Neutral Citation Number: [2017] EWCA Civ 1188

Case No: A2/2015/3778

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Employment Appeal Tribunal
HH Judge Clark

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2017

Before :

LADY JUSTICE GLOSTER
(Vice President of the Court of Appeal (Civil Division))
LORD JUSTICE UNDERHILL
and
LORD JUSTICE IRWIN

- -

Between:

BAE SYSTEMS (OPERATIONS) LIMITED	**Appellant**
- and -	
MARION KONCZAK	**Respondent**

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- -

Mr Paul Gilroy QC (instructed by **Eversheds Sutherland**) for the **Appellant**
Mr Tristan Jones (appearing through **the Bar Pro Bono Unit**) for the **Respondent**

Hearing dates: 29th & 30th March 2017

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. From 1998 until her dismissal with effect from 23 July 2007 Mrs Marion Konczak was employed by BAE Systems (Operations) Ltd. Although Mrs Konczak is the respondent before us and BAE the appellant, it is convenient to refer to them, as they were in the original proceedings, as Claimant and Respondent. Between October 2006 and October 2007 the Claimant brought three sets of proceedings against the Respondent in the Employment Tribunal arising out of alleged discrimination in the course of her employment and her dismissal. The proceedings have had an extraordinarily, and very regrettably, complicated history. There have been four substantive hearings in the Employment Tribunal – two before a tribunal chaired by Employment Judge Cook (referred to before us as "Cook 1" and "Cook 2") and two before a tribunal chaired by Employment Judge Sherratt ("Sherratt 1" and "Sherratt 2"). Each of those hearings has generated an appeal to the EAT. There have also been contentious interlocutory and case management hearings. The Claimant has succeeded in respect of some of her claims but failed in respect of others.

2. What is before us is the Respondent's appeal against a decision of the EAT (comprising HH Judge Peter Clark) against the most recent decision of the Employment Tribunal (i.e. Sherratt 2), in which the Claimant's compensation was finally quantified at £360,178.60. It is important to note from the outset that the Claimant has suffered throughout the period covered by these proceedings from mental ill health. It is her case that this has been caused or materially contributed to by the unlawful conduct of the Respondent, but it is in any event common ground that it has been prolonged by the stress of her involvement in these proceedings. This makes the very lengthy history of the claim particularly regrettable. It is, however, fair to observe that substantial offers of compensation have been made by the Respondent but rejected.

3. Before us, as indeed at all previous stages of the litigation, the Respondent has been represented by Mr Paul Gilroy QC. At the early stages of the proceedings the Claimant acted for herself. Following her success on the liability hearing she was for a period represented by solicitors and counsel but since 2008 she has again been unrepresented. She has, however, had the advantage latterly of representation by Mr Tristan Jones of counsel, instructed through the Bar Pro Bono Unit. His written and oral submissions have been of the highest quality.

OUTLINE FACTS

4. In view of the nature of the issues before us I need give only the barest outline of the facts giving rise to the Claimant's claims.

5. From September 1999, when her employment became permanent, the Claimant was employed as a "Secretary grade 8". She was part of the liaison team which worked with a detachment of officers from the Royal Saudi Air Force ("the RSAF") who were working with the Respondent as part of a major project for the supply of aircraft to the RSAF (the "Al Yamamah Integrated Project Team" – "AYIPT"). She was based at Samlesbury, near Preston. Although at first she got on well with the RSAF officers, she became increasingly unhappy following changes in their personnel, and in

particular following the replacement of the previous Liaison Officer, General Otaibi, by a Captain Al-Jehani. She says that she was subjected to bullying and harassment, and in particular to two episodes of sexual harassment by two members of the AYIPT team. In January 2005 she was removed, at Captain Al-Jehani's request, from her RSAF liaison role and was moved to the Respondent's commercial team at Warton.

6. The Claimant was unhappy at Warton because she was not given a proper job to do. In March 2006 she applied for a job back at Samlesbury, but not as part of the AYIPT team. That application prompted a proposal from her line manager, Jeremy Dent, that she should in fact resume working for the AYIPT team, albeit not in her previous role. She was extremely unhappy at that proposal because it would involve her working with officers by whom she had been mistreated previously, including the two officers who she said had sexually harassed her. She believed that her objections to that move were not being taken seriously, and at a meeting on 26 April with Mr Dent and a colleague she broke down in tears. Shortly afterwards, Mr Dent came to see her in her room. In what appears to have been an attempt to express sympathy, however clumsily, he said words to the effect that women take things more emotionally than men, while men tend to forget things and move on. This comment, to which I will refer as "the Dent comment", is central to the proceedings.

7. The Claimant did not return to work the following day. She was certified by her GP as unfit to work on account of work-related stress. She never returned to work thereafter. She was eventually, as I have said, dismissed with effect from 23 July 2007. The reason for the dismissal was not clearly expressed in the dismissal letter but was eventually formulated by the Respondent as being "it not being appropriate for the claimant to return to her old job in the commercial department and … there being no other positions for her".

PROCEDURAL HISTORY

LIABILITY

8. The complaints made by the Claimant in her three sets of tribunal proceedings can be sufficiently summarised for present purposes as follows:

   (1) Five complaints of sex discrimination relating to her treatment by the Respondent following the move from Samlesbury to Warton at the beginning of 2005. The last of these was based on the Dent comment.

   (2) A complaint of victimisation as regards the handling of a grievance lodged by her in 2006.

   (3) A complaint that the Respondent did not make sufficient efforts to facilitate her return to work in 2007, which was said to constitute a failure to make reasonable adjustments for her illness (which was accepted as constituting a disability within the meaning of the Disability Discrimination Act 1995).

   (4) A failure to carry out a risk assessment, which as I understand it was also characterised as a failure to make reasonable adjustments under the 1995 Act.

(5) Complaints that her dismissal (a) was on the grounds of her disability and/or disability related; (b) constituted victimisation on account of her previous complaints of sex discrimination; (c) was unfair; and (d) was in breach of contract.

9. By a judgment sent to the parties on 8 October 2008 a tribunal chaired by Employment Judge Cook dismissed all the claims of sex discrimination save only as regards the Dent comment. It also dismissed the complaint of victimisation arising out of the handling of the grievance. It upheld the claims of failure to make reasonable adjustments. It upheld all the claims arising out of her dismissal, save for the complaint of wrongful dismissal. In so far as the claims on which she succeeded were for discrimination, the door was opened to compensation for injury to feelings and psychiatric injury, together with pecuniary loss consequent on such injury. Directions were given for a remedy hearing. This decision is "Cook 1".

10. I should note one finding in Cook 1 which is relevant to the issues before us. Mr Gilroy had submitted that the Dent comment, even if it amounted to sex discrimination, was *de minimis.* At para. 70 of its Reasons the Tribunal rejected that submission, on the basis that it accepted the Claimant's evidence (recited at para. 69) that the comment "had been the final straw": she said that when she went home after the meeting at which it was made she knew that she could not go back.

11. The Respondent appealed. By a decision dated 20 July 2009 the EAT (chaired by HH Judge McMullen QC) dismissed the appeal.

REMEDY

Cook 2

12. The remedy hearing took place before the same tribunal over six days in April 2011. The delay following the dismissal of the liability appeal is regrettable but it appears to be accounted for by a number of interlocutory disputes. The Claimant was represented by Mr Richard O'Dair of counsel.

13. The Tribunal heard psychiatric evidence from Dr Kevin Craig for the Claimant and Dr Christopher Jarman for the Respondent. Both had submitted substantial reports, and there was a joint "statement of agreement/disagreements" dated 13 June 2010. It also saw a report from Dr Gurpal Gosall, a consultant psychiatrist to whom the Claimant had been referred by her GP in August 2007. For present purposes I need only quote paras. 2.3 and 2.4 of the joint statement, which records the experts' disagreement about the Claimant's state of mental health in the period leading up to the events of 26 April. They read as follows:

> "2.3 Dr Craig believes Mrs Konczak experienced anxiety symptoms that began from around January 2005 onwards. Her symptoms were mild initially but deteriorated over the ensuing months. Psychiatric symptoms exist on a continuum with normal emotions. A person may feel low in mood or anxious to a mild extent or for a short period of time and this may be considered normal. If sustained and severe, these symptoms cross a threshold and are diagnosed as a mental illness, based on established but subjective criteria. Impairment of function is

> another significant factor in deciding whether symptoms should cross this threshold and be considered an illness. By this latter criterion something clearly changed following events of 26 April 2006 which led to Mrs Konczak leaving work and going on sick leave, which, in Dr Craig's view, indicated a loss of function and thus a transition to a diagnosable disorder.
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> 2.4 Dr Jarman notes Mrs Mrs Konczak dates her difficulties at BAE from August 2004 or even earlier, from August 2002. He notes that having had a previous history of dyspeptic symptoms, she developed them again at this time. Dr Jarman observes Mrs Konczak herself admitted that such symptoms were anxiety-related and considers that such was the case during this period at BAe, despite her denial. Dr Jarman notes that Mrs Konczak describes herself as very severely anxious with low mood in January 2005 and as 'far worse' by February. She felt her self-esteem sinking daily and was 'down all the time' in 2005 as well as depressed and 'dreadfully unhappy' by 24.4.06, two days before the first of BAe's acts and/or omissions and the period under consideration. Indeed before that date she describes herself as being at 'rock bottom'. Dr Jarman considers that had she requested it, she would have been given a sickness certificate for 'work-related stress' at any time between January 2005 and 26.4.06 and that she would have been diagnosed with an adjustment disorder before 26th April 2006, had she been subject to expert assessment. Dr Jarman considers Mrs Konczak went off sick as a response to her employers wish to transfer her to the AYI department at Samlesbury and the prospect of a continuing loss of her former autonomy. He does not consider her departure indicated a loss of function nor does he find that it was at this time that she acquired a diagnosable disorder."

14. The Tribunal's judgment – i.e. "Cook 2" – was sent to the parties on 20 June 2011. I need not summarise its findings in any detail since things have moved on. The essential point is that it applied a cut-off to the Claimant's compensation for her psychiatric illness and the consequent pecuniary loss because she, unreasonably as it believed, refused an offer of £75,000 in July 2008. The formal judgment reads (so far as material) as follows:

> "1. So far as the unfair dismissal element is concerned, we have made a calculation of a net amount of £15,411 from the date of dismissal until the offer made in July 2008. To that must be added the Basic Award of £3,255 together with the conventional amount of £250 for loss of statutory rights.
>
> 2. So far as the act of discrimination is concerned, we conclude that it is appropriate to make an award of injury to feelings of £2,500.
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> 3. So far as the dismissal was discriminatory on the grounds of disability and an act of victimisation following her complaint of sex discrimination, we make a further award of injury to feelings in a combined amount of £9,000.

> 4. To this we add a further award for damages for injury to feelings of £2,500 because of the respondent's failure to make reasonable adjustments and a further award of £500 because of their failure to carry out a risk assessment."

EAT: Clark 1

15. The Claimant appealed against the decision in Cook 2. The appeal was heard by a tribunal chaired by HH Judge Peter Clark on 14 March 2012: this appeal was referred to before us as "Clark 1". The EAT found that the ET had been wrong to find that "her pecuniary loss arising from her discriminatory and unfair dismissal" was terminated by her refusal of the Respondent's offer in July 2008 and remitted the calculation of such loss to a differently-constituted tribunal. I need not set out its reasoning.

16. The order made in Clark 1 reads:

> "(1) The liability judgment stands.
>
> (2) Paragraphs 2, 3 and 4 of the Remedy Judgment also stand.
>
> (3) The first sentence of paragraph 1 of that judgment is set aside. The calculation of pecuniary loss, both loss of earnings and pension loss, is at large and will arise for determination by the fresh Tribunal. The second sentence of paragraph 1 of that Judgment is not the subject of appeal and remains.
>
> (4) The Tribunal should take no account of settlement negotiations that have already taken place between the parties in its determination of pecuniary loss. The fact of those negotiations is simply irrelevant to the fresh determination of pecuniary loss.
>
> (5) The Tribunal will need to hear medical as well as lay evidence in order to determine the appropriate period of loss arising from the Respondent's tortious act of dismissal and act of sex discrimination."

17. It is convenient to say at this point that the Claimant has been paid the various elements in the Cook 2 award confirmed at paras. (2) and (3) of the EAT order, which total £18,005.

Sherratt 1

18. The remitted remedy hearing took place before a tribunal chaired by Employment Judge Sherratt in December 2012. By a judgment sent to the parties on 18 February 2013 the Claimant was awarded compensation for pecuniary loss totalling £318,629.66. That represented a grossed-up figure of £236,355.71. The relevant parts of the Tribunal's reasoning can be summarised as follows.

19. At paras. 6-11 of its Reasons the Tribunal identifies the evidence before it. The Claimant again relied on the report of Dr Craig, though he was not called to give

evidence. The Respondent relied on the evidence of Dr Jarman, who was called and was cross-examined. The experts' joint statement was also in evidence.

20. At para. 20 the Tribunal set out Mr Gilroy's analysis of the issues, which in practice formed the structure for its subsequent consideration. He identified five issues, but only two remain live for our purposes.

21. The first issue concerned the relevance of other possible causes contributing to the Claimant's breakdown at the end of April 2006. Mr Gilroy formulated it as follows:

> "To what extent did events within the claimant's workplace (as alleged by the claimant) during the 26 months prior to her conversation with Jeremy Dent on 26 April 2006 cause or contribute to her current condition/mental state ?"

His case essentially reflected Dr Jarman's position as summarised in the joint statement quoted above. On the Claimant's own evidence, over the two years prior to the Dent comment she had become deeply unhappy (and, latterly, unwell) because of her perceived treatment, first at Samlesbury and then at Warton; and he contended that that treatment – none of which had been found in Cook 1 to be unlawful – contributed very substantially to her eventual breakdown following the Dent comment. He relied on what he analysed as some fifteen complaints relating to her treatment during that period which could be identified in her witness statement. In the subsequent history of the proceedings the label "the fifteen events" (or various cognate phrases) is used repeatedly. The "events" in question are of a rather miscellaneous character, some serious and some less so, and there is some overlap, so that it is debatable whether fifteen is the correct number. But none of this matters. It is simply a shorthand for the fact that, on the Claimant's own case, there had been a long history of stress and problems at work, for which the Respondent bore no legal responsibility, before the Dent comment was made.

22. Mr Gilroy submitted that a substantial discount should be made for those factors. He referred the Tribunal to the decision of Keith J in the EAT in *Thaine v London School of Economics* [2010] UKEAT 0144/10, [2010] ICR 1422, and in particular the statement in the (judicially-drafted) summary that:

> "Where an employee's psychiatric ill-health has been caused by a combination of factors, some of which amount to unlawful discrimination for which the employer is liable, but others which were not the legal responsibility of the employer, it is open to an Employment Tribunal to discount the employee's compensation by such percentage as reflects its apportionment of that responsibility."

23. Mr Jones's response was, as summarised by the Tribunal, at para. 25:

> "Firstly, he reserved the right to argue on appeal that *Thaine* was wrongly decided. Secondly, the *Thaine* approach even if correct for sex discrimination cannot be correct for cases of disability discrimination such as this and thirdly that if there was to be such a reduction then it should be minimal."

24. The Tribunal concluded, at para. 27:

> "The Tribunal takes the view that the claimant's condition was 'normal' prior to the end of July 2004. We have not received any evidence of any events outside of the claimant's working life that in our judgment might have led to any change in her psychiatric health from July 2004 until the comment made by Mr Dent on 24 April 2006 and so we find that it was only matters arising in the workplace that caused any deterioration in the claimant's mental health. On the basis that these matters occurred in the workplace, they are the vicarious responsibility of the respondent and so in this particular case we do not find that there were any causes which were not the legal responsibility of the employer that led to any change in the claimant's mental state from July 2004 to April 2006."

25. To anticipate, that reasoning was unsustainable. The finding that the Claimant's condition was not contributed to by events *outside* the workplace did not meet Mr Gilroy's case, which was based on events *in* the workplace.[1] The Tribunal's view that those events could not form the basis of an apportionment because they were the vicarious responsibility of the Respondent would only have been legitimate if its conduct in relation to them had been unlawful; but the Cook tribunal had held that it was not.

26. At para. 77 of the Reasons, in the section where it was applying its conclusions on the issues formulated by Mr Gilroy to the actual assessment of loss, the Tribunal said:

> "In our judgment, set out above when answering question 1, we have concluded that the claimant's life events outside the workplace did not cause or contribute to her current condition and so we reject the respondent's contention that the claimant's unfitness for work has been caused by an underlying medical recurrent condition and/or the claimant's past history of depression."

That conclusion was flawed for the same reasons.

27. I turn to the second issue, which concerns the alleged failure of the Claimant to mitigate her loss by accepting treatment for her condition. Mr Gilroy's formulation was:

> "Leaving aside the issue as to what the claimant's condition is, has she made the deliberate decision not to address that condition by pursuing either (a) therapeutic intervention, or (b) psychotropic medication, until the Tribunal proceedings have been concluded ?"

28. The Tribunal found at para. 55 that the Claimant had tried cognitive behavioural therapy ("CBT") but had made a reasonable decision that it would not work until the proceedings were over. However, it found at para. 54 that she had also made a

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[1] It was common ground that the Claimant had a previous history of depression, but at this stage of the case that was no longer being relied on by the Respondent. Its case was based squarely on Mr Gilroy's "fifteen events".

deliberate decision not to take psychotropic medication until the Tribunal proceedings had concluded. After directing itself as to the correct approach to mitigation, it continued:

> "89. Applying the principles to this case, we find that the claimant has failed in her duty to mitigate her loss on the basis that she has in the past unreasonably refused a number of offers of medical treatment in the form of drugs and our finding of the claimant's past unreasonableness is in our view supported by the fact that the claimant now claims to be taking the drugs that she has previously so steadfastly refused, other than on occasion, and in the absence of any proof of them having any harmful side-effects when taken by the claimant. We find that a reasonable person unaffected by the prospect of compensation would have taken the steps prescribed by their doctors, including the taking of medication, with a view to making as speedy and as effective a recovery as possible.
>
> 90. The Tribunal finds that there has been no reasonable trial of medication and that the claimant has not sufficiently or specifically stated the reasons why, for her, drugs are not appropriate. She has not set out, apart from the question of brain fogging, any side-effects suffered by her or their extent. All the medical experts conclude that at some stage if the claimant wishes to recover then psychotropic medication is to be taken.
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> 91. Having made these findings it falls to the Tribunals to consider a date when, in its view, the claimant's behaviour in failing to take the proffered medication became unreasonable and thus when she failed to mitigate her losses.
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> 92. The Tribunal has looked again at the report produced by Mr Gosall in August 2007, produced very shortly after the date of the claimant's dismissal. It was at that stage that Dr Gosall noted that claimant's distrust of psychotropic medication and he did not think that at that time anti-depressants were a vital part of her treatment package, although they did remain an option in the future if she were to display more obvious signs of depression or intractable anxiety symptoms.
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> 93. We have formed the view that the claimant's condition has deteriorated since 2007 and that the deterioration was such that the claimant should have taken up offers of anti-depressants when her condition continued to deteriorate. It is difficult to find anything upon which to "hang" a conclusion as to the date upon which the claimant should have started to take appropriate medication no later than July 2010 after the decision not to continue with the CBT as it did not appear to be of benefit at that time. Given that the date of termination was 23 July 2007, it is convenient to use 24 July 2010 as the date when the claimant should have commenced a course of medication".

29. At para. 94 the Tribunal found that if treatment had been started on 24 July 2010 there was a 75% chance that it would in due course have produced a partial improvement in her condition such that she could have returned to work and earned at a level 50% below her previous levels. It assessed compensation on that basis.

EAT: Hand

30. Both the Claimant and the Respondent appealed to the EAT. The Claimant was represented by Mr Jones. By a judgment handed down on 13 January 2014 the EAT (HH Judge Hand QC presiding) allowed both appeals in part.

31. We are only concerned with the Respondent's appeal. This was allowed on two grounds.

32. First, the EAT found that the Tribunal's answer to Mr Gilroy's apportionment argument was wrong in law, for the reasons which I have given at para. 25 above. As I understand it, Mr Jones did not in fact seek to defend the Tribunal's reasoning. Rather, his case was that apportionment was not appropriate as a matter of law. I consider that issue in detail later in this judgment. At this stage it is necessary only to say that, broadly speaking, the law is that apportionment of the kind endorsed in *Thaine* is legitimate where the injury is "divisible" but not where it is not: the statement of principle most commonly cited is in the judgment of Laws LJ in *Rahman v Arearose Ltd* [2000] EWCA Civ 190, [2001] QB 351. Mr Jones submitted that the psychiatric injury suffered by the Claimant was indeed indivisible. The EAT discussed that issue, and in particular the effect of the decision in *Thaine*, at some length, but I need not summarise its analysis, save to note that it held that the issue whether an injury is indivisible is one of fact, on which the Tribunal had, because of the wrong turn that it had taken, made no finding. It concluded, at para. 39:

> "We do not think that it is necessary for the purposes of this appeal to say any more about the *Thaine* case than that in the ordinary case, and the instant appeal is such a case, it seems to us that any Employment Tribunal must first reach a conclusion in relation to an injury or a state of health that is said to be causing loss and itself to result from the tortious act of the employer, as to whether that injury or state of health is divisible or indivisible. In this case, it seems to us apparent that the Employment Tribunal did not do that."

33. Secondly, the EAT held that the Tribunal's finding that it was reasonable of the Claimant to decline drug treatment up to 24 July 2010 was unexplained. Its reasoning appears at paras. 42-43, but I need not summarise it here.

34. The case was remitted to the same tribunal to reconsider its decision in those two respects.

35. The EAT's consequent order reads (so far as relevant):

> "THE TRIBUNAL ORDERS that the Appeal be allowed and that the matter be remitted for rehearing to the same Employment Tribunal on the following issues:

(i) Whether, on the evidence already heard by the Employment Tribunal and on the facts found by it and also on the facts found by an Employment Tribunal presided over by Employment Judge Cook ('the Cook Tribunal') at a hearing in 2008 and at a further hearing in 2011 (save insofar as any findings made on that hearing were reversed on appeal to this Tribunal in 2012) the cause of the psychiatric illness suffered by the Claimant from 26 April 2006 was capable of being divided between the sex discrimination found by the Cook Tribunal to have occurred on that day and fifteen other alleged incidents which were said to have occurred over the previous 21 months, none of which had resulted in the Cook Tribunal making a finding of sex discrimination.

(ii) Whether, if the Employment Tribunal concludes in relation to (i) above that the cause of that psychiatric illness is divisible, an apportionment can be made as between the act of sex discrimination found by the Cook Tribunal to have occurred on 26 April 2006 and the aforesaid fifteen other alleged incidents as a cause of the psychiatric illness and is so what apportionment.

(iii) Whether, if there is an apportionment, the subsequent dismissal of the Claimant on 23 July 2007 had any and, if so what, effect on that apportionment.

(iv) By what reasoning and on what evidence already heard by the Employment Tribunal and on what facts already found by it and also on what facts found by the Cook Tribunal as aforesaid, the Employment Tribunal reached the conclusion when it decided up until 24 July 2010 the Claimant's failure to take medication was reasonable but thereafter was unreasonable."

THE DECISIONS UNDER APPEAL

THE ET: SHERRATT 2

36. The remitted hearing took place over two days in October 2014. In accordance with the EAT's order, the only evidence before the Tribunal was that which was before it in Sherratt 1, together with the findings of the Cook tribunal. That meant, so far as the medical evidence was concerned, that the ET had the reports of Dr Craig and Dr Jarman, together with the oral evidence of Dr Jarman which it had heard on the previous occasion. Mr Gilroy asked it to take into account also a note, taken by Ms Choudry of his instructing solicitors ("the Choudry note"), of an answer in the course of Dr Craig's oral evidence to the Cook 1 tribunal, to the effect that "the contribution of other events to that injury was of the order of 20% to 50%".

37. The Tribunal's Judgment and Reasons were sent to the parties on 30 October 2014. I will take in turn its treatment of the divisibility and the mitigation issues.

Divisibility

38. The Tribunal considered issue (i) at paras. 8-24. At paras. 8-12 it set out the history and referred to *Thaine*. At para. 13 it recorded Mr Gilroy's submissions as follows:

> "(1) The claimant's psychiatric injury is patently divisible
>
> (2) That for the 15 events not to be taken into account as being substantially responsible for that injury would offend against all logic, reason and a just resolution of this case
>
> (3) That Dr Craig … did indeed accept that the contribution of the other events to that injury was of the order of 20% to 50%
>
> and that the award of compensation should be substantially adjusted to take account of these factors."

(Point (3) is a reference to the Choudry note.)

39. At paras. 14-16 the Tribunal summarised the evidence of Dr Craig. It regarded his evidence as supporting the Claimant's case that the Dent comment was "the final straw", but it said nothing about any evidence relating to the impact of the fifteen events. Rather, it summarised his evidence about the impact on the Claimant of her treatment after she went off work and her eventual dismissal: it referred to his having said that "the company's acts or omissions contributed to 90% of perpetuation of her mental health symptoms". It observed, at para. 16, that that 90% figure was concerned with "perpetuation" rather than "causation" and that, so far as causation was concerned, Dr Craig "seems to recognise a variety of factors as causing the mental health symptoms without attributing to them any individual impact". The discussion of the figures of 90% and of the distinction between causation and perpetuation is rather opaque, but it is convenient to say at this stage that Mr Gilroy made it clear that he did not quarrel with that part of the evidence, as recorded: his point was that the evidence as summarised said nothing about the impact of the fifteen events.

40. At paras. 17-19 the Tribunal considered and rejected Mr Gilroy's submission that it should take into account the Choudry note, on the basis that there was no finding about it in the Cook 2 decision.

41. At para. 20 the Tribunal referred to the evidence of Dr Jarman, as follows:

> "It was his view that acts or omissions of the company during the period he was asked to consider so that acts or omissions of the company did not causally or materially contribute to any psychiatric injury of the claimant. When he was asked to comment, if he was in a position to do so, on the extent if any that the claimant's condition was aggravated or caused to deteriorate by the previous acts or omissions and to comment if in a position to do so in percentage terms as to the extent to which the act and/or omission has contributed to the deterioration and the period for which it lasted, he stated that this

question was not applicable because of his finding that there had been no contribution but he went on to say:

> 'It should be noted that even if there were such deterioration/aggravation it would not be possible scientifically to give a measurement in percentage terms or state a period reliably when such a deterioration/aggravation was in evidence. Any such attempt would be no more than a guess.'"

42. At paras. 20-21 the Tribunal summarised Mr Jones's submissions, which included a reference to *Rahman*. The summary concluded:

> "In his submission it was plain, applying such principles, that the claimant's injury triggered by the final straw comment made by Mr Dent is indivisible rather than divisible. Various factors contributed but it was the final straw that pushed her over the edge and, on this point only, the claimant relied on the evidence of Dr Jarman as set out above as to it being impossible to say what percentage of her condition was attributable to conduct on the part of the respondent."

43. The Tribunal's conclusions appear at paras. 23-24, as follows:

> "23. On the basis of the evidence heard, the facts found, the views of the psychiatrists and the submissions made to us, we conclude that the psychiatric illness suffered by the claimant from 26 April 2006 is not capable of being divided between the sex discrimination found by the Cook Tribunal to have occurred on that day and the 15 other alleged incidents because the claimant's injury was triggered by the final straw of the Dent comment. In any event it seems to us that the Dent comment and the previous alleged incidents are not the only matters that are relevant to this Tribunal when compensating the claimant for an act of unfair dismissal which was held to amount to disability discrimination. We have to take into account matters that occurred after 26 April 2006 which led to the claimant's discriminatory dismissal, as well as the impact of the dismissal itself upon the claimant.
>
> 24. We believe that we are supported in this finding by the view of Dr Jarman that it would not be possible scientifically to give a measurement in percentage terms and the lack of evidence from Dr Craig as to causation, given his comment as to perpetuation rather than causation."

The final phrase may be a little obscure if read in isolation, but it is clear that what the Tribunal meant was that Dr Craig's 90% figure was not directed at the issue which it had to decide; and, as I have said, Mr Gilroy had no criticism on that point.

44. The point made in the second sentence of para. 23 is worth emphasising. Although the issues as formulated by the Hand EAT focused on apportionment between the injury caused by the "fifteen events" and the injury caused by the Dent comment, the Dent comment was not the only unlawful act done by the Respondent for which the

Claimant was entitled to be compensated. The Cook tribunal had made findings of discriminatory treatment thereafter, up to and including her dismissal, which on the evidence clearly aggravated and prolonged her illness. The issues on this appeal focus specifically on a single discriminatory comment; but it is important to bear in mind when considering the size of the award that that is not the whole picture.

45. It followed from that conclusion that the issues raised by paras. (ii) and (iii) of the EAT's order did not arise.

Mitigation

46. I should set out the Tribunal's reasoning on this aspect in its entirety:

> "26. In his submission leading counsel for the respondent submitted that the selection of 24 July 2010 as the date from which the claimant failed to mitigate her losses was unsupported by the evidence or the Tribunal's findings of fact, unexplained, and cannot stand. It was apparent that he wanted us to reconsider our conclusion and if we reached a different conclusion then we should make an alternative finding. It was the submission of Mr Jones that all we were to do, in accordance with the terms of remission, was to give reasons for our earlier finding and then if we found ourselves unable to give cogent reasons for that earlier finding then we should say so and invite both representatives to return to the Tribunal to make submissions on the question of failure to mitigate.
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> 27. In his written submissions Mr Jones sets out the broad chronology of the claimant's treatment, which we shall not rehearse here, and to him it was clear from the chronology why the Tribunal concluded that it was reasonable for the claimant to refuse to take medication before July 2010. He went on to state:
>
> > 'Those providing her treatment made it clear that, whilst medication was an option, they did not expect her to make progress until the resolution of these proceedings, at which point medication and/or cognitive therapy would be appropriate. As to why the Tribunal concluded that Mrs Konczak's refusal to take medication after July 2010 was unreasonable, Mrs Konczak assumes that the Tribunal must have considered the situation changed significantly in July 2010; that the agreed plan of waiting until the outcome of the Tribunal proceedings was no longer appropriate in light of the delay in those proceedings; and that as she was no longer under the care of the Community Mental Health Team, but instead only her GP, that was the appropriate moment for her to start a course of medication.'
>
> 28. The Tribunal indicated during the course of the oral Hearing that this statement reasonably reflected the Tribunal's reasoning for the conclusion it reached in the Judgment under appeal and we adopt it as our reasoning.

> 29. As to the Tribunal selecting the particular date of 24 July 2010, Mr Jones did not think it unreasonable that the Tribunal should select this date by way of convenience to enable it to carry out its calculations. It was in his submission the finding as to the month rather than the particular date in the month that was significant. Mr Gilroy did not raise any objection on this point concerning the particular date in July 2010. We therefore maintain our conclusion on the fourth remitted issue, adopting the reasoning set out above."

THE EAT: CLARK 2

47. The Respondent appealed to the EAT as regards both the Tribunal's decision about divisibility and its amplified reasoning on the mitigation question. The appeal was heard by HH Judge Peter Clark, sitting alone. By a judgment handed down on 23 October 2015 he dismissed the appeal.

48. As regards divisibility, Judge Clark rejected the Respondent's complaint that the Tribunal should have taken into account the Choudry note. He pointed out that the order of the Hand EAT referred deliberately to "facts found" by the Cook tribunal, in contradistinction to the "evidence already heard" by the Sherratt tribunal itself. He continued, at para. 28:

> "That makes obvious sense. The facts found by the Cook Employment Tribunal are a matter of record and appear in their Reasons. The Sherratt Employment Tribunal was able to revisit evidence which it had heard. What it was not able to do was to revisit evidence heard by the Cook Employment Tribunal and put it into context. That is important because, whilst the precise question and answer recorded by Ms Choudry is not disputed, the point which Mr Jones would want to take is the overall context of the earlier cross-examination leading up to that question and answer. That may have been capable of resolution by the Cook Employment Tribunal but not the Sherratt Employment Tribunal. Thus, although I accept that Ms Choudry accurately recorded the exchange with Dr Craig relied upon and that Mr Gilroy referred to it in subsequent written submissions, I am unable to accept that it was evidence which the Sherratt Employment Tribunal was permitted to consider, under the clear terms of the Hand EAT remission, in relation to issue (i)."

49. Judge Clark then turned to the substantive issue as regards divisibility. He held that the Tribunal had been entitled to reach the conclusion which it did. He referred at para. 29 of his judgment to the statement of Laws LJ in *Rahman* that the essential feature of a single indivisible injury is that there is simply no rational basis for an objective apportionment of causative responsibility for the injury. He continued:

> "30. In finding that to be the case here the Employment Tribunal reviewed the evidence and facts found. They referred to Dr Jarman's opinion (see paragraph 20) that an attempt to apportion responsibility for the Claimant's condition as at 26 April 2006 would be no more than a guess. Further, they drew a distinction (paragraph 18) between Dr Craig's 90% comment as to perpetuation rather than causation of

> her symptoms. Finally, they accepted (paragraph 23) that the Claimant's condition on 26 April 2006 was triggered by the Dent Comment; the final straw, as recorded in Cook 1, paragraph 69.
>
> 31. Standing back, the question for me on appeal is whether, on the material properly before it and applying the law as directed by the Hand EAT, the Respondent has shown that the conclusion by Sherratt 2 that the relevant injury at 26 April 2006 was indivisible is one that is impermissible as matter of law. The answer is that I cannot [*sic*]. Consequently this challenge on the issue of causation fails."

50. As for the mitigation issue, Judge Clark held that the Tribunal's reasoning was adequate. He said, at paras. 33-34:

> "33. … As Mr Jones has explained to me, by reference to the chronology of the Claimant's treatment, which was set out (based on the evidence and facts found at Sherratt 1) in his written submission leading up to the passage cited at Sherratt 2, paragraph 27; in particular, Mr Jones referred to a letter from Dr Gosall, Consultant Psychiatrist, who saw the Claimant in August 2007 and wrote letters dated 9 August 2007 and later 27 May 2009. I was referred to the latter. In summary, in May 2009 Dr Gosall acknowledged the Claimant's 'distrust of psychotropic medication', however, they (antidepressants) remained an option in the future.
>
> 34. Underlying her condition then was the unresolved Tribunal litigation. However, as Mr Jones submitted at Sherratt 2 and the Tribunal accepted, what changed in 2010 was that the litigation remained unresolved and it was no longer appropriate to await the outcome of the proceedings. She was no longer under the care of the Community Mental Health Team (CMHT) but instead only her GP and that was the appropriate time for her to start her course of medication. Her failure then to do so amounted to a failure to mitigate, which is reflected in the assessment of loss (see Sherratt 1, paragraph 93). The date 24 July 2010 was selected for convenience, being three years after dismissal. Thus it was not simply the refusal to take the medication which constituted the failure to mitigate; it was that refusal in the context of the treatment chronology. I note that at paragraph 43 the Hand EAT suspected that the material was there for the Tribunal to reach conclusions (as to the July 2010 date). There was. Mr Jones spelled it out. Sherratt 2 agreed with his analysis. The parties know why the Tribunal reached its conclusion on the July 2010 date. No further steps are necessary."

(Something has gone wrong with the English in the first sentence of para. 33, but the overall sense is clear.)

51. Accordingly the Respondent's appeal was dismissed in its entirety.

THE APPEAL

52. The Respondent pleads three grounds of appeal, on all of which permission to appeal was given (by myself), though not with equal enthusiasm. I take them in turn.

GROUND 1: "THE CRAIG CONCESSION"

53. The background to this appears sufficiently from paras. 36 and 40 above. Mr Gilroy in his skeleton argument submitted that on its true construction the order of the Hand EAT permitted the evidence of Dr Craig recorded in the Choudry note to be relied on. I do not accept that: I cannot improve on the reasoning of Judge Clark set out at para. 48 above. Indeed in his oral submissions Mr Gilroy abandoned this way of putting it but submitted that the note should be admitted nevertheless, in the interests of justice. I find it hard to see how we would ever be justified in going behind, on appeal, the basis on which the EAT, clearly deliberately, directed that the remitted hearing should proceed. But even if some acceptable way of doing so could be devised I can see no basis for taking such an exceptional course.

GROUND 2: THE TRIBUNAL'S CONCLUSION ON DIVISIBILITY

Introduction

54. As pleaded in the Appellant's Notice this ground is headed "Failure to adopt the correct approach to causation". It reads:

> "Notwithstanding the test articulated by Laws LJ in *Rahman*, which was referred to by both the Sherratt Employment Tribunal and the Clark Appeal Tribunal, namely that the essential feature of a single indivisible injury is that there is 'simply no rational basis for an objective apportionment of causative responsibility for the injury', the EAT then failed to apply that test, by ignoring the clear rational basis for an objective apportionment of causative responsibility for the injury, namely 15 matters set out in the Respondent's own witness statement for the purposes of the original Employment Tribunal Hearing. The Sherratt Tribunal in concluding that the relevant injury at 26th April 2006 was indivisible erred in law. In failing to correct this critical issue on the issue of causation, the EAT also erred in law."

The Background Law

55. The best starting-point is *Rahman* itself. The claimant was assaulted by two black youths in the fast-food restaurant in which he worked and suffered a serious facial injury. His employers were held liable in negligence for not putting in place sufficient protection. His injuries were negligently treated in hospital, causing him to become blind in one eye. He also developed a serious psychiatric illness. One of the issues was whether the psychiatric illness, and its consequences, should be regarded as "the same damage" within the meaning of the Civil Liability (Contribution) Act 1978.

56. The discussion of the relevant principles is in the judgment of Laws LJ at paras. 16-22 (pp. 361-4). Because the issue arose in the context of a claim under the 1978 Act the

actual language of the discussion does not explicitly refer to the issues which we have to decide and I do not think that I need to set it out here or even to summarise it in detail. For our purposes it is enough to refer to two essential propositions, as follows:

(1) At common law wrongdoers who together cause "a single indivisible injury" are each liable to compensate the claimant for the whole of the injury suffered – see para. 17 (p. 361E).

(2) An injury is to be regarded as single and indivisible "where there is simply no rational basis for an objective apportionment of causative responsibility for [it]" – see para. 19 (p. 363 A-B).

I should also mention, because it features in the subsequent case-law, a passage quoted by Laws LJ from *Prosser & Keeton on Torts*, as follows:

> "… if two defendants each pollute a stream with oil, in some instances it may be possible to say that each has interfered to a separate extent with the plaintiff's rights in the water, and to make some division of the damages. It is not possible if the oil is ignited, and burns the plaintiff's barn."

57. Applying that approach, the Court held that the evidence showed that neither defendant could fairly be regarded as having caused the totality of the claimant's overall condition. The psychiatric evidence did in fact analyse his overall condition into four separate components – PTSD, "a severe depressive disorder of psychotic intensity" "a specific phobia of black people with paranoid elaboration" and "enduring personality change" (see para. 24) – and to some extent, though not wholly, it was able to attribute the cause of the different components as between the initial assault and the negligence of the hospital (for example, and most obviously, the phobia of black people was caused by the initial assault). Laws LJ held that in those circumstances the injury should be regarded as divisible, even if only on a rough-and-ready basis. The Court approved the judge's apportionment of 75% to the hospital and 25% to the employers.

58. One well-recognised type of case where there is a rational basis for an objective apportionment is where an industrial injury has become worse as a result of exposures at work over a long period, for only part of which the defendant employer is legally responsible. Examples are claims for noise-induced hearing loss (see *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405), asbestosis (see *Holtby v Brigham & Cowan (Hull) Ltd*. [2000] 3 All ER 421) or the vibration white finger (*Allen v British Rail Engineering Ltd* [2001] EWCA Civ 242, [2001] ICR 942). In such cases the Court can make an assessment, however broad-brush, of the degree of disability attributable to exposure during the period for which the particular employer is responsible. But the facts of *Rahman* illustrate that that is not the only kind of case in which a rational basis of apportionment is available.

59. The application of the principle expounded in *Rahman* in the context of psychiatric injury caused by stress at work was discussed in *Sutherland v Hatton* [2002] EWCA Civ 76, [2002] ICR 613. Paras. 36-42 of the judgment of the Court given by Hale LJ (pp. 629-631), under the heading "Apportionment and Quantification", summarise and analyse the cases to which I have referred above (also referring to and

distinguishing the well-known decisions of the House of Lords in *Bonnington Castings v Wardlaw* [1956] AC 613 and *McGhee v National Coal Board* [1973] 1 WLR 1). At para. 41 (p. 630G) the Court says:

> "Hence if it is established that the constellation of symptoms suffered by the claimant stems from a number of different extrinsic causes then in our view a sensible attempt should be made to apportion liability accordingly. There is no reason to distinguish these conditions from the chronological development of industrial diseases or disabilities. The analogy with the polluted stream is closer than the analogy with the single fire."

60. At para. 42 the Court goes on to make a distinct point, as follows. It says (pp. 630-1):

> "Where the tortfeasor's breach of duty has exacerbated a pre-existing disorder or accelerated the effect of pre-existing vulnerability, the award of general damages for pain, suffering and loss of amenity will reflect only the exacerbation or acceleration. Further, the quantification of damages for financial losses must take some account of contingencies. In this context, one of those contingencies may well be the chance that the claimant would have succumbed to a stress-related disorder in any event. As it happens, all of these principles are exemplified by the decision of Otton J at first instance in *Page v Smith* [1993] PIQR Q55 (and not appealed by the claimant: see *Page v Smith (No 2)* [1996] 1 WLR 855). He reduced the multiplier for future loss of earnings … from 10 to 6 to reflect the many factors making it probable that the claimant would not have had a full and unbroken period of employment in any event and the real possibility that his employers would have terminated his employment because of his absences from work."

61. The points made at paras. 41 and 42 of the judgment are recapitulated in the numbered "practical propositions" which the Court propounds by way of summary at para. 43 of its judgment: at the end of the paragraph it describes them as "principles". Proposition 15 (p. 632 E-F) is:

> "Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment … ."

Proposition 16 (p. 632F) is:

> "The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event."

62. The distinction between propositions 15 and 16 needs to be appreciated. Proposition 15 is applicable to cases where the injury in question is regarded as having multiple causes, one or more of which are, or are attributable to, the wrongful acts of the employer but one or more of which are not. Proposition 16 applies where the claimant has a pre-existing vulnerability which is not treated as a cause in itself but

which might have led to a similar injury (for which the employer would not have been responsible) even if the wrong had not been committed. At the level of deep theory the distinction between pre-existing vulnerability and concurrent cause may be debatable, and even if it is legitimate it may be difficult to apply in particular cases. There may also be cases where both propositions are in play. It may in many or most cases not be necessary for a court or tribunal to worry too much about where exactly to draw the line. Both propositions are tools which enable a tribunal to avoid over-compensation in these difficult cases. Nevertheless they are clearly treated as conceptually distinct.

63. The principles enunciated in *Hatton* as regards apportionment and quantification did not fall to be applied in any of the actual cases before the Court, since in all but one of them the claim was held to fail on liability, and in the other there was no challenge to the quantum of the damages awarded at first instance. The guidance is thus formally *obiter*.

64. *Hatton* – or, strictly speaking, one of the other cases heard with it – was appealed to the House of Lords: see *Barber v Somerset County Council*, [2004] UKHL 13, [2004] 1 WLR 1089. However no issue arose as to the principles discussed above. Lord Walker said, at para. 63 described this part of the judgment of the Court of Appeal generally as "a valuable contribution to the development of the law", but he said in terms that the House had heard no argument on the section dealing with apportionment and quantification of damage and that it was better to express no view on those topics (p. 1109B).

65. The analysis in *Hatton* was the subject of critical comment in this Court in *Dickins v O_2 plc* [2008] EWCA Civ 1144, [2009] IRLR 58. The claimant had recovered damages for a psychiatric illness developed as a result of being subjected to excessive stress at work. No issue about apportionment arose in the appeal but the question was nevertheless raised by the Court. At paras. 45-47 of her judgment (p. 64) Smith LJ said:

> "45. In *Hatton,* Hale LJ said that, where multiple causes were at work in a case of psychiatric injury, a sensible attempt at apportionment should be made. She recognised that most cases of apportionment involved divisible injuries but observed that there were other cases where that was not so. She mentioned *Rahman v Arearose* [2001] QB 351, 62 BMLR 84, [2000] 3 WLR 1184 where two tortfeasors had injured the Claimant and had contributed to the development of an indivisible psychiatric injury. The Court of Appeal approved a broad brush apportionment between tortfeasors so as to avoid injustice as between them. Whether such a case can be used to justify a general rule that apportionment should be carried out in cases of indivisible psychiatric injury where excessive stress has been a contributory cause, I am not at all certain. It should be noted however that Hale LJ's remarks were *obiter*; apportionment did not arise in any of the four appeals under consideration. Moreover, the House of Lords in *Barber* expressly declined to endorse that aspect of Hale LJ's guidance, saying that they had heard no argument on the topic (*per* Lord Walker of Gestingthorpe at para 63).

> 46. I respectfully wish (*obiter*) to express my doubts as to the correctness of Hale LJ's approach to apportionment. My provisional view (given without the benefit of argument) is that, in a case which has had to be decided on the basis that the tort has made a material contribution but it is not scientifically possible to say how much that contribution is (apart from the assessment that it was more than *de minimis*) and where the injury to which that has led is indivisible, it will be inappropriate simply to apportion the damages across the board. It may well be appropriate to bear in mind that the Claimant was psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort. There may then be a reduction in some heads of damage for future risks of non-tortious loss. But my provisional view is that there should not be any rule that the judge should apportion the damages across the board merely because one non-tortious cause has been in play.
>
> 47. Thus I have grave doubts as to the appropriateness of the exercise that was carried out in the instant case, although ultimately the result of a different approach might not have been very different. I can see, for example, that it might well have been appropriate for the judge to discount the future losses to some extent on the basis that the Respondent might well have suffered a breakdown at some time in the future; alternatively that the flooding of her home in 2006 had prolonged her psychiatric illness so that the Appellant was liable only for a reduced period of suffering and absence from work."

In short, Smith LJ was questioning whether proposition 15 could ever apply in practice, because psychiatric injury is always indivisible: she suggests that justice can be sufficiently achieved by the application of proposition 16. Sedley LJ made similar observations. At para. 53 (p. 65) he said:

> "Like [Smith LJ], I am troubled by the shared assumption about the appropriateness of apportionment on which the case has proceeded. While the law does not expect tortfeasors to pay for damage that they have not caused, it regards them as having caused damage to which they have materially contributed. Such damage may be limited in its arithmetical purchase where one can quantify the possibility that it would have occurred sooner or later in any event; but that is quite different from apportioning the damage itself between tortious and non-tortious causes. The latter may become admissible where the aetiology of the injury makes it truly divisible, but that is not this case."

66. Smith LJ returned to the subject extra-judicially shortly afterwards when giving the Munkman lecture in Leeds in 2008, a version of which was published as an article in the Journal of Personal Injury Law 2009 titled "Causation – the Search for Principle". At p. 103 she said:

> "I do not think that one can apportion damages for psychiatric injury. It seems to me that it is *par excellence* an indivisible injury. As a rule, the claimant will have cracked up quite suddenly; tipped over from

> being under stress into being ill. The claimant will almost always have a vulnerable personality. But a defendant must take the claimant as he finds him, eggshell skull or vulnerable personality included. So having a vulnerable personality should not result in any reduction in damages.
>
> Besides underlying vulnerability, there may be other potentially harmful factors at play in the claimant's life which may have contributed to the breakdown, and have been nothing to do with the negligence. If the judge comes to the conclusion that the other factors would probably have caused the breakdown in any event, regardless of the negligent factor, the claimant will fail. But if the judge concludes that both the negligent and non-negligent factors have contributed and the negligence has had a more than minimal effect, he ought in my view to award full verdict damages. The defendant should not be entitled to a reduction in damages for the chance that the other factor might have caused a breakdown."

After referring to the decision of the House of Lords in *Hotson v East Berkshire Health Authority* [1987] AC 750, she said:

> "Let me return to cases of stress-related psychiatric injury. In general, the doctors are not able to quantify the contributions which different factors have made. Psychiatry does not lend itself to the kind of statistical analysis which orthopaedic surgeons and oncologists can provide. So the judge is likely to be left with evidence that the claimant had a vulnerable personality and that there was more than one factor in play when he had the breakdown. If that is the state of the evidence, it seems to me that the claimant should succeed in full provided that the negligent factor was of more than minimal effect. It also seems to me illogical if, in one breath the judge says that he can say only that the negligence has made a material contribution to the injury, in the next breath he embarks on an apportionment which has to reflect the contributions which the judge has just admitted he cannot assess."

She went on to refer to her observations in *Dickins*.

67. I think that in her criticisms of *Hatton* Smith LJ may over-state the difference between her position and what the Court was saying in that case. As regards cases where all that is being said is that the claimant had a pre-existing vulnerability to psychiatric injury, I understand the guidance in *Hatton* to be that any reduction, or discount, should indeed be made by the application of proposition 16, as Smith LJ herself suggests, rather than by apportionment in accordance with proposition 15. And even in cases where there are "multiple extrinsic causes", the Court in *Hatton* says only that a "sensible attempt" should be made to apportion the harm between what is and is not attributable to the defendant's wrong. It recognises that there may still be cases where the harm is "truly indivisible" and that in such cases apportionment would be wrong. There is thus no difference as to the applicable principle, which indeed is authoritatively stated in *Rahman*. The difference is that Smith LJ believes that in the case of psychiatric injury the harm will always be indivisible, whereas the encouragement in *Hatton* to find a basis for apportionment where possible means that

the Court believed that the harm would be divisible at least sometimes. (That is to put it at its lowest: in fact I think it can be inferred that the Court in *Hatton* believed that apportionment would be possible in the generality of such cases, but that is not explicitly stated, and it cannot be tested since it did not have to consider any individual cases.)

68. Problems of apportionment of this kind are not uncommon in discrimination cases. They first arose in the EAT (in a constitution chaired by myself) in *HM Prison Service v Salmon* [2001] UKEAT 21/00, [2001] IRLR 425, which was essentially similar to the present case in that the claimant had suffered a psychiatric illness as a result of a number of causes, some of which constituted unlawful discrimination for which her employer was held to be liable but some of which did not. The tribunal had undertaken an apportionment exercise. I expressed some concerns not dissimilar from those subsequently expressed by Smith and Sedley LJJ in *Dickins* – see para. 20 (p. 429); but the point did not arise for decision, and in any event the case-law has since moved on.

69. In *Thaine*, to which I have already referred, the EAT (Keith J presiding) had to consider a similar situation to that in *Salmon*. The claimant had suffered psychiatric ill-health partly as a result of unlawful harassment but partly also as a result of what the tribunal described as "concurrent causes", though arguably there was an element also of what might have been better characterised as pre-existing vulnerability. The tribunal discounted its award of compensation by 60% on that account. The EAT reviewed the authorities to which I have referred in the previous paragraphs (and some others). In substance, it preferred the view of this Court in *Hatton* to those expressed in *Dickins*, and it upheld the decision of the employment tribunal. At para. 23 (p. 1432 C-G) it said:

> "At the end of the day, we think that the weight of authority supports the approach taken by the Tribunal in this case. Indeed, it accords with our sense of what fairness dictates. As Mustill J (as he then was) said in *Thompson*, one of the original cases on the topic which was expressly approved and followed in both *Holtby* and *Allen*, at pp 443D-444A:
>
> > 'If we know – and we do know, for by the end of the case it was no longer seriously in dispute that a substantial part of the impairment took place before the defendants were in breach, why, in fairness, should they have been made to pay for it? The fact that precise quantification is impossible should not alter the position. The whole exercise of assessing damages is shot through with imprecision … I see no reason why the present impossibility of making a precise apportionment of impairment and disability in terms of time, should in justice lead to the result that the defendants are adjudged liable to pay in full, when it is known that only part of the damage was their fault. What justice does demand, to my mind, is that the court should make the best estimate which it can, in the light of the evidence, making the fullest allowances in favour of the plaintiffs for the uncertainties known to be involved in any apportionment.'

> We similarly ask: why should the LSE have to compensate Miss Thaine for her psychiatric ill-health and its consequences in its entirety when the unlawful discrimination for which it was responsible, though materially contributing to her psychiatric ill-health, was just one of the many causes of it?"

70. I too believe that, to the extent that there is a difference between the views expressed by Smith and Sedley LJJ in *Dickins* (and by Smith LJ in her article) and the propositions enunciated in *Hatton*, we should follow the latter; and I would therefore endorse what Keith J said in *Thaine*. Strictly, as Smith LJ pointed out, *Hatton* is not binding so far as concerns these issues. Nevertheless, it represents the considered, and fully reasoned, opinion of the Court in what was intended to be a decision giving guidance for the future in cases of psychiatric injury caused by the wrongdoing of an employer. Although the Court was concerned with common law causes of action rather than the statutory tort of discrimination, that difference has no bearing on the question of principle. I would therefore accept the propositions relevant to this appeal unless I were satisfied that they were wrong. That is not the case. On the contrary, they seem to me consistent with principle and to follow the approach of the Court in *Rahman*, which is binding on us. Mr Jones did not in the end seek to argue otherwise.

71. What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.[2]

72. That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is "indivisible": if it was suffered as a result of two torts, each tortfeasor is liable for the whole, and any question of the relative degree of "causative potency" (or culpability) is relevant only to contribution under the 1978 Act. It is less easy in the case of psychiatric harm. The message of *Hatton* is that such harm may well be divisible. In *Rahman* the exercise was made easier by the fact (see para. 57 above) that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation. The most difficult type of case is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where "the claimant will have cracked up quite

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[2] It follows that issue (i) as remitted by the Hand EAT was, as counsel accepted before us, not accurately expressed, since it asks whether "*the cause of* [the Claimant's illness] was capable of being divided between the sex discrimination found by the Cook Tribunal to have occurred on that day and [the fifteen events]". Fortunately, the error is not important to the disposal of the appeal.

suddenly, tipped over from being under stress into being ill". On my understanding of *Rahman* and *Hatton*, even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury – though, importantly, if (as Smith LJ says will be typically the case) the claimant has a vulnerable personality, a discount may be required in accordance with proposition 16.

Mr Gilroy's Submissions

73. Although Mr Gilroy's pleaded ground of appeal is that, in considering whether there was a rational basis for apportioning the Claimant's illness, the ET "ignored" the fifteen events, that is plainly not the case. The Tribunal's conclusion, at para. 24, was explicitly that it was not possible to divide the illness between the consequences of the fifteen events and the consequences of the Dent comment. In the course of oral submissions, Mr Gilroy sought to put the case in a number of different ways, not all foreshadowed in his skeleton argument; but he eventually summarised them under five heads, which I take in turn.

(1) Perversity

74. Mr Gilroy's first submission was simply that this was "patently" a case of a divisible injury – in other words, that the Tribunal's decision was perverse. That argument cannot succeed without some particularisation of the conceptual basis on which the injury should have been apportioned, and of the evidence supporting such apportionment. Mr Gilroy at first said that the fifteen events were obviously major contributory causes to the development of the Claimant's illness and that an apportionment should have been carried out on the basis of their "impact" or "causative potency". But that is not the nature of the exercise: see para. 71 above. He also emphasised that the authorities showed that the exercise could be carried out "broadly", but although that is true it does not help unless it is possible to identify the basis of the apportionment.

75. However, Mr Gilroy did also rely on the evidence of Dr Jarman, supported by her witness statement, that the Claimant was already ill long before the Dent comment. If the Tribunal was obliged to accept that that was the case, that would indeed form a straightforward basis for apportionment: the injury could and should be treated as divisible between that pre-existing condition and the degree to which it was aggravated by subsequent events. Mr Jones had two (related) answers to this way of putting the case.

76. First, he said that, however the Claimant might have described her condition subsequently (when she was in a bad way and not a wholly reliable historian), the evidence was that she had not consulted her doctor about her mental health at any point in the two years prior to 26 April 2006. It was clear that, as she had said at the time, the Dent comment was the last straw. It was this that pushed her over the edge into a diagnosable mental illness. That was, as appears from the joint statement, the approach of Dr Craig. The Tribunal had accepted that view of the evidence, and it was entitled to do so.

77. Secondly, he said that the case had never previously been advanced by Mr Gilroy on the basis that the Claimant had a diagnosable mental illness prior to 26 April 2006, and that the basis for apportionment should be the degree to which the Dent comment had aggravated that illness. Rather, he had pinned his colours throughout to the broad proposition that the fifteen events had plainly contributed to the development of the illness. This way of putting the case could only prosper if the Tribunal had made an express factual finding accepting Dr Jarman's evidence. There was no such finding, because none was necessary given the way the case had been put.

78. I would accept the first of those two points. Dr Craig's opinion plainly constituted evidence on the basis of which the Tribunal could conclude that it was only after the Dent comment that the Claimant developed a diagnosable illness. We were told by Mr Jones that in Sherratt 1 there had been a good deal of cross-examination on this issue. The Tribunal's finding may possibly have been generous – we are not in a position to say – but it was not perverse. On that analysis this is a case of the kind focused on by Smith LJ in the passage quoted from her article – that is, where until the moment of the wrongful act the employee is vulnerable but not ill. Even in such a case, as I have said, apportionment may be possible, but it is necessary to identify a rational basis for it, and none was identified here.

79. Since I accept the first of Mr Jones's points I need not reach a view on the second. It is fair to say that Mr Gilroy has indeed throughout focused very heavily on "the fifteen events", and until the oral argument before us there appears to have been no explicit reliance on the argument that the Claimant already had a diagnosable illness before 26 April 2006. But it might be said that these were really only two approaches to the same question; and I would have been very reluctant to exclude the Respondent from relying on this way of putting the case if the evidential basis for it were undisputed.

80. In this connection I should mention a point raised by Mr Gilroy in the course of his oral submissions. He referred us to para. 44 of the Reasons in Cook 2, in which the Tribunal said:

> "Having carefully considered all of the medical reports and the evidence in cross examination, the tribunal find that the claimant had a history of depression and stress at work that existed prior to working for BAE and also a medical record of not being able to face work, and that on at least two occasions she went to her GP and obtained a certificate of sickness enabling her to take time off because of difficulties at work."

No reliance appears to have been placed on this passage in Sherratt 2, nor in the grounds of appeal. In any event, however, it is on its face concerned with the Claimant's mental health before she started to work for BAE. In the earlier stages of the case the Respondent had indeed placed some reliance on evidence of mental ill-health in that period. However, the Tribunal in Sherratt 1 had made an express finding that she was well in 2004, and the remittal by the Hand EAT was explicitly on the basis only of the effect of what happened to her after that date – the "fifteen events".

(2) "Affront to justice"

81. Mr Gilroy's second submission was that it would be an affront to justice that the impact of the fifteen events, for which the Respondent bore no legal responsibility, should be ignored. As to that, it is necessary to establish first that the events in question did indeed in some sense contribute to the development of the Claimant's illness. But even assuming that that is so, the injustice is not quite as obvious as Mr Gilroy suggests. The basic rule is that a wrongdoer must take his victim as he finds him, eggshell personality and all. That is not inherently unjust. Its effects are of course mitigated by propositions 15 and 16 in *Hatton*. But proposition 15 requires a finding that the injury in question is indeed divisible; and the Tribunal was unable to make such a finding here. As for proposition 16, the question whether a discount should be made for the risk that the Claimant would have suffered a breakdown in the future was not before the Tribunal. I also draw attention to what I have said at para. 44 above.

82. I need to say something more about the availability in this case of "*Hatton* proposition 16", which has troubled me. The order permitting the appeal to proceed at the sift stage in the EAT was made by Simler J. She observed:

> "Nobody appears to have addressed the question whether the claimant would have suffered psychiatric injury in any event had the 'Dent comment' not occurred, in circumstances where she complained of a course of conduct of sexual harassment and discrimination over a two-year period (leading to psychiatric injury) but all of which (bar the Dent allegation) were rejected by the Cook Tribunal. Arguably this should have been addressed."

As I read it, that is a proposition 16 argument – that is, an argument that even if it was the making of the Dent comment alone which caused the Claimant's breakdown, she was evidently highly vulnerable (at least partly because of the "fifteen events") and her damages should have taken into account the possibility that a similar breakdown would have been triggered by something else. As Simler J's observation makes clear, the point had not been put that way in the grounds of appeal; indeed she was concerned that "nobody [had] addressed the question". In his skeleton argument for the EAT Mr Gilroy quoted her observation, though without elaboration or any application to amend; but it does not seem to have featured in his case as advanced before Judge Clark. Nor did it feature in the grounds of appeal to this Court, or Mr Gilroy's skeleton argument. However, in the course of his oral submissions about the basis for an apportionment, Mr Gilroy did refer to the risk that the Claimant might have become ill in any event, although the point does not appear in his five-fold summary of his submissions; and we heard submissions about it from Mr Jones. He said that it was in substance a new point, which should not be allowed to be taken. Slender though the Respondent's reliance on it has been, I have been concerned whether, even if we reject the appeal as considered thus far, we ought not to consider whether to remit the case to the Tribunal for a consideration of this point.

83. Other things being equal, I might have been sympathetic to that course. This is the kind of case where a substantial discount on this basis might have been justifiable. As I have already observed, the dividing line between cases covered by proposition 15 and by proposition 16 may in practice be indistinct. But it is necessary to have regard

to the procedural history. The Hand EAT defined the remitted issues with care. So far as the present issue is concerned, the formulation of "issue (i)" focused specifically on the question whether the Claimant's illness was divisible. That cannot, however charitably, be treated as wide enough to cover the conceptually separate question of whether a specific discount should be made to reflect the Claimant's pre-existing vulnerability.[3] We were reminded by Mr Jones of the decision of this Court in *Aparau v Iceland Frozen Foods plc* [2000] ICR 341, which emphasises that where an issue has been remitted to an employment tribunal its jurisdiction is limited to deciding the remitted issue. But in any event I would not have thought it right, given the long history of this case, to allow a new way of putting the case to be advanced for the first time in this Court.

(3) "Difficulties not insuperable"

84. Mr Gilroy's point was that although there might be difficulties about apportionment in this case they were not insuperable. This submission does not substantially add to those which I have already considered.

(4) The Tribunal's Reasons

85. Mr Gilroy submitted that, independently of the first three submissions, the Tribunal's reasoning in support of its conclusion on indivisibility was inadequate. The particular point that he made was that its summary of Dr Craig's evidence was focused entirely on the impact of events after 26 April 2006 and contained no basis for a finding about the impact of the fifteen events.

86. I do not accept that submission. The Tribunal's reasoning on the divisibility issue is indeed rather compressed and particular passages are not entirely clear in their expression. But it is necessary to read the conclusion in paras. 23-24 in the light of the previous summaries both of the evidence and of the submissions. Essentially, the Tribunal was accepting Mr Jones's submission that it was, on the evidence, the Dent comment that "pushed [the Claimant] over the edge": that is, she had been not been suffering from an illness up to that point. As discussed above, that finding entitled it to reject a basis for apportionment based on aggravation of a pre-existing injury; and, as it said at para. 24, the evidence of neither Dr Craig nor Dr Jarman provided any other basis for "dividing" the injury. Although the Tribunal's summary of Dr Craig's evidence does indeed say nothing about the Claimant's complaints about her treatment prior to 26 April 2006, I do not regard that as fatal. His position in the joint statement was that, although she had problems prior to that date, they did not prior to that date constitute an illness. It was clear that that was the basis of the case being advanced by Mr Jones, which the Tribunal accepted.

(5) The EAT

87. Mr Gilroy's final submission was that the EAT failed to correct the errors of the Employment Tribunal. But since in my view there were no such errors this point adds nothing.

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[3] I appreciate that Simler J seems to have thought that the point could, or at least arguably could, be taken notwithstanding that it had not been advanced so far. But that can have been no more than a preliminary view, since the Claimant had not been heard about it.

GROUND (3): MITIGATION

88. Paras. 33-34 of Judge Clark's judgment explain the sequence of events: the reasoning on this point in Sherratt 1 was unclear; at the remitted hearing in Sherratt 2 Mr Jones offered the Tribunal in his written submissions his understanding of what its thinking had in fact been; and the Tribunal accepted that that understanding was correct. The passage in Mr Jones's submissions which it approved appears at para. 46 above (reproducing para. 27 of the Tribunal's Reasons). However that passage cannot be fully understood without reference to the "treatment chronology" there referred to. Mr Jones took us to that. What appears there is that up to June 2010 the Claimant had been under the care of the CMHT, which had been confidently expecting the litigation to end soon, at which point she was to be referred for CBT. But in early July it was appreciated that the end of the litigation was not imminent after all, and the CMHT saw no value in pursuing the CBT option. A letter dated 12 July recorded that the CMHT would no longer be involved and that the Claimant was reverting to the care of her GP. It was that change which the Tribunal decided to adopt as the decisive change in the circumstances rendering it unreasonable for the Claimant to refuse treatment with anti-depressants.

89. Mr Gilroy submitted that Mr Jones's suggestion had been "pure speculation". That is an unduly pejorative term. Being familiar with the facts and having argued the point in Sherratt 1, Mr Jones was very well placed to assess what the Tribunal was likely to have meant, even if it had failed to spell it out. But in the end that does not matter. What matters is that the Tribunal confirmed his understanding.

90. Mr Gilroy's more substantial submission was that the reasoning as now supplied still did not meet the requirement of the Hand EAT that the Tribunal provide a "cogent analysis" of what had changed as at July 2010 so as to make the Claimant's refusal to take anti-depressants unreasonable when the Tribunal had previously found it to be reasonable. I do not agree. When reference is made to the treatment chronology as fully set out by Mr Jones the Tribunal's reasoning is perfectly clear; and it is in my view equally clear that it is sustainable.

CONCLUSION

91. I would dismiss the appeal.

Lord Justice Irwin:

92. I agree. I wish to add a few words of my own, given the importance of the analysis contained in the judgment of Underhill LJ. I agree with him that if and insofar as there is a difference between the propositions set out in *Hatton,* and the views expressed by Smith and Sedley LJJ in *Dickins*, then we should follow the approach laid down in *Hatton*, and by Keith J in *Thaine*. As a matter of principle, and supporting the fundamental approach that compensation should never become windfall, where an injury is divisible, even if on a rough and ready approach to the division, recompense must be limited to the consequences of identified injury attributable to the tort in question. I further support the proposition that it will often be appropriate to look closely, particularly in a case where psychiatric injury proves indivisible, to establish whether the pre-existing state may not nevertheless

demonstrate a high degree of vulnerability to, and the probability of, future injury: if not today, then tomorrow.

93. In my view, the problem exposed here, properly analysed, is not so much a problem of law as a problem of medicine or science. The territory between the non-pathological but sensitised and vulnerable individual and the person with a defined pathology constitutes highly debatable land. It should be closely and carefully mapped by the relevant experts, and it is imperative that they should bring to bear as much clinical and diagnostic precision as possible, paying close attention to one or both of the internationally recognised psychiatric diagnostic systems. In particular, it is necessary to consider whether a less serious but nevertheless established and defined disorder may not have been achieved before progression to the diagnostic end-state. In addition, it should be routine for the experts to assess the level of risk of crossing the borderland between non-pathology and pathology through some other stimulus than the tortious act or omission. It will be recognised that exercise is often difficult and uncertain, but it will often be possible to give such advice within reasonable parameters of time and to the level of probability. Such an exercise is necessary in order to address proposition 16 in *Hatton*.

94. In this case, I agree that the findings of fact below must now remain undisturbed. The consequence is that the award must be regarded as the consequence of an 'indivisible' injury, and the award should stand.

Lady Justice Gloster:

95. I also agree.