THE INDUSTRIAL TRIBUNALS

CASE REFS: 304/16
1219/18

CLAIMANT: **Donna Nesbitt**

RESPONDENT: **The Pallet Centre Limited**

DECISION ON A REVIEW

The unanimous decision of the tribunal is that the application for review is granted and the tribunal confirms its decision save that it varies the total award of compensation to be paid by the respondent to the claimant from £13,453.83 to £16,517.67.

Constitution of Tribunal:

Employment Judge: **Employment Judge Drennan QC**

Members: **Mr I Carroll**
Mrs A Gribben

Appearances:

The claimant appeared in person and was not represented.

The respondent was represented by Mr D McGettigan, Peninsula Business Services Ltd

REASONS

1. The tribunal issued a decision, which was recorded in the register, and issued to the parties on 17 August 2018, in which it held:-

> *"1. The claimant's claim of equal pay, pursuant to the Equal Pay Act (Northern Ireland) 1970, as amended, is dismissed, the respondent having established the genuine material factor defence, for the purposes of Section 1(3) of the said Act.*
>
> *2. The claimant was unfairly constructively dismissed.*
>
> *3. The claimant was unlawfully discriminated by way of victimisation, pursuant to the Sex Discrimination (Northern Ireland) Order 1976.*
>
> *4. The tribunal makes a total award of compensation to be paid by the respondent to the claimant in the sum of £13,453.83.*

5. *The claimant's claim of sexual harassment, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and her claim for unauthorised deduction of wages and/or breach of contract for non-payment of bonus are dismissed upon withdrawal."*

1.2 The claimant made an application for a review of the said decision, dated 31 August 2018 and received by the tribunal by email on 4 September 2018, and by hard copy on 5 September 2018. The said application for review was made, pursuant to Rule 34(3)(e) of the Rules of Procedure contained in Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) and also contained an application for an extension of time, on the grounds the decision arrived at the claimant's address at a time when she was already on a pre-arranged holiday.

1.3 In a letter, dated 10 September 2018, the tribunal informed the parties, as follows:-

"In relation to your application for a review of the decision issued to the parties on 17 August 2018, on the grounds that the interests of justice require a review, Employment Judge Drennan QC, after a preliminary consideration of the application pursuant to Rule 35 of the Rules of Procedure has extended the 14 day time limit as he considers it just and equitable to do so for the reasons set out in the application and has directed that Review Hearing be arranged to determine the said application. The Parties will be notified in due course of the date and time of the review. Notice of the Review Hearing to be heard on 1 November 2018 and was issued to the parties on 4 October 2018."

2. The Rules of Procedure, in so far as relevant in relation to this application, provide as follows:-

Rule 34 – Review of Other Decisions

(1) Parties may apply to have certain decisions made by a tribunal as a Chairman reviewed under this role and Rules 35 and 36. Those decisions are –

…

(3) …. Decisions may be reviewed on the following grounds only.

(e) the interests of justice require a review.

Rule 35 – Preliminary consideration of application for review.

(1) An application under Rule 34 to have a decision reviewed must be made to the Office of the Tribunals within 14 days of the date on which the decision was sent to the parties. The 14 day time limit may be extended by a Chairman if he considers that it is just and equitable to do so.

(2) The application must be in writing and must identify the grounds of the application in accordance with Rule 34(3) and provide the details of the grounds so identified, ….

(3) The application to have a decision reviewed shall be considered (without the need to hold a hearing) by the Chairman of the tribunal which made the decision …..

and that person shall refuse the application if he considers that there are no grounds for the decision to be reviewed under Rule 34(3) or there is no reasonable prospect of the decision being varied or revoked.

….

Rule 36 – The Review

(1) Where a party has applied for a review and the application has not been refused after the preliminary consideration mentioned in Rule 35, the decision shall be reviewed by the Chairman or tribunal who made the original decision …….

……

(3) A tribunal or chairman who reviews a decision under paragraph (1) … may confirm, vary or revoke the decision. If the decision is revoked, the tribunal or chairman must order the decision to be taken again ….

3.1. The ground for review – "interests of justice require a review", set out in Rule 34(3)(e) of the Rules of Procedure has often been referred to as a residual category, giving the tribunal a wide discretion (see ***Flint v Eastern Electricity Board [1975] IRLR 277***). However, it was also held in ***Flint***, although the discretion is undoubtedly wide, it was not boundless and it must be exercised judicially having regard to the terms of the overriding objective; and with regard, not just to the interests of the party applying for a review but also the other party and the public interest requirement that there should be, as far as possible, finality of litigation.

3.2 It used to be thought a review on these grounds could only be granted in "exceptional circumstances" (see ***Trimble v Supertravel Ltd [1982] IRLR 451***). This was doubted in ***Williams v Ferrorsan [2004] IRLR 607,*** which held that, in light of the overriding objective, there was in fact no reason for an "exceptionality hurdle and that there is a difference between saying that a case, to which the interests of justice ground applies, will in practice be unusual or exceptional and saying that this ground should be read as if inserted into it are the words 'exceptional circumstances' (see also ***Sodexho Ltd v Gibbons [2005] ICR 1647****).* These authorities also emphasise that such a review is not an opportunity for a disappointed party to proceedings to get a second bit of the cherry. In ***Stevenson v Golden Wonder Ltd [1977] IRLR 474,*** Lord McDonald said the review provisions were "not intended to provide the parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis …."

3.3 In the case of ***Newcastle upon Tyne City Council v Marsden [2010] ICR 743,*** Underhill P, as he then was, reviewed the relevant principles and expressed the view the "broad statutory discretion has become gradually so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires in the particular case. He accepted tribunals were no longer required to apply an exceptionality test when considering applications on the grounds of interests of justice requiring a review nor any other type of restrictive formula, such as "procedural mishap or procedural shortcomings", as referred to in ***Trimble***; but he warned against rejecting the basic principles in the older cases and, in particular, after referring to Rimer LJ's statement in ***Jurkowska v Hlmad Ltd [2008] ICR 841*** that "dealing with cases justly requires

that they be dealt with in accordance with recognised principles" and held that the principles set out in ***Flint*** and other cases to the importance of finality of litigation remained valid. In the recent case of Ministry of Justice v Burton [2016] EWCA Civ 714, albeit pursuant to Rule 70 of the 2013 Rules of Procedure in Great Britain, relating to "reconsideration where it is necessary in the interests of justice", which has replaced the previous role in Great Britain which was similar to Rule 34 of the Rules of Procedure in Northern Ireland. Elias LJ, at paragraph 21, stated the discretion to act in the interests of justice is not open-ended and emphasised the importance of finality, which he said militated against the discretion being exercised too readily. In ***Outasight v B Ltd v Brown [2015] ICR DII,*** the EAT confirmed that Rule 70 of the 2013 Rules of Procedure did not alter the substantive legal principles relating to "interests of justice", established under the previous role.

4.1 The claimant's application for review on the grounds that the interests require a review, related, in particular to the tribunal's decision to dismiss the claimant's claim for equal pay, pursuant to the Equal Pay Act (Northern Ireland) 1970, as amended and the amount of compensation awarded to the claimant for the injury to her feelings/personal injury on foot of the tribunal's decision that the claimant had been unlawfully discriminated against by way of victimisation pursuant to the Sex Discrimination (Northern Ireland) Order 1076. (See copy of the said application for Review by the claimant attached at Appendix A to this decision and the respondent's written submissions attached at Appendix B to this decision). At the Review Hearing the claimant and the respondent's representative made further oral submissions, on foot of the said application and written submissions.

4.2 The main focus of the claimant's application for review, relating to the claimant's claim for equal pay, related to the fact, in relation to this claim, the only witness for the respondent was Mr Julian Morrow, the general manager of the respondent and that none of her four comparators or their immediate line managers were called by the respondent to give evidence. Indeed, the claimant in the course of the substantive hearing, raised this issue, as referred to in paragraph 3.4 of the decision and, as set out in the said paragraph, the tribunal has specifically addressed that issue and its reasons for not drawing the inference sought by the claimant. In the decision the tribunal has set out in considerable detail its findings of fact, having considered the evidence given to the tribunal by the parties, the documents contained in the trial bundles as amended to which the tribunal was referred during the course of the hearing, together with the submissions of the claimant and the respondent's representative. In particular, the tribunal considered, as set out in the decision, the documentary evidence, as presented to the tribunal in evidence, following the previous series of Case Management Discussions and the Orders made at those hearings. In light of its conclusions, as set out in the said decision, in relation to Mr Morrow's evidence, it was not necessary for the tribunal to consider any issue of inference in relation to the history of these proceedings at the previous Case Management Discussion.

It was not, as suggested by the claimant in her application that the claimant was not given the opportunity to challenge the evidence of Mr Morrow. Indeed she did so; but, as set out in paragraph 3.4 of the decision, she was not in a position, as set out therein, to challenge his evidence in relation to the specific role/work of the comparators in the course of her own evidence or cross-examination. The tribunal has carefully set out its findings of fact in relation to the claimant's role/work and the roles/work of her comparators and its conclusion, in light of those findings of fact, in relation to the said issue of the genuine material factor defence. (See in particular

paragraphs 3.5-4.2 of the decision). The tribunal addressed in paragraph 3.4 of the decision, issues relating to uncertainty in relation to the precise job titles of the claimant and her comparators and its conclusion that such differences were not of significance and relevance in comparison to the actual job/work carried out by them.

4.3 The tribunal can fully understood the claimant's disappointment with the tribunal's decision in relation to her claim of equal pay. However, as set out above, the tribunal, in the course of its decision, has addressed the issues, the subject of her application for review in relation to her claim of equal pay. The tribunal considers the claimant's application is an attempt to relitigate these issues which is not the purpose of a review. In addition, there must be finality of litigation. The tribunal's decision or review, after considering the claimant's review application, the said submissions of the parties in light of the relevant case law is therefore to confirm its decision to dismiss claimant's claim of equal pay.

5.1 In relation to the claimant's application for review, relating to the amount of compensation awarded to the claimant for the injury to her feelings, pursuant to the tribunal's decision that the respondent had unlawfully discriminated against the claimant by way of victimisation and that there should have been an uplift for aggravated damages.

The tribunal at this Review Hearing has carefully reconsidered its findings of fact in relation to its said decision and, in particular, the award it made in relation to compensation for injury to feelings/personal injury arising from those acts of discrimination; and, whether the award was "too low" and should therefore be varied on review. The tribunal is satisfied it is entitled, pursuant to an application for review, on the grounds the interests of justice require such a review, and in light of the case law, referred to previously, to vary such an award, if its considers it is appropriate to do so in the interests of justice.

5.2 In relation to any award of aggravated damages, such an award is an aspect of injury to feelings and is only awarded to the extent that the aggravating features have increased the impact of the discriminatory act/acts on the claimant (see further Underhill P in ***Commissioner of Police of the Metropolis v Shaw (UKEAT/0125/11),*** where he refers to the phrase "high handed, malicious, insulting or oppressive" behaviour. It has to be emphasised such compensation is compensatory only and is not to punish the respondent for his conduct. Further in ***McConnell v The Police Authority for NI (1997) N 1 244***, and subsequent decisions in Great Britain, aggravated damages have been held to be a sub-heading/element of injury to feelings.

5.3 The tribunal, on foot of this application for review of the said award for compensation, has carefully reconsidered the level of award made by the tribunal for compensation for injury to feelings/personal injury arising from the findings of fact it made in deciding the claimant had been unlawfully victimised by the respondent. (It should be noted that, in the decision of the tribunal in relation to the award of compensation there was a typographical error and the relevant date in relation to the interest awarded should have been 16 August 2018; albeit the sum calculated was correct). The tribunal has taken into account the case law referred to previously and, in particular, the issue of finality of litigation. In relation to the award of compensation for injury to feelings/personal injury, the tribunal is satisfied, in light of the terms of the said application and the submissions of the parties, the claimant is seeking to relitigate and have another "bite of the cherry" of the matters before the tribunal on this issue and

which it determined as set out in the decision; and a review on the ground the interests of justice require a review, is not appropriate in the circumstances – subject to what is set out below. It has concluded, in light of the said submissions of the parties at this Review, it failed to sufficiently take into account the cumulative nature of the series acts of victimisation, as found by the tribunal and their specific nature with regard to the claimant and the impact on the claimant, on the evidence before it, as a consequence (see, in particular paragraphs 6.2-6.5 of the decision). It concluded that, in the circumstances, the respondent's actions were high handed and insulting and spiteful in nature and thereby increasing the impact on the claimant; and that the award of compensation should have included therefore an award of aggravated damages, as an element of the said award of compensation for injury to feelings/personal injury.

5.4 In light of the foregoing, the tribunal was satisfied, in the exercise of its discretion, the interests of justice required a review of the decision of the tribunal to award the claimant the sum of £4,500 together with interest; and the said decision should be varied to increase the award of compensation for injury to feelings/personal injury to £7,000.00, together with interest, as set out below:

Injury to feelings/personal injury	-	£7,000.00
Interest (at 8% from 22 October 2015 Until 16 August 2016	-	£1,578.74
		£8,578.74

5.5. The tribunal therefore varied the total compensation to be paid by the respondent, on review, as follows.

£7,938.93
£8,578.74

Total £16,517.67

Employment Judge:

Date and place of hearing: 1 November 2018, Belfast.

Date decision recorded in register and issued to parties:

A.

31st August 2018

The Secretary to the Tribunal
Office of the Industrial Tribunals
Killymeal House
2 Cromac Quay
Belfast
BT7 2JD

Case Ref No 304/16 and 1219/16

Dear Secretary of the Tribunal

I wish to apply for a review of the decision issued on 17th August 2018 under Article 34 3 (e) Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 in reference to Case Numbers 304/16 and 1219/16 with regard to the dismissal of my claim for Equal Pay, the amount of the award for unlawful discrimination by way of Victimisation and the absence of an uplift for aggravated damages.

I am aware that I am slightly late with this application. Unfortunately this was due to me being on holiday when the decision arrived. When I received correspondence from the President, that the decision should be completed before 20th August 2018, I had already booked my holiday. Unfortunately at that time it was not a definite that the decision would be completed by this date. I respectfully request the Tribunal to take this into consideration and the length of time I have been waiting on this decision, when applying their discretion to allow this application to proceed.

If my application for a review is allowed to proceed, please see as follows;

<u>Equal Pay</u>

I believe the Tribunal erred in dismissing my claim for Equal Pay and my reasons for this are as follows;

Mr Morrow was the only witness for the respondent. None of my 4 comparators or their immediate line managers were called by the respondent to give evidence.

A

In the course of my evidence I strongly challenged the absence of these witnesses and of any relevant documentation which would have corroborated the respondent's evidence and the evidence of Mr Morrow as to the role/work of my comparators.

In paragraph 3.4 of the Tribunals judgement, it states "However significantly, in the tribunals judgement the claimant frankly and fairly acknowledged that she was not in a position, save in the general sense referred to above, to challenge his evidence in relation to the specific work/role of the comparators. In such circumstances, the tribunal was not prepared to draw any inferences from any such failures by the respondent and was satisfied it was able to determine the necessary facts for the GMF issue...".

It further states "In light of the claimants said acknowledgement, the tribunal was able to place considerable reliance on the documentation prepared by Mr Morrow, with the assistance of his representatives, of the examples of the said factors relied upon by the respondent in relation to the claimant and her said comparators".

The burden of proof

The woman bringing an equal pay claim has to show the employment tribunal that, on the face of it, she is receiving less pay than a man in the same employment doing equal work.

Her employer must then either accept her claim or prove to the employment tribunal that the difference in pay was for a genuine and material reason, which was not the difference of sex.

I provided evidence to the Tribunal to show that I was paid less than my 4 comparators and that I did work of equal value. The respondent raised 4 material factors. Due to the absence any witnesses with direct knowledge of the roles/work of said comparators, I believe the respondent has not proven that the difference in pay was not the difference of sex.

The respondent had the resources and the opportunity to call the said comparators or their direct line managers as witnesses, but chose not to. In effect this denied me the opportunity to challenge the respondent's evidence and consequently their said material factors.

I believe I was in a position to challenge the respondents evidence had the said comparators or their direct line managers been called as witnesses.

Discrepancies/Inaccuracies in the Respondents Evidence

In the evidence provided by the respondent with regard to the job titles of my comparators, it was proven that there were discrepancies. In particular, the job titles of my comparators were magnified by the respondent, after my claim for equal pay. The Tribunal decided that such differences in the job titles were not of any significance in determining the GMF defence.

A

Moreover, in my evidence for the Tribunal, I provided a very detailed description of my role/work with the respondent company. The job description provided by the respondent as evidence for my role/work indicates significantly less responsibilities and duties than what my role actually entailed. The details I provided of my job description were in fact accurate and subsequently, were not challenged by the respondent.

I believe these differences were significant in relation to the Tribunal placing considerable reliance on the respondent's evidence in relation to their said roles/work of my comparators and their said GMF defence.

I believe evidence was provided for these discrepancies and inaccuracies and therefore doubt should have been placed as to the accuracy of the respondent's evidence provided in relation to the said role/work of my comparators and their said GMF defence.

In light of the above I believe the Tribunal has erred in placing considerable reliance on the respondent's evidence and also Mr Morrows evidence (the only witness) given that he would have had only 'indirect' knowledge of the said roles/work of my comparators.

Transparency

Further evidence was also provided to the Tribunal to show that the respondent was not transparent in regards to pay and remuneration. A very detailed questionnaire, relating to identifying relevant information for my equal pay claim, was sent to the respondent in January 2016. Initially I did not receive a reply. A Tribunal Order had to be placed on the respondent in April 2016 to respond to the questionnaire. The respondent's initial reply was evasive and ambiguous. After further Tribunal orders, the respondent eventually replied in full in June 2016. This was approximately 6 months after my initial request, 6 months after my claim for Equal Pay was submitted to the Tribunal and 2 months after my Unfair Constructive Dismissal.

In addition 2 Unless Orders were placed on the respondent to obtain further information necessary for my claims.

It is my belief that inferences should have been drawn in my claim for Equal Pay from;

- the lack of relevant witnesses called by the respondent
- the discrepancies and inaccuracies in the respondent's evidence
- the respondent's lack of transparency
- the respondents persistent failures in providing the relevant and necessary discovery for my claim for Equal Pay

I believe the Tribunal erred in dismissing my claim for Equal Pay in light of all of the above.

A

Award for Injury to Feelings/Personal Injury

In its judgement the Tribunal confirmed that I was subject to the following acts of victimisation;

1. Initiating and continuing with the whole disciplinary process including issuing the suspension (described as a sham para 6.2 page 58)
2. Penalising me by leaving a "black mark" on my personnel file (para 6.2 page 58)
3. Unreasonably withholding my Christmas bonus (para 6.8 page 58)
4. Termination of my company sick pay with little/no notice (para 6.4 page 58)

The Tribunal has taken account of the medical evidence provided by my GP which outlined my acute stress reaction, insomnia, ongoing symptoms of depression, low mood, poor sleep, anxiety and tearfulness and confirms that I was provided medication as a result of the impact the victimisation had on me.

The Tribunal also considered my witness evidence dated 27th March 2017 where I detailed the impact the acts of victimisation had on me since 22nd October 2015 to 28th March 2017 (the date of my resignation) including;

- Vulnerability
- Shock
- Failure to comprehend what was happening
- Utter devastation
- Insomnia
- Physical pain (lower limb pain)
- Loss of appetite
- Heart palpitations
- Panic attacks
- Dizziness
- Extreme stress/anxiety
- Humiliation and embarrassment
- Extreme emotions (tearfulness)
- Reputational damage

Medical certificates for this period were also included in the bundle of evidence provided to the Tribunal in addition to the medical information provided by my GP and my witness evidence.

As outlined in the paragraph 6.6 of the Judgement (page 59) the Tribunal deemed the injury to feelings suffered to fall within the lower band of the awards band for injury to feelings (Vento Bands).

These bands were originally outlined in the case of Vento v Chief Constable of West Yorkshire Police.

Awards in relation to the three bands were described as follows;

i The top band should normally be between £15000 an £25000. 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 cases should an award of compensation for injury to feelings exceed £25000.

ii The middle band of between £5000 and £15000 should be used for serious cases, which do not merit an award in the highest band.

iii Awards of between £500 and £5000 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 so low as not to be a proper recognition of injury to feelings.

The valuations of the bands were amended in 2018;

Bottom band - £900 - £8600

Middle Band - £8600 - £25700

Top Band - £25700 - £42900

In light of this guidance outlined above in the Vento case, I believe that my award should have fell in the top band of these guidelines or at a minimum the higher end of the middle band on the basis that I suffered victimisation over a sustained campaign (22nd October 2015 to 28th March 2016), it was not a one off occurrence (suspension initially, disciplinary, withholding my Christmas bonus, personnel file black mark, the abrupt termination of my company sick pay) and has impacted on me as outlined above.

These acts of victimisation also led to my Unfair Constructive Dismissal.

As provided in my evidence, I had been employed by the respondent for nearly 23 years. I was/am a single mother and relied heavily on my income with the respondent company. The mere thought of the financial impact alone, at that time, of being dismissed was absolutely devastating.

Furthermore, the treatment I received from not one but the three senior managers of the respondent company, involved in these acts of victimisation as set out in paragraph 6.2 (page 57) of the Tribunal decision, was equally as devastating.

My subsequent absence from work for 20 weeks because of extreme stress and anxiety was due solely to the respondents repeated acts of victimisation. Moreover, the impact of this victimisation did not end when I resigned but continued long after, as evidenced in the report from my GP where it is noted that I still have episodes of depression.

In light of the above I believe the Tribunal has erred in placing my award for injury to feelings/personal injury suffered within the lower Vento band of the awards band for injury to feelings

Aggravated Damages

During the disciplinary process and the grievance process, the respondent did not follow the LRA Code of Practice or their own procedures when they initiated and continued with the whole disciplinary process including the issuing of the suspension, and their failures to properly deal with my Equal Pay grievance, dismissing my claim without full and proper investigation and also their failures in dealing with my allegation against Mr Ervine, not taking my allegation seriously and failing to properly investigate and showing Mr Ervine my confidential statement before he constructed his own.

The suspension was also dealt with in a high handed manner. I was escorted from the respondent's premises by Mr Kirkwood and made to feel like a criminal. This also took place in front of my work colleagues which I found highly embarrassing and very upsetting. I left the respondents company in complete shock as to what had just taken place.

Letters were then unnecessarily hand delivered to my home whilst I was on sick leave, which had the effect of making me feel very intimidated in my own home.

Furthermore the respondent persistently disrupted the tribunal proceedings of both of my cases, having had many orders plus two Unless Orders put on them, in order to provide the necessary discovery regarding my claims. These failures on behalf of the respondent caused considerable extra efforts on my behalf in preparing my cases and added to the symptoms of stress, anxiety and depression I was already feeling.

I believe uplift for aggravated damages should have been applied to my award in light of the above.

I respectfully request that my application for a review is given further consideration.

Yours faithfully

Donna Nesbitt

B

CASE REF NO. 1219/16IT, 304/16IT

INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS (NORTHERN IRELAND) 2005

BETWEEN:

Donna Nesbitt CLAIMANT

AND

The Pallet Centre

RESPONDENT

Respondents Submissions

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1. The claimant has submitted a review application and has outlined three main aspects. The respondent contests the claimant's grounds as being little more than amounting to a disagreeing of the determination of the Tribunal rather than any actual substantial grounds.

   Dismissal of Equal pay.

2. The claimants main ground in this respect is that "none of my four comparators or their immediate line managers were called by the respondents to give evidence".

3. In this regard, It is entirely a matter for the respondent to put forward their case accordingly and to call what witnesses they feel appropriate. It is not for the claimant to determine what witnesses the respondent must call that she wishes to cross examine.

4. If a claimant believes the evidence of individuals are relevant to the proceedings, then she should call them as witnesses. The reminder that the claimant can seek to adduce relevant

witness evidence rather than it being the obligation of the respondent can be found in *Ms K Balmain and Ors v Atlas Cleaning Ltd [2007] EATS/0015/07/MT,* The claimant could have applied for a witness order accordingly but did not do so. The claimant had been aware since the exchange of witness statements specifically who would be giving evidence and what evidence they would be providing accordingly.

5. In the case of ***Arnold Clark Automobiles Ltd v Middleton UKEATS/0011/12*** There was no obligation on them [the respondent] to provide any defense or to call any witnesses at all. No one had indicated that either witness had relevant evidence to give. They had not featured as potential witnesses at the case management discussion that had taken place at an earlier date.

6. Various reasons were offers as to why the Employment Tribunal should have been able to reach a decision on the evidence led, for the purposes of this review the main aspects being, the onus was on the Claimant; calling these witnesses was not in the interests of justice nor was it required by the overriding objective, and it was not necessary to put parties on an equal footing, nor was it necessary for expedition or for fairness.

7. In respect to any likely inferences to be drawn by a failure to call a witness that would strengthen either parties case without sufficient reason allows the jury/panel to infer that it would not have helped the case. This inference we argue can apply both ways in that neither the respondent nor the claimant called the four comparators that the claimants now refers too, on that basis we argue that the Tribunal have taken the correct approach in drawing no inferences on either side in this regard.

8. The claimant has outlined that there were discrepancies and inaccuracies in the respondent's evidence. Firstly, in regards to the job titles of her comparators. The respondent argue that this is a matter that has already been determined by the Tribunal at first instance. The claimant's grounds of appeal are little more than a reiteration of the claimant's argument during the course of her claim. The claimant has not presented any further evidence, nor provided any grounds in her application other than disagreeing with the Tribunals conclusion.

9. At para 3.4 (p40) the Tribunal have outlined that they did find uncertainly in relation to the precise job titles "however for the purpose of determining the GMF defence, "the tribunal did not find such differences in any job title used ..of significance and relevance in comparison to the actual job/work carried out by each of them".

10. The respondent argues that the Tribunals determination of what are the relevant factors for consideration was correct, ie that a job title in its self would be of little or no justification when considering a claim of equal pay, but it an examination of the material work undertaken by the claimant and her comparators was of importance.

11. The Tribunal outlined considerable reasons for their conclusions in this regard in paragraphs 3.5 to 4.2 including a detailed review and comparison of each comparator and the claimant in terms of their seniority, line management responsibilities, hands on work and responsibility.

12. In respect to the evidence presented, and the claimants assertion stating "due to the absence of any witness with direct knowledge of the roles/work of said comparator, I believe the respondent has not proven that the difference in pay was not the difference of sex" " in effect this denied me the opportunity to challenge the respondents evidence", The claimant quotes the tribunal from para 3.4 " "However significantly in the tribunals judgement the claimant frankly and fairly acknowledged that she was not in a position, save in the general sense referred to above, to challenge this evidence in relation to the specific work/role of the comparators".

13. The respondent argue that the claimant has misinterpreted this reference, and rather than this being some acknowledgement from the Tribunal that she was prevented from being able to challenge the respondents evidence, we understand this to be that the claimant was unable to challenge the respondents evidence.

14. We draw a distinct difference between not having an opportunity to challenge evidence and simply not being able to challenge it. The respondent argue that the claimant was simply unable to challenge the evidence presented and on that basis the Tribunal correctly were able to determine that the absence of any witnesses did not appear to have had any effect on the evidence and so the tribunal "were not prepared to draw any inferences.. and were able to determine the necessary facts for the GMF issue on the evidence placed before it".

15. The claimant had adequate opportunity to cross examine Mr Morrow, and did so, but was not able to challenge the evidence presented, the respondent argue that had any other witnesses been called the claimant would not have been able to challenge their evidence also, or little further if anything would have been added or achieved by it.

16. In ***Elmore v The Governors of Darland High School and another UKEAT/0209/16***, **the EAT** considered whether it was wrong for a tribunal to find that an employee's dismissal was fair when their employer had failed to call witness evidence of the appeal stage at the hearing. It confirmed that the role of the tribunal is to reach a decision based on the evidence put before it and were sufficiently able to determine the fairness of a matter in the absence of evidence of a witness.

17. The Tribunal were presented with detailed job descriptions and outlines as to each comparator and how their role deferred to the claimant.

18. The evidence that was provided by Mr Morrow and was accepted by the Tribunal as being credible. The claimant is fundamentally misconceived to suggest that Mr Morrow being director

would not be aware of the specific tasks each individual undertook. The respondent's organisation is not a large one. The claimant maintains Mr Morrow only had "indirect knowledge" of the roles, however it is apparent that Mr Morrow had close and direct contact with the claimant and comparators and therefore perfectly adequately able to outline the distinction of the roles and present the evidence on behalf of the respondent's case.

19. The Tribunal were able to adequately make fair and reasonable conclusions based on the evidence of Mr Morrow in regards to the claimant's role and those of her comparators and to determine they were not like for like roles and any difference in pay was sufficiently justified.

20. In summary, the claimants ground of review on this point is little more than complaining about how the respondent presented their case, which as demonstrated above is a matter for them. The Tribunals role was to consider the evidence based before it, and they considered that there was sufficient clear evidence to determine the issues taking into account the claimants and the respondent case based on evidence presented.

Transparency

21. The claimant has outlined that she believes inferences should be drawn from the following:

- lack of relevant witnesses called by the respondent.
- Discrepancies and inaccuracies in respondent's evidence, not outlined what
- Respondents lack of transparency
- Respondents failures in providing the relevant and necessary discovery

22. The respondent would reiterate its argument above in respect to the first two points of the claimants ground, but in respect to the remaining points, the claimant has outlined that the respondent delayed in providing replies to requests for discovery and information and was not transparent.

23. A CMD was held on the 12th of April 2016 outlining directors for the case. A further CMD was held on the 18th of May 2016, and it was confirmed that the Tribunal accepted that "the claimants request made clear what she was seeking". The issues were clarified at this CMD. At this point the claimant had submitted a further claim and the date for reply was not until the 1st of June. The claimant also made a request for further information.

24. The claimant made a request for further information stating the respondent have not fully complied. The respondent replies on the 22nd of June outlining that they believed they had fully replied.

25. Further exchanges between the claimant and the respondent took place, the claimant asserting the respondent had not complied, the respondent asserting they had. There was CMD on the

29th of July, listing the equal pay claim for a stage one equal value hearing on the 30th of august and also dealt with outstanding orders and both parties were ordered to provide further information on each other.

26. The stage 1 Equal vale hearing took place on the 30th of august 2016, submissions were made and further orders were made for the respondent.

27. further correspondence between parties and the claimant called for a further CMD held on the 17th of October 2016. It was acknowledged that the respondent had complied in part, and had considered the wording of some of the requests and the fact that the representative that had carriage of the case had become ill and had in advance sought an extension of time, so the Tribunal were not prepared to issues a strike out and clarified further orders of replies.

28. A further CMD took place on the 29th of November again related to a strike out application made by the claimant. The Tribunal considered that the respondent had complied substantially with the order, and that some of the matters the claimant referred too were in fact matters for consideration during cross examination. There were two points that the Tribunal confirmed were not completely dealt with and ordered compliance for both the claimant and respondent accordingly.

29. A pre hearing review took place on the 13th of January 2017. The respondent contended they had complied with the order, the Tribunal acknowledged they had but the replies were confusing in their layout. The representative clarified all points and the Tribunal ruled that the respondent had complied with the order.

30. A further CMD took place on the 8th of February, this outlines in detail each stage of the interlocutory matters for the case. The matter was related to the service of the respondent's witness statements. The respondent had that day served the statements and the Tribunal reviewed such and indicated that the statements in their view did not deal sufficiently with the GMF defence and ordered further detailed statements.

31. The respondent submits that procedural flaws if any, in terms of the respondent's delays in replies or matters of discovery during a claim are not areas where the Tribunal can draw inferences from as requested by the claimant. The claimant's argument may be relevant in respect of any costs order if appropriate and ought to have been made at the time, but I understand the claimant was self-represented and therefore no costs order would be appropriate in any event.

32. Any such delays had no bearing on the overall fairness of the substantive hearings or its outcome as prior to the hearing all and any orders had been complied with by the respondent. The claimant was in full knowledge of all the evidence on which the respondent sough to rely on and had all evidence available to her to make out her claim. On that basis the respondent argue

that it was correct for the Tribunal not to draw any inferences from any such delays or failures as they had no overall impact in the final hearing or its outcome.

Review of Injury to Feelings award

33. The claimant submitted a medical report dated the 4th of October 2017 submitted to the Tribunal on the 17th of October by email after the completion of the hearing. The determination at para 1.2 outlines the medical evidence was admitted without formal proof, was not subject to cross examination, and had been submitted at end of hearing therefore limited weight can be attached.

34. It was open to the claimant to submit this evidence as part of disclosure. It should be noted the claimant's various applications to the Tribunal against the respondent for failure to disclose documents yet the claimant did not submit this evidence until proceedings were complete. The claimant was clearly aware of the process of disclosure as highlighted by the herself on numerous occasions. The claimant has not presented any explanation for not presenting this evidence during the trial. The respondent had no opportunity to review, obtain any counter evidence, or to merely cross examine the claimant on its contents.

35. The medical report is limited in its contents, there appears to be no other records, and is merely a reiteration of the claimants alleged symptoms and is not an actual diagnosis or option. This is confirmed by the use of the phrase "she described symptoms" whereby it appears more is merely repeating what he was told by the claimant.

36. The final paragraph of the letter actually indicated that the claimant "took a proactive approach to her low mood and anxiety and although now has learned how to manage these well". Again it is difficult without the ability to cross examine the author of the report Dr Karen Alexander or the claimant to know what was meant by taking a proactive approach but certainly sounds like the GP is indicated that the claimant was dealing well with any symptoms.

37. The claimant has listed findings by the Tribunal regarding victimisation and then outlining that it has had a traumatic effect on her listing a long list of symptoms, which do not appear to be supported by the medical evidence submitted.

38. The respondent is not disputing that matters have had some impact on the claimant, however it should be noted that the claimant commenced alternative employment very soon after resigning, and had admitted in evidence that it was her choice not to apply for roles of a similar pay that she had received from the respondent therefore any financial impact was a result of the claimants own decision.

39. The claimant due to her new role mitigated her loss, although could have by her own evidence mitigated it further and choose not to, but in any event the Tribunal made an award for loss of earnings which the respondent say was generous given the claimant's admissions.

40. In respect to the claimants claim that she believes she falls within a higher vento bracket, the claimant is merely reiterating her argument, and has not presented any substantial grounds for review. The claimant submitted evidence post hearing that the Tribunal has rightfully attached little weight too.

41. The evidence does not fully corroborate the claimants claim. The award is at the discretion of the Judge, the claimant moved on to a new role very soon after her resignation.

42. The case of ***HM Land Registry v Mrs A McGlue Appeal No. UKEAT/0435/11/RN*** stated "As a matter of principle, awards made in respect of injury to feelings were not susceptible to close calculation. They would therefore not be interfered with unless they were manifestly excessive or wrong in principle. The making of an award had plainly not been wrong in principle. The Employment Appeal Tribunal had been shown a number of comparable cases, but a difficulty with being guided too tightly by such cases was the brevity of any report and the difficulty of knowing precisely how the discrimination set out in each report had actually affected the individual. They did not clearly demonstrate that the tribunal had adopted the wrong bracket."

43. The claimant is merely disagreeing with the award of the Tribunal, but not offering any solid legal basis of challenge. The claimant has not established how her circumstances and the impact of such are so sufficiently serious as to meet the higher brackets set out in **Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871.** The respondent say that the claimants claim rightfully belongs in the lower end of the lower Vento bracket.

Aggravated Damages.

44. The claimant has cited a number of issues to which she feels she is entitled to aggravated damages.

45. One claimed factor is her claim of the respondent's failure to deal with her equal claim grievance. The respondent feel they have adequately dealt with it, and this matter has been determined by the Tribunal in the respondent's favour. The respondent says that given this aspect of the claimant's claim has been dismissed there could be no damages aggravated or otherwise awarded for this aspect.

46. The other aspects which the claimant has outlined have been determined by the Tribunal. They are infact aspects that resulted in the Tribunal arriving at their decision in respect to the claims of victimisation and constructive dismissal and have been taken into account in any award given to the claimant.

47. In respect to the aspect where the claimant claims the respondent "persistently disrupted the tribunal proceedings", while there can be no denial the case was not straight forward, and orders were placed on the respondent, but as noted above, there were concerns regarding the claimants requests not being sufficiently clear, there were directions placed on the claimant, the claimant had pursued claims for sex discrimination, unlawful deduction of wages, breach of contract, for non-payment of bonus and during proceedings withdrew these claims. The respondent argue that the claimant was at times correct in her assertions regarding directions but at other times was over zealous, unclear and all aspects were determined by the Tribunal at each stage.

48. In the matter of ***Land Registry v McGlue***, the approach in examining whether there was a case for aggravated damages was for the Tribunal to consider whether, objectively viewed, the conduct was capable of being aggravating, namely aggravating the sense of injustice which the individual felt and injuring their feelings still further.

49. The distress could be made worse by (a) being done in an exceptionally upsetting way; (b) motive, as conduct based on prejudice, animosity, spite or vindictiveness was likely to cause more distress; (c) subsequent conduct, for example where a trial was conducted in an unnecessarily offensive manner.

50. In each case the emphasis was one of degree. A tribunal should be cautious not to award damages for injury to feelings for the same conduct as it awarded aggravated damages.

51. Aggravated damages were not punitive and did not depend on any sense of outrage by a tribunal as to the conduct. The tribunal had not found that L's conduct had been deliberate. There was insufficient evidence to meet the hurdle for the award of aggravated damages.

52. The respondent argues that none of the findings of the Tribunal would indicated that the respondent had acted in such a high handed manner as to justify aggravated damages, compensation for the injury to the claimant's feelings has already been awarded as a result of any conduct of the respondent.

53. In the matter of ***Maria McKeith v Frank McCorry and others Case Ref 1188/15,*** The Tribunal dismissed all claims for aggravated damages stating aggravated damages can be awarded by the Industrial Tribunal to provide compensation where the Respondent/Defendant may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination. Dealing specifically with one of the claimants points above regarding disclosure the tribunal in this case referring to the "disturbing pattern" of documentation which was produced late by the Respondent during the Tribunal hearing and stated "despite describing the Respondent's approach to releasing documentation as "careless, disinteresting, and less than

wholehearted", the Tribunal were not satisfied that their actions were high-handed, malicious, insulting or oppressive "to a degree that would justify an award of aggravated damages".

54. The respondent submit that the tribunal were correct in their award to the claimant and would invite the Tribunal to dismiss all grounds of the claimant's appeal.

Denis McGettigan
29.10.2018