.

not, conceptually, a different creature from "injury to feelings"[7]: rather, they refer to the aggravation – etymologically, the making more serious – of the injury to feelings caused by the wrongful act as a result of some additional element. Indeed if this were not so, the fact that Scots law does not recognise aggravated damages as such would mean that substantially different remedies were available in identical cases north and south of the border, which is a state of affairs to be avoided if at all possible. As it is, however, as Judge Clark observed in **Tchoula**, *loc. cit.*, whether a tribunal makes a single award for injury to feelings, reflecting any aggravating features, or splits out aggravated damages as a separate head should be a matter of form rather than substance.

22. *Criteria.* The circumstances attracting an award of aggravated damages fall into the three categories helpfully identified by the Law Commission: see para. 16 (2) above. Reviewing them briefly:

(a) The manner in which the wrong was committed. The basic concept here is of course that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase "high-handed, malicious, insulting or oppressive" is often referred to (as it was by the Tribunal in this case). It derives from the speech of Lord Reid in **Broome v Cassell & Co. Ltd.** [1972] AC 1027 (see at p. 1087G), though it has it roots in earlier authorities. It is there used to describe conduct which would justify a jury in a defamation case in making an award at "the top

[7] It may seem intuitively wrong to describe the reaction to the kind of conduct which typically gives rise to an award of aggravated damages with the rather anodyne label "injury to feelings". But "injury to feelings" covers the whole gamut of emotional injury and certainly goes beyond what in an ordinary conversational context might be called "hurt feelings". Mummery LJ in **Vento** (below), at para. 50 (p. 331F), refers to "upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, depression and so on". Even that excursion through Roget is not exhaustive: one element that we would add, because it is material to the present case, is "loss of congenial employment" (see **Ministry of Defence v Cannock** [1994] ICR 918).

of the bracket". It came into the discrimination case-law by being referred to by May LJ in **Alexander** as an example of the kind of conduct which might attract an award of aggravated damages. It gives a good general idea of the territory we are in, but it should not be treated as an exhaustive definition of the kind of behaviour which may justify an award of aggravated damages. As the Law Commission makes clear[8], an award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.

(b) Motive. It is unnecessary to say much about this. 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. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury – see **Ministry of Defence v Meredith** [1995] IRLR 539, at paras. 32-33 (p. 543). There is thus in practice a considerable overlap with head (a).

(c) Subsequent conduct. The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. Such cases can arise in the discrimination context: see **Zaiwalla and Co. v Walia** [2002] IRLR 697 (though N.B. Maurice Kay J's warning at para. 28 of his judgment (p. 702)); and **Fletcher** (above). But there can be other kinds of aggravating

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[8] See paras. 1.4-6 of Part II, noting that the identical passage in its consultation paper was approved both by Dyson J. in **Appleton v Garrett** [1996] PIQR 1 and by this Tribunal (Smith J. presiding) in **Ministry of Defence v Meredith** (above), at para. 29 (p. 542).

subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously: examples of this kind can be found in **Armitage**, **Salmon** and **British Telecommunications v Reid**. A failure to apologise may also come into this category; but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case. (For another example, see the very recent decision of this Tribunal (Silber J presiding) in **Bungay v Saini** (UKEAT/0331/10/CEA).) This basis of awarding aggravated damages is rather different from the other two in as much as it involves reliance on conduct by the defendant other than the acts complained of themselves or the behaviour immediately associated with them. A purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach. However, tribunals should be aware of the risks of awarding compensation in respect of conduct which has not been properly proved or examined in evidence, and of allowing the scope of the hearing to be disproportionately extended by considering distinct allegations of subsequent misconduct only on the basis that they are said to be relevant to a claim for aggravated damages.

23. *How to fix the amount of aggravated damages.* As Mummery LJ said in **Vento v Chief Constable of West Yorkshire Police (no. 2)** [2003] ICR 318, at paras. 50-51 (pp. 331-2), "translating hurt feelings into hard currency is bound to be an artificial exercise". Quoting from a decision of the Supreme Court of Canada, he said:

> **"The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional."**

Since there is no sure measure for assessing injury to feelings, choosing the "right" figure within that range cannot be a nicely calibrated exercise.[9] Those observations apply equally to the assessment of aggravated damages – inevitably so since, as we have sought to show, they are simply a particular aspect of the compensation awarded for injury to feelings; but the artificiality of the exercise is further increased by the difficulty, both conceptual and evidential, of distinguishing between the injury caused by the discriminatory act itself and the injury attributable to the aggravating elements. Because of that artificiality, 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 risk of double-counting of this kind was emphasised by Mummery LJ in **Vento**; but the fact that his warning is not always heeded is illustrated by **Fletcher** (above). The ultimate question must be not so much whether the respective awards considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant.

24. *Relationship between the seriousness of the conduct and the seriousness of the injury.* It is natural for a tribunal, faced with the difficulty of assessing the additional injury specifically attributable to the aggravating conduct, to focus instead on the quality of that conduct, which is inherently easier to assess. This approach is not necessarily illegitimate: 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 it should be applied with caution, because a focus on the

[9] Practice is in our experience variable as to the extent to which claimants in discrimination cases give explicit evidence about the injury to their feelings. In principle they should certainly be asked to do so: it is wrong that tribunals should be asked to make assumptions. In **London Borough of Hackney v Adams** (above) Elias P warned against assuming that in every kind of discrimination case a claimant will inevitably have suffered injury to feelings. But the fact remains that even when such evidence is given, it is often difficult to assess objectively because so much depends on the idiosyncrasies of the particular witness, including their articulacy and their levels of stoicism or self-awareness. Some degree of standardisation is realistically inevitable.

respondent's conduct can too easily lead a tribunal into fixing compensation by reference to what it thinks is appropriate by way of punishment or in order to give vent to its indignation[10]. 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(s) in question ?", even if in practice the approach to fixing compensation for that distress has to be to some extent "arbitrary or conventional".

SHOULD "AGGRAVATED DAMAGES" STILL BE AWARDED ?

25. We are very doubtful whether the practice of awarding "aggravated damages" as a separate head of compensation is a good thing. As we have shown, it was simply taken over from the common law cases, where its pedigree was obscure and not very satisfactory. If we were starting from scratch we would regard it as more sensible for tribunals in England and Wales to follow the Scottish practice and make a single award for injury to feelings, taking into account (and making clear that it had done so) those aggravating features that are currently dealt with under the separate head of "aggravated damages"[11]. Although, as we have observed above, the difference between the two approaches is one of form rather than substance, the approach generally adopted in England seems to us unsatisfactory for at least four reasons, already to some extent trailed above:

(1) It requires tribunals to make a sharp distinction between, on the one hand, the wrongful conduct itself and its consequences, and, on the other, certain additional features of the

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[10] We suspect that it is this kind of thinking that the Law Commission had in mind when making the observation in its consultation paper, which was picked up by Slade J in **Ministry of Defence v Fletcher** (see paragraph 20 above), to the effect that awards of aggravated damages sometimes contain a punitive element.

[11] And indeed mitigating features, i.e. factors which meant that the injury to the claimant's feelings was less than might otherwise have been expected: see per Smith J. in **Armitage** (at p. 287E).

respondent's conduct and their consequences, and to do so by reference to a loose criterion of exceptionality. That is an exercise which is both artificial and ill-defined. There is no bright line by which to distinguish what part of the injury to the claimant's feelings is the result of the "core" wrongful act and what part is the result of the exceptional feature in question: it is all shades of grey.

(2) Partly because of the artificiality of the exercise, there is a real risk of double counting.

(3) Putting "aggravated damages" in a separate box can sometimes, if only subconsciously, lead tribunals to treat them as punitive.

(4) It adds an unnecessary level of complication and technicality to the assessment of compensation.

It is our experience that awards of aggravated damages are quite often erratic or suspect because of these difficulties. To anticipate, the risks identified at both (2) and (3) may have eventuated in the present case; and point (4) is certainly illustrated by the issues which we have had to consider on this appeal. Removing the concept of "aggravated damages" as a head of compensation distinct from "injury to feelings" would make the law simpler without, in our view, diminishing the proper compensation available to victims of discrimination.

26. We are not alone in this opinion. In **McConnell**, above, the Court of Appeal of Northern Ireland expressly deprecated the award of aggravated damages in a discrimination case under a separate head. Sir Robert Carswell said, at para. 20 (p. 630):

> **"[The tribunal] awarded £10,000 'for injury to feelings' and then added a further separate sum of £2,500 'by way of aggravated damages'. The**

> **conclusion which must be drawn from this sentence is that there has been duplication in the assessment of compensation. What a tribunal ought to do in such cases is to weigh the evidence and form a view as to the level of distress and humiliation caused by the act or acts of discrimination, having regard to all the circumstances of the case. These circumstances will include any features which may have had the effect of aggravating the sense of injury felt by the complainant. The final result of this assessment will be a single figure reflecting the total injury to his feelings, which may in appropriate cases include an element of aggravation."**

And McCollum LJ said, at para. 79 (p. 634):

> **"However caused, injury to feelings is to be compensated as a single head of damages. To award damages under different heading risks duplication of damages, or the introduction of an element of exemplary damages."**

In **Reid v British Telecommunications plc** [2004] IRLR 27 Keene LJ said, at para. 36 (p. 331):

> **"I turn to the question of aggravated damages. I should preface my comments on this aspect by saying that I have some concern about how the concept of aggravated damages, as distinct from exemplary or punitive damages, is applied in discrimination cases where damages are already being awarded for injury to feelings. I say that because aggravated damages are essentially compensatory in nature. They are intended to compensate a claimant for the injury he has suffered, albeit on a more generous basis (see Lord Hailsham of St Marylebone, L.C. in *Broome v Cassell & Co* [1972] AC 1027 at 1073 C-D). Such injury includes injury to feelings, and a tribunal therefore must be careful to avoid double counting in any award when a separate award for injury to feelings has been made. I have some sympathy with the views expressed by the Northern Ireland Court of Appeal to this effect in *McConnell v Police Authority for Northern Ireland* [1997] IRLR 625 at 629 para 19. Nonetheless, it is clear from the decision of this court in *Alexander v Home Office* [1988] IRLR 190 at 193 that it is open to a tribunal in a discrimination case to include in an award an element of aggravated damages where the party found guilty of discrimination has behaved in a "high-handed, malicious, insulting or oppressive manner."**

More recently, in **Martins v Choudhary** [2008] 1 WLR 617, an appeal from the decision of a County Court Judge in a harassment case, Smith LJ said, at para. 20 (p. 624):

> **"As I have already observed, the judge did not make separate awards for injury to feelings and aggravated damages. No ground of appeal arises from that and I wish to say that I think she was right not to do so. It seems to me that, in the context of a case of this kind (and for that matter in a**

> **discrimination case) where damages fall to be awarded for injury to feelings, the quantum of damage should reflect the aggravating features of the defendant's conduct as they have affected the claimant. As 'aggravated damages' are supposed to be compensatory, that seems to me to be the most satisfactory way of dealing with them. If a separate award of 'aggravated damages' is made, it looks like a punishment; in other words it looks like exemplary damages. I appreciate that differing views have been expressed on this issue in this Court. I have expressed my view and, in the context of this appeal, it is obiter."**

(This seems to be the way the law is moving in relation to the common law torts too: see **Richardson v Howie** [2004] EWCA 1127, per Thomas LJ at paras. 15-25.)

27. However, tempting though it is to follow the path already trodden in Scotland, and favoured by the Court of Appeal of Northern Ireland and by Keene and Smith LJJ in this jurisdiction, we do not believe that that course is open to us. Although we are aware of no case where the question has been addressed head-on, separate awards of aggravated damages have been approved by the Court of Appeal too often in recent years for us now to say that they represent the wrong approach[12]. A particular reason why it would now be difficult to row back is that the so-called "**Vento** guidelines", which have acquired almost Mosaic status, are framed by reference to "ordinary" injury to feelings, with "aggravated damages" falling to be awarded on top. This does not, as we understand it, reflect a considered decision by the Court in that case that aggravated damages ought, or ought always, to be so treated[13]: the point was not argued, and in fact the general trend of the judgment of the Court, given by Mummery LJ, is to

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[12] Examples are **Vento (**below**)**; **Reid** (despite Keene LJ's dicta); **Scott v Inland Revenue Commissioners** [2004] ICR 1410; and **Massey**. These must, we think, be the cases that Smith LJ had in mind when she referred in **Choudhary** to "differing views" – though, as we say, in none of them is the question addressed head-on.

[13] That this is the correct reading of **Vento** is confirmed by **Scott** (above): see per Sedley LJ at para. 34 (p. 1420). (We should note that although in that paragraph Sedley LJ makes the point that aggravated damages constituted a discrete head of compensation, he was not making any point of principle about how they *should* be classified but was merely explaining the course taken in **Vento**.) We would add that in **Vento**, as in many other cases of this kind, there was a further element in the non-pecuniary award, namely compensation for psychiatric injury. Here too the distinctions involved are very soft-edged, and it is necessary to be careful to avoid double-counting: cf. **Salmon** (above), at para. 29 (p. 430).

emphasise the importance of considering the award for non-pecuniary loss as a total – see in particular the approach taken in para. 63 (p. 335 B-C) and the guidance given at para. 68 (pp. 335-6). Rather, it simply reflects the fact that in that particular case the employment tribunal had made a separate award of aggravated damages. Nevertheless, the application of the **Vento** guidelines would become less straightforward if we were now to encourage tribunals to abandon the practice of putting any sufficiently serious aggravating features in a separate box. That does not seem to us an insuperable obstacle, but it reinforces our view that any change of approach in this area should be made at a higher level than ours.

28. We will not, therefore, ourselves try to prescribe a change in practice in the English tribunals – though we repeat that the difference between the English and Scottish practice seems to us to be one of form rather than substance. However, it would be a healthy reminder of the real nature of aggravated damages if any such awards were in future formulated as a sub-heading of "injury to feelings" – i.e. "injury to feelings in the sum of £X, incorporating aggravated damages in the sum of £Y" – rather than as a wholly distinct head: this may reduce the risk of the tribunal being seduced into introducing a punitive element by the back door. More generally, tribunals should pay careful attention to the principles which we have endeavoured to set out above. Ultimately the most important thing is that they identify the main considerations which have led them to make the overall award for injury to feelings, specifying any aggravating or mitigating features to which they attach particular weight. As long as this is done they should not lose sleep over exactly where the dividing line falls between the award for ("ordinary") injury to feelings and the award of aggravated damages (and the award for psychiatric injury where one is made). What matters is whether the total award for non-pecuniary loss is fair and proportionate: see **Vento** (*loc. cit*).

THE APPEAL

29. The Commissioner, as we have said, focuses his challenge on the award of aggravated damages. Mr Cheetham provided us with a table, derived from the helpful list of reported awards in discrimination cases at the back of section L of *Harvey on Industrial Relations and Employment Law*, which showed that out of 25 cases in which aggravated damages had been awarded there were only two where the employment tribunal had awarded as much as £20,000.[14] Of those, one was reduced on appeal to £8,000 (this was **Fletcher**), and the other (**Scanlon v Redcar & Cleveland Borough Council**, a decision of a tribunal sitting in Newcastle) seems from the brief report that we were shown to have had some oddities in its reasoning[15]. No other award was of more than £10,000, save for one of £15,000 (**Vento**) which was reduced on appeal to £5,000. The large majority of awards were in the range £5,000-£7,500. Even allowing, as we must, for inflation in relation to the less recent of those cases[16], this analysis vividly illustrates the exceptional nature of the award made in the present case. Mr Cheetham pointed out that it is exceptional in another respect also, namely that it is the only reported case, apart from **Scanlon**, where the amount awarded by way of aggravated damages exceeds the award for "ordinary" injury to feelings: typically the former is less than half the amount of the latter. He accepted that it was theoretically possible that the injury caused by the aggravating features could be greater than that caused by the act of discrimination itself, but he submitted that that would in practice be very unusual.

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14 The most recent edition has a few more cases, but the overall picture is no different.

15 Specifically, the Tribunal declined to award exemplary damages on the basis that the employer was already sufficiently punished by the award of aggravated damages but said that it would otherwise have awarded £7,500 by way of aggravated damages and £12,500 as exemplary damages. That suggests an unacceptable blurring between the two concepts; but we were not shown the full judgment.

16 The reduced award of £5,000 in **Vento** would correspond, broadly, to £6,600 in today's money.

30. This kind of comparative exercise has to be treated with some caution. Every case depends on its own facts, and the particular difficulty of distinguishing between the core injury and that attributable to the aggravating features means that it is necessary to consider the latter in the context of the former: two tribunals might draw the line very differently, and it is, as we have already emphasised, ultimately the total award that has to be assessed. But, even making those allowances, it is in our view clear that the award of £20,000 by way of aggravated damages in the present case was wholly excessive. We consider below what particular features of the case might properly be regarded as aggravating; but however they are assessed they do not come close to justifying an award so far out of line with the conventional scale. Having reached that conclusion, it is perhaps unnecessary for us to try to identify the particular errors in the Tribunal's reasoning which may be responsible for the error. However, we will briefly comment on the approach in paragraphs 9-12 of the Reasons.

31. We should say by way of preliminary that the exercise which the Tribunal performed in paragraphs 10 and 11 of seeking to distinguish between which aspects of the Appellant's conduct were "oppressive" and which were "high-handed" was unnecessary and indeed, with respect, inappropriate. As we say at paragraph 22 (1) above, the time-honoured phrase which the Tribunal was seeking to apply should not be taken as the definitive guide to the circumstances in which aggravated damages fall to be awarded, and it should in any event not be treated as if it were a statutory definition. But that would not matter as long as the features in question did in fact justify the amount of aggravated damages awarded, and the Tribunal should at least be commended for taking the trouble to set out carefully what factors it relied on. However, there are more pertinent criticisms, specifically:

(1) Although the Tribunal correctly directed itself, at paragraphs 9 and 12, that the features on which it relied in making its award of aggravated damages should not overlap with

those which were compensated in its award for injury to feelings, some at least of the features identified would appear to be plainly part of the complaint itself rather than constituting something exceptional in the manner of the act or the Appellant's motivation. The plainest example is item 10.1, "the instigation of unwarranted disciplinary proceedings" – which is the very detriment complained of; but the same point could be made about 10.2 and arguably several of the other items. It does not follow that the Tribunal was necessarily guilty of double-counting: maybe it simply put some items into the wrong box. But it is impossible to be confident about its analysis.

(2) Some of the items do not appear to be matters of which the Claimant would have been aware at the time and accordingly it is hard to see how they could have aggravated his distress – for example, items 11.4 and 11.5.

(3) The Tribunal in the first sentence of paragraph 12 expressly distinguishes between "injury to feelings" on the one hand and the award of aggravated damages for "high-handed and oppressive" conduct on the other. That is a false distinction: see paragraph 21 above. This could just be a piece of loose wording, but the second half of the paragraph reinforces the suspicion that the Tribunal was in fact making its award to reflect not the aggravation of the injury to the Claimant's feelings by the conduct in question but the seriousness of the conduct in itself: the message is "police officers should not act in this way". These considerations are in fact, whether the Tribunal realised it or not, punitive and not compensatory.

(4) The Tribunal made no explicit findings about the impact on the Claimant of what had happened to him beyond the very brief observations in paragraph 5 of the Reasons. Its remaining factual findings, in particular in paragraph 8, are concerned with

recapitulating why the Appellant's conduct was so reprehensible; and in fact the same focus on the seriousness of what the Appellant did appears in paragraphs 6-8, which deal with "ordinary" injury to feelings. That is not the right focus: see paragraph 24 above.

We regret having to make these criticisms of a Tribunal which evidently tried to approach its task systematically and conscientiously. Part of the fault is no doubt in the unsatisfactory state of the law which it had to apply. The errors which it made are a useful illustration of some of the points which we have made above.

32. The parties were agreed that if we found that the Tribunal had erred in law we should substitute our own decision as to the correct award. Consistently with the approach which we have advocated above, we do not think that we can do so simply by reducing the amount of the award of aggravated damages. If, as we think may be the case, one of the Tribunal's errors was to compensate under the head of aggravated damages injury to feelings that would more naturally form part of the core injury, to reduce the former without increasing the latter might lead to under-compensation. What ultimately matters is whether the total award reflects the injury suffered by the Claimant, and it is on that that we should concentrate.

33. Assessing the injury in question is not straightforward. There are two complicating features.

(1) First, the Tribunal made no explicit findings about the effect of the Appellant's conduct on the Claimant's feelings beyond the fairly general observations in paragraph 5 of the Reasons. We have been shown the Claimant's witness statement lodged for the purpose of the remedies hearing, which describes the impact in very strong terms: for example,

he describes himself as "a shattered, broken individual" and as having been "crucified". We have no doubt that the statement is sincere; but the Tribunal, which had ample opportunity to observe the Claimant at both hearings and who heard him cross-examined on the witness statement (though we have no note of the cross-examination), had to form its own view as to whether to accept his estimation of the injury to his feelings in its entirety. There is reason to believe that the Tribunal, which had not accepted the Claimant's full case on liability, did not wholly do so: if it had, it would hardly have put his case in "**Vento** band 2", even though it could be said to be a "one-off event"[17]. In our view the fair course is to accept the broad picture given in the witness statement but with some caution as to the strongest parts of the language used.

(2) Secondly, the Claimant's witness statement describes how at various points in 2009 and 2010 he had to seek medical help for stress-related symptoms, for which he was prescribed counselling and anti-depressant medication, and how he was in fact off work for some weeks. But, as noted at paragraph 8 above, the Tribunal was expressly invited not to take into account any injury to the Claimant's mental health. Since, as already noted, there can be considerable overlap between the suffering compensated as "injury to feelings" and the suffering compensated as injury to health, we do not believe that we should discount these symptoms in our assessment; but in so far as they might have attracted a higher level of compensation if supported by medical evidence or given a medical label (which is debatable) that is not something that we can take into account.

[17] It is in fact debatable whether that would be the correct characterisation, and in any event there is no absolute rule that a "one-off event" cannot attract compensation in the highest band, though it will not normally do so. But in the end assessing the right level of compensation does not depend on labels of this kind.

34. Against that background, we can summarise the injury requiring compensation as follows. The Claimant was removed from a role in the PCeU which he particularly enjoyed and for which he was particularly well-fitted: he described it as the high-point of his career. His present job in the Extradition Unit is considerably less satisfying. He was for some months the subject of a wholly unjustified disciplinary investigation, which caused him great worry and distress and affected his reputation: he had to declare to various bodies with which he was involved that he was under investigation. There was the particular humiliation of being escorted from the office on the occasion of his suspension (it made him feel, he said, like Dreyfus), amplified by the fact that that was done by the very man, D.I. Williams, about whose lack of integrity he had complained. However, it seems from the Claimant's long and impassioned witness statement that overarching all these particular effects was the destruction of his faith in the Metropolitan Police. He had treated the police service as a vocation and had believed in its fundamental values of integrity and professionalism. It was deeply upsetting to find that the result of making a complaint about the dishonest behaviour of a colleague had led to him being exposed to spurious disciplinary charges and that his superiors had colluded to protect D.I. Williams rather than standing up for what was right. He says that, despite being formally cleared, he feels ostracised and stigmatised – "an outsider". No steps have been taken against those who victimised him, and he has received no apology. The experience has been profoundly disillusioning and demotivating, and he no longer looks back on his working life with any satisfaction. He has suffered, as we have said, quite serious physical and psychological symptoms associated with stress and has had to take time off sick, though he prides himself on having come through these episodes unbroken.[18]

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[18] The Claimant also relies in his witness statement on what he says is the inadequacy of the subsequent investigation of his grievances. In the absence of any findings from the Tribunal it is impossible for us to form a fair view about whether this amounts to a significant aggravating feature. That is not necessarily a criticism of the Tribunal: there must be a limit as to the extent to which what are essentially fresh complaints can be investigated in the context of remedy - cf. paragraph 22 above. We were told by Mr Cheetham that a fresh investigation is in train; but the

35. That amounts to a very serious injury to the Claimant's feelings, affecting his well-being on a long-term basis. But it is not at the most extreme end of the spectrum. This is not a case of a prolonged campaign of discriminatory bullying. That distinguishes it from the cases of **Armitage**, **Vento** and **Fletcher** (in which the combined awards for aggravated damages and injury to feelings were, in today's money, about £44,000, £30,000 and £38,000 respectively – though in **Vento** there was a further award for psychiatric injury). Nor did the Claimant lose his job, as did the claimants in **Vento, Fletcher** and **Virgo Fidelis** (in which the combined award would be about £42,000 in today's money). The Claimant in the end suffered no disciplinary sanction, and there has been no permanent or public damage to his reputation. He was within a few years of retirement and would not have remained in the PCeU even up to that point: see paragraph 18 of the Reasons.

36. In our judgment the right overall figure to compensate the Claimant for that injury is £30,000. If it were necessary to pick out features, over and above the act of unlawful detriment, which exceptionally aggravated the injury to his feelings, and to assign a value to them, we would focus on the conduct of D.I. Williams in escorting him from the building, on the absence of any subsequent apology or of any action against D.I. Williams and D. Supt. McMurdie, and on the conduct of D.C.S. Mawer; and we would split the award between £22,500 for the "core" injury and £7,500 for the aggravation of it by those factors. It will, however, be clear from what we have already said that we doubt the value of that exercise. The award of £22,500 puts the case in the higher **Vento** band, but we have no problem about that: part – but not all – of the Tribunal's error was one of misattribution between the different heads of compensation.

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same applies. In the context of what is inevitably a broad assessment we do not in any event believe that this aspect would have a significant impact on the amount to be awarded.

CONCLUSION

37. Accordingly we allow the appeal and substitute an award of compensation in the sum of £30,000 for the £37,000 awarded by the Employment Tribunal. We are conscious that that reduction is not very great, and we have considered whether it could be said that, even if £37,000 was very high, it was not so high as to constitute an error of law. But this is not a case where the only ground of appeal is that the award was manifestly excessive. There were, as we have sought to show, specific errors in the Tribunal's approach which led to the award being higher than it should have been, and these must be reflected in our decision. (For the avoidance of doubt, the further award of £1,000 which the Tribunal made by way of costs is undisturbed.)

38. We should say that Mr Davies submitted a statement from Francesca West, the Policy Director of Public Concern at Work, the charity concerned to protect the interests of whistleblowers, and indeed he tendered her as a witness. The main burden of the statement was to emphasise that this Tribunal should ensure the effective judicial protection of the interests which the **Public Interest Disclosure Act 1998** (which introduced Part IVA of the 1996 Act) was designed to protect; and Ms West contended that the features of the present case were such as to require an award of aggravated damages at an unprecedented level. In so far as her points concerned the details of the present case, our reasoning appears sufficiently above. On the wider question, all three members of this Tribunal acknowledge the importance of protecting whistleblowers and that discrimination against them is a serious matter. But the means by which the law affords that protection is by giving them the right to claim compensation for loss suffered, on the same basis as victims of other kinds of unlawful discrimination, which is itself designed to be in line with the compensation awarded for personal injury and injury to reputation at common law. There is no warrant for awarding compensation in whistleblower

cases on some special basis. Serious as it is, discrimination against whistleblowers is not inherently more serious than discrimination against employees on the grounds of their race or gender or any of the other protected characteristics identified in the **Equality Act 2010**. Deterrence and punishment are not, as such, a relevant factor in assessing compensation (save in the exceptional case of exemplary damages); but we would observe that the deterrent effect of findings such as were made against the Appellant in the present case is not to be under-estimated, whatever the financial consequences. (We would also observe that in cases where, unlike the present, the claimant has suffered the loss of a job or even a career, and thus sustained serious pecuniary loss, the awards can be very much higher.)

39. Mr Davies also told us that the Claimant had paid £20,000 in costs to his firm; and that against that background any reduction in the Tribunal's award would only reinforce his feeling that the whole stressful and distressing process of litigation had not been worthwhile. He made no application for costs and in truth the point was no more than a letting off of steam, however understandable. The Claimant's predicament is not unique. Legal representation in a major claim of this kind is expensive; but the judgement of the legislators is that, for important reasons of policy, costs ought not to be routinely awarded in the employment tribunals. Whatever the rights and wrongs of that, it could not of course be right to inflate the award of compensation in order to allow the Claimant to recover by the back door costs to which under the Rules he is not entitled.