1. Compensation that is awarded by tribunals and the measure of damages for a personal injury claim in the civil courts follow the same basic principles. Yet some employment lawyers have little experience of running a personal injury trial or assessment of damages in the courts. There are lessons to be learned from the overlap.

2. In discrimination cases a tribunal must make an order for compensation (unless it is not just and equitable to do so). Once it decides to make such an order, it must adopt the usual measure of damages and it cannot alter the amount of the compensation on a broad just and equitable basis (*Hurley v Mustoe (No 2)* [1983] ICR 422).

3. Section 124 of the Equality Act 2010 provides:

   (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1) (the jurisdiction to determine a complaint relating to a contravention of Part V-work).

   (2) The Tribunal may —
   a. make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
   b. order the respondent to pay compensation to the complainant;
   c. make an appropriate recommendation.

   (5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

   (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court under Section 119.

4. Section 119 provides:

   (2) The county court has power to grant any remedy which could be granted by the High Court—
   a. in proceedings in tort;
   b. on a claim for judicial review.

   (4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

5. It is interesting to note in passing that the Tribunal has no power to order compensation unless it first considers whether to make an appropriate recommendation under
subsection (2)(a) or a declaration as to the rights of the complainant and the respondent under subsection (2)(c). This step is probably overlooked in many cases where claimants are keen to look solely at compensation.

6. A worker subjected to a detriment for whistleblowing can claim a declaration and unlimited compensation (ERA 1996 ss 48(1A), 49(6), s 103A, s 124(1)). Injury to feelings awards are available and should be based on the Vento guidelines (Virgo Fidelis Senior School v Boyle [2004] ICR 210, Commissioner of Police for the Metropolis v Shaw [2012] IRLR 291). Aggravated and exemplary damages are potentially available also. Indeed a claimant's reputation as a whistleblower has a major effect of his or her future employment prospects. Injury to feelings are not available in relation to less favourable treatment of part-time workers and fixed-term employees.

7. A tribunal may reduce the amount of any award by so much as appears just and equitable in the event that it finds that the claimant has caused or contributed to the act or omission of the employer (ERA 1996 s 49(5)). Whistleblowing detriment cases may be subject to a potential reduction of up to 25% under ERA 1996 s 49(6A) if a tribunal finds that a protected disclosure was not made in good faith and they consider it just and equitable in all the circumstances to make such a reduction.

8. The compensation, as with personal injury damages, should place the claimant into the financial position he or she would have been, but for the unlawful conduct of the employer (MOD v Cannock [1994] ICR 918, [1994] IRLR 509). This means that concepts which are familiar to personal injury lawyers such as exacerbation and acceleration of injuries are ones that could be invaluable to an employment lawyer in a high value discrimination claim. Very substantial psychiatric or psychological injury claims may raise the same issues in some personal injury claims involving so called ‘eggshell skull’ claimants.

9. A tribunal must assess the chance that the loss would have happened in any event and discount if the employer might have caused the same damage lawfully. In the old case of Livingstone v Rawyards Coal Co (1880) 5 App Cas 25. It was held that damages are to put the injured party in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation. Thus the familiar Polkey approach may be taken: what would have happened if there had not been discrimination? (Abbey National plc v Chagger [2009] ICR 624, [2009] IRLR 86.) In complex long-term future loss claims this may involve calculations by reference to the latest Ogden Tables, which suggest starting point multiplicands and multipliers for lengthy periods of pecuniary loss (Abbey National plc v Chagger).

10. The tribunal should follow the method for assessing loss of future earning capacity honed in the civil courts. As McGregor on Damages explains: This amount is calculated by taking the figure for the claimant's present annual earnings, less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based on the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments.
over the years. This latter figure has long been called the multiplier, the former figure has come to be referred to as the multiplicand. Further adjustments, however, may or may not have to be made to the multiplicand or multiplier on account of a variety of factors, namely the probability of future increase or decrease in annual earnings, the so-called contingencies of life and the incidence of inflation and taxation.

11. The Ogden Tables give the courts and tribunals a reliable starting point for such assessments. The annual loss of earnings can be multiplied by the multiplier shown in the tables and then discounted for other risks, possibilities and uncertainties that the claimant’s employment would have continued in an unbroken fashion. A court or tribunal must assess as best it can on the evidence the appropriate discount factor for the chances of the uncertain or even speculative occurring. Although a party can prove (on the balance of probabilities) that a past event happened, it is impossible to prove that a future event will happen - all that you can do is to evaluate the chance and the loss of that chance (MoD v Cannock [1994] IRLR 509).

12. One approach may be a percentage assessment for ‘loss of a chance’ as in Allied Maples Group Limited v Simmons & Simmons [1995] 1 WLR 1602 where the happening of a specific event is in issue. However, the traditional method is to adjust the multiplier or multiplicand with the career model appropriate to the particular claimant so as to reflect (a) the likelihood of an increase in earnings at some point in the claimant’s career and (b) those contingencies/vicissitudes in respect of which a discount appears to be appropriate (Herring v MoD [2003] EWCA Civ 528).

13. In a dismissal case the essential approach is to ask what would have occurred had there been no unlawful discrimination (Abbey National plc v Chagger). If there were a chance dismissal would have occurred in any event, even if there had been no discrimination, then that must be factored into the calculation of loss. However the fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing. His prospects of obtaining a new job are probably less than if he had stayed as it is generally easy to obtain employment from a current job than from the status of being unemployed. The employee may have been stigmatised by taking proceedings and that may have some effect on his chances of obtaining future employment. A discriminatory dismissal may not only shorten what would have otherwise been a period of employment; it also alters the subsequent career path that might otherwise have been taken and the employer will be liable for so-called stigma loss. The mere fact that third party employers contribute to, or are the immediate cause of, the loss resulting from their refusal of employment does not, of itself, break the chain of causation. Stigma loss is rarely a separate head of loss but one of the features relevant to the question of how long it will be before a job can be found.

14. It is generally only in rare cases that it is appropriate for a court to assess an individual’s loss over a career lifetime, because in most cases assessing the loss up to the point where the employee would be likely to obtain an equivalent job fairly assesses the loss (Wardle v Credit Agricole [2011] IRLR 694). A Tribunal should only assess loss on the basis that it will continue for the course of the claimant’s working life where it is entitled to
take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job.

15. Two other matters arising from personal injury cases may be of particular interest to employment lawyers. First is whether discrimination awards should be uplifted by 10% in line with personal injury awards under Simmons v Castle and second whether an injury to feelings award or settlement is taxable as income or exempt as an injury award.

**Injury to feelings**

16. As under the Protection from Harassment Act 1997 where (modest) damages for anxiety may be awarded (S and D Property Investments v Nisbet [2009] EWHC 1726 (Ch)), the tribunal has a clear jurisdiction to award damages for injured feelings even where the claimant has suffered no actual physical or mental injury or loss.

17. The Vento v Chief Constable of West Yorkshire Police (No 2) [2003] ICR 318 brackets of £500–£5,000 (lower), £5,000–£15,000 (middle) and £15,000–£25,000 (serious) are now just a starting point. They need to be uplifted by tribunal on account of inflation and any other factors which might affect the value of the awards. Although the EAT did in one case give a broad uplift for inflation on 2010 (Da’Bell v NSPCC [2010] IRLR 19 (lower to £6,000; middle to £18,000; upper to £30,000), the better view is that each tribunal ought to assess non-pecuniary loss in ‘today’s money’ on each occasion. Tribunals are not required explicitly to perform an uprating exercise by referring to previous decided cases or to Vento as it is accepted that assessment of compensation is necessarily subjective and imprecise – not an exact science. As Underhill P said in Bullimore v Pothecary Witham Weld [2011] IRLR 18, “Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. ‘Uprating’ such as occurred in Da’Bell is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision referring to such a case which has not itself expressly included an uprating was wrong”.

18. HM Prison Service v Johnson [1997] ICR 275, [1997] IRLR 162 is an old case but gives a good summary of the approach to injury to feelings:
   a. “Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation… should not be allowed to inflate the award.
   b. Awards should not be too low, as this would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could… be seen as the way to untaxed riches.
   c. Awards should bear some broad similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.
d. In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

e. Finally, tribunals should bear in mind… the need for public respect for the level of awards made."

19. The quantum of injured feelings do not depend on the seriousness of the discrimination, but on the severity of the effect on the claimant. In theory an act of terrible prejudice could have modest effects, whereas a passing comment could have catastrophic results to an ‘egg shell skull’ claimant. Although it was held that it is wrong to discount an award for injury to feelings simply on the basis that the claimant would have been dismissed fairly within a short time (O’Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615) this should be possible in principle where the employer could show that the claimant’s feelings would have been injured regardless of the unlawful act.

20. Awards must not be so low as to be minimal: Alexander v Home Office [1988] ICR 685, [1988] IRLR 190. An award of under £750 was likely to be too low even in 2002 (Doshoki v Draeger Ltd [2002] IRLR 340) so even the most modest injured feelings should result in an award of over £1,100 now. In Kemehe v Ministry of Defence [2014] IRLR 377 an award for injury to feelings of £12,000 in respect of a one-off racial slur was reduced £5,000 as it had no “lasting employment consequences” and so was in the lower Vento band. The Court of Appeal restated the policy for assessing awards:

"Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or mind which may persist for months, in many cases for life."

21. The difficulty with assessing awards for injury to feelings is the tendency to call evidence about the severity of the discrimination or how heinous the unlawful act was. Awards are purely compensatory and are not a means of punishing or deterring employers (Ministry of Defence v Cannock [1994] ICR 918, [1994] IRLR 509. It is too easy to focus on the act when looking at awards, whereas personal injury cases show how the act itself is irrelevant to compensation – it is only necessary to look at the effect of the act on the claimant.

22. Although injury to feelings and psychiatric injury are distinct, there will nearly always be overlap (HM Prison Service v Salmon [2001] IRLR 425, EAT). The risk of double recovery must be addressed in every case where both are claimed. Sometimes the effect on the claimant will better be described in medical terms as a personal injury, whereas there may be some very minor cases where a doctor might say that there is no medical injury at all and only non-medical upset and distress. It may be difficult to say
when the distress and humiliation becomes a recognised psychiatric illness such as depression, but doctors appear to be much more open now to giving such effects a medical label. For taxation and uplift reasons referred to below, it is now prudent for any serious prolonged feelings of humiliation or anxiety to be put before the Tribunal as a psychiatric illness, supported by a formal diagnosis and/or expert evidence and not just as injury to feelings supported by a victim impact witness statement.

Awards for personal injury

23. Sometimes the stress and anxiety as a result of discrimination may result in psychiatric injury and in extreme cases may also manifest itself in a physical injury caused by the unlawful act. It has long been confirmed that tribunals have jurisdiction to make awards in such cases (Sheriff v Klyne Tugs [1999] ICR 1170 – where the claim was that racial discrimination had caused a nervous breakdown). Where there is only one act or event, a claimant can choose to claim in the civil courts for breach of the employer’s common law duty of care and/or contractual duty or claim in the tribunal under the Equality Act, but it cannot do both. Only where there are two distinct unlawful acts, each giving rise to a separate cause of action can a claimant sue in both forums at once (and then subject Henderson v Henderson estoppel).

24. Where there is a duty of care between claimant and defendant that extends to prevent harm that is reasonably foreseeable. However harm does not need to be foreseeable in cases of intentional tort such as trespass. This leads to the question of whether in the statutory context of discrimination there is any requirement that the loss be reasonably foreseeable. Some controversy continues to simmer about the decision that where some harm is foreseeable, all harm that arises naturally and directly from the act of discrimination will be compensated (Essa v Laing [2004] ICR 747, [2004] IRLR 313 and see also Abbey National plc v Chagger [2009] ICR 624, [2009] IRLR 86).

25. Some suggest that there is a theoretical distinction in the causation test between negligence and discrimination. In the civil courts a claimant must show that the injury was the reasonable foreseeable consequence of the negligence; whereas in the employment tribunal it is often suggested there is no ‘reasonably foreseeable’ test in the statutory wording, so a claimant need only show a direct causal link between the act of discrimination and the loss. However this distinction is doubtful both in theory and in practice.

26. It is correct that the majority in the Court of Appeal in Essa v Laing focussed on the fact that it was a case involving direct and intentional racial harassment and so reasonable foreseeability was not the appropriate test as in intentional torts such as trespass or deceit. This leads some commentators to suggest that the authority is only applicable to intentional unlawful acts.

27. However the case also discussed negligence and personal injury authorities and came to the same conclusion based on that route too. In psychiatric injury cases in the civil courts, the House of Lords held in Page v Smith [1996] AC 155 that all personal injuries
are ‘the same type of loss’ so if a physical injury is reasonably foreseeable, the claimant must be compensated also for unforeseeable psychiatric injury that was suffered at the same time. The claimant in that case was in a collision which left him physically unhurt, but suffering from psychiatric damage. A defendant must take his victim as he finds him – perhaps with an eggshell personality, perhaps with an eggshell skull. Thus in Corr v IBC Vehicles [2008] 1 AC 884 where an horrific injury at work eventually drove a claimant to an unforeseeable suicide, all the injuries, including the suicide, were a result of the accident and could be compensated.

28. In Essa v Laing [2004] ICR 746 the majority held that the whole injury should be compensated where injury to feelings arising from racial abuse was reasonably foreseeable, but psychiatric illness was not. As the two injuries were of the same type and not of a different kind, there was no requirement that psychiatric injury was itself foreseeable. The minority argued that they were a different kind: injury to feelings being a common-day experience and something distinct from illness.

29. The majority view prevailed and so even in unintentional discrimination cases, there is a clear rationale for all the injury to be compensated as long as some injury to feelings is reasonably foreseeable. The test of causation is whether the discrimination has made a material contribution to the claimant’s injury (Dickins v O2 [2009] IRLR 58, citing Sutherland v Hatton [2002] IRLR 263).

30. In practice there may be little difference between the two tests of causation as the foreseeability threshold is very low. The test of foreseeability for some injured feelings and a mild psychological injury is unlikely to be different. It should be straightforward to show through medical evidence (even from a general practitioner perhaps) that a person who suffers from injured feelings has actually also sustained a mild anxiety disorder from discrimination. If a mild psychiatric injury is foreseeable then (as in Page v Smith) even an extreme psychiatric injury may be compensated. As an employer must take a claimant as he finds him, that person may have an eggshell personality and have an extraordinary and unforeseeably severe reaction to the discrimination.

31. The more fruitful area for dispute is not the initial causation argument about whether any injury was caused by the discrimination, but the subsequent argument as to the assessment of damages for such an injury. At that second stage the question is whether the employer caused all of the loss or whether it was just an exacerbation or acceleration of a pre-existing injury or condition. The argument is that some injury would have occurred in any event because the eggshell personality claimant could have had a similar reaction to a family argument or a stressful incident in the street.

Acceleration or exacerbation of psychiatric injury

32. There is an important distinction between proof of damage and assessment of damages in both courts and tribunals. In proving damage, a claimant must prove on the balance of probabilities that the defendant's act or omission caused the harm in respect of which he claimed. However with the assessment of damages, a court or tribunal can enquire into
what would have happened, either in the past or in the future, if the employer had not caused harm to the claimant. It might require the court to assess the chances that one or more particular events would or would not have occurred and calls for a different approach (Gregg v Scott [2005] 2 A.C. 176).

33. In personal injury claims it is common to adopt an exacerbation or acceleration approach to the assessment of damages. There will often be expert evidence about whether there was a pre-existing injury or the chances of the claimant suffering a similar injury in the future. This does not require an excessively analytical approach but medical experts can be asked to forecast the chances that a similar injury would have occurred at different times in the future.

34. Exacerbation is a process which divides that part of the injury which the employer did not cause and which was pre-existing from that part of the injury which was caused by the discrimination – the amount by which the condition deteriorated or was worsened by the unlawful conduct.

35. Acceleration of damage is a similar process from that adopted by the courts in a professional negligence case in assessing the loss of a chance of a successful outcome to a matter: Allied Maples Group Limited v Simmons & Simmons [1995] 1 WLR 1602.

36. A tribunal may adopt the exacerbation or acceleration approach – that a serious personal injury was caused by the discrimination, but that it was likely that an eggshell skull claimant was vulnerable to such an injury from the stresses and strains of normal life and thus the award is not for the whole of the injury but just for the period of acceleration which made it manifest itself earlier. For the approach of the courts in personal injury cases see Kenth v Heimdale Hotel Investments Ltd [2001] EWCA Civ 1283.

Other discounting factors – accelerated receipt and benefits

37. It is also important to remember that an award for future loss must be adjusted for accelerated receipt (Bentwood Bros (Manchester) Ltd v Shepherd [2003] ICR 1000, [2003] IRLR 364). The approach to discounting must be just, but is not rigidly circumscribed. The approach taken in personal injury claims in which a discount rate of 2.5% has been applied may be followed. However discount for accelerated receipt does not apply to past loss of earnings (Melia v Magna Kansei Ltd [2006] IRLR 117). There should also be a full deduction of benefits which fall outside the recoupment provisions: Puglia v C James & Sons, [1996] ICR 301, [1996] IRLR 70. This was a departure from Hilton v Faraji [1994] IRLR 267 which had followed the personal injury authorities (e.g. Parry v Cleaver [1970] AC 1) and held that no deduction should be made. An attempt at a halfway house using the ‘just and equitable’ statutory wording (and analogous personal injury cases) in Rubenstein v McGloughlin [1996] IRLR 557 has not found favour in the EAT. Morgans v Alpha Plus Security [2005] ICR 125 followed Puglia so that the full amount of invalidity benefit is deducted from net wages for the purpose of calculating loss of earnings for a compensatory award.
Loss of Congenial Employment

38. A part of ‘general damages’ which is often claimed in personal injury cases, but infrequently in the tribunal is for loss of congenial employment. This is on the basis that the effect of the discrimination has been to damage or destroy a career from which an employee derived particular satisfaction and pleasure. Section 124 EqA 2010 provides that an award is assessed as it would be in the county court under s.119, which includes High Court tortious remedies (s.119(2)). This is a recognised head of loss is tort law.

39. In an appropriate case where an employee has lost his or her vocation or much-loved career due to discrimination, it may be possible to show a tribunal that an additional amount of general damages is payable. However it might form part of the overall injury to the claimant’s feelings and there must not be double recovery – so an injured feelings award and loss of congenial employment must be considered in the round.

40. How much is such a claim worth? In Davison v Leitch [2013] EWHC 3092 Andrews J awarded £6,500 to a claimant who was unable to return to her career as an equity trader stating:

“The only remaining matter for me to consider on damages is the claim for loss of congenial employment. I have been taken to two authorities, Evans v Virgin Atlantic Airways [2011] EWHC 1805 and Dudney v Guaranteed Asphalt Ltd [2013] EWHC 2515 which demonstrate that the range of awards is normally in the order of £5,000 - £7,000 (as is borne out by the schedule in Kemp & Kemp) and illustrate the types of factors that can influence whereabouts in the range a particular claim will fall. This is a case in which Mrs Davison’s injury has put paid to her ability to return to any form of work in the financial sector and severely limited the nature of any future employment. Many of her undoubted talents are going to go to waste. Her future is uncertain and any work that she does undertake in future is likely to be fairly solitary and considerably less well paid. In my judgment, a figure towards the upper end of the range is justified. I shall award £6,500 under this heading.”

Simmons v Castle: Should Tribunal awards be uplifted by 10%?

41. From April 2013, personal injury awards were increased by 10% when the Court of Appeal gave guidance in Simmons v Castle [2013] 1 WLR 1239. This decision uplifted general damages to be paid to compensate a victim of a tort. The Court of Appeal held that the primary purpose of the 10% increase was to compensate successful claimants, as a class, for being deprived of the right to recover success fees from defendants in cases funded by a conditional fee agreement. The Jackson report noted that the level of general damages was generally on the low side.

42. Whether this should also apply to awards for non-pecuniary losses before the employment tribunal is a matter awaiting a judgment of the Court of Appeal (listed for December 2016). The Presidential Guidance issued on 13 March 2014 suggested that the 10% uplift should be added by tribunals to awards for injury to feelings. This was
approved without particular analysis in Ozog v Cadogan Hotel Partners Ltd [2014] Eq LR 691 and applied by Simler J in King v Sash Window Workshop Ltd [2015] IRLR 348, EAT on the basis that compensation for a statutory tort should correspond to the amount which could be awarded by a county court (section 124(6) Equality Act 2010).

43. However, HHJ Serota QC in De Souza v Vinci Construction UK Ltd [2015] IRLR 536, EAT held that this was wrong and the 10 per cent uplift to general damages ought not to apply to awards for injury to feelings. As the uplift in was for the loss of success fees and ATE insurance premiums, that rationale had no application in the tribunal where such matters were not a factor. That reasoning was approved by Slade J in Chawla v Hewlett Packard Ltd [2015] IRLR 356, EAT and rejected by Langstaff P in Beckford v LB Southwark [2016] IRLR 178, EAT. Langstaff P held that there need for awards to be broadly comparable meant that tribunal awards must be broadly comparable to personal injury awards uplifted by 10%. He pointed out that the 10% applied to all cases after 1 April 2013, not just those that would have been funded under a CFA (although nearly all would have been).

44. As Essa v Laing is authority for the proposition that injury to feelings and personal injury are two injuries of the same type and not of a different kind, there seems to be good reason to assess them in the same way.

45. Although the Judicial College Guidelines presently give the awards both with and without the 10% uplift, this distinction will disappear in future years. A tribunal award can be broadly comparable with personal injury awards today by reference to the non-uplifted bracket. However it is unrealistic to maintain this distinction for years to come. The books will stop showing both figures fairly soon. The statutory imperative and good sense of keeping tribunal awards in line with personal injury awards means that the 10% increase is likely to be incorporated over time, even if not straight away.

Tax on Injury to Feelings awards

46. A settlement or award payable in connection with termination of employment by death, or on account of injury to, or disability, of the employee is exempted from tax under ITEPA 2003 s 406. In Moorthy v Revenue and Customs Commissioners [2016] UKUT 13 (TCC), [2016] All ER (D) 08 (Feb). It was held that a payment by the employer to settle unfair dismissal and age discrimination claims (including an injury to feelings claim) following his redundancy dismissal was taxable under Income Tax (Earnings and Pensions) Act 2003. The Upper Tribunal decided that a payment made in connection with termination of employment as compensation for injury to feelings is taxable under the termination provisions of ITEPA 2003.

47. The Employment Appeal Tribunal had held that such compensation for injury to feelings was tax-exempt as injury to feelings amounted to an injury (Orthet Ltd v Vince-Cain [2005] ICR 374). Although this was followed with approval by Singh J in Timothy James Consulting v Wilton [2015] IRLR 368 the Upper Tribunal took the view that upsetting
someone’s feelings is not the same as an actual injury. Therefore it held that the exemption under ITEPA 2003, s 406 did not apply.

48. The distinction between an injury to feelings and a generalised anxiety disorder, which is recognised as a personal injury (ICD-10: “a period of at least six months with prominent tension, worry and feelings of apprehension, about everyday events and problems”) is now a subtle one. Whilst Hicks v Chief Constable of the South Yorkshire Police [1992] 1 All ER 690 pointed out that suffering a normal human emotion does not give rise to damages, the Court of Appeal in Essa v Laing held that “if psychiatric injury and physical injury are treated as the same type of damage, I do not see why injury to feelings and psychiatric injury should not also be so treated”. If injury to feelings is the same type of damages as a personal injury, then it begs the question why the taxation of them should be different. The answer may be that the definition of injury in the taxation legislation (originating in the Finance Act 1960) pre-dates the concept of injury to feelings and therefore cannot have included a statutory award of compensation for injury to feelings because no such award was available in law.

Interest and Tax

49. Interest on awards of debt, damages or compensation is taxable under Income Tax (Trading and Other Income) Act 2005 s 369. Such interest is not subject to PAYE, but the recipient has to declare it to the Revenue, as with any other untaxed interest, in respect of the relevant tax year.

50. There is an exemption in ITTOIA 2005, s 751 from the charge to tax for interest on damages (and like payments) in respect of personal injury, including damages for death, disease and impairment of physical or mental condition.

51. The exemption from tax does not extend to the Employment Tribunal's power to award interest on compensation under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (1996/2803) save to the extent that it relates to interest on compensation for a deterioration in the claimant's physical or mental condition which amounts to personal injury. Nor is there any exemption from tax for the interest, under the Employment Tribunals (Interest) Order 1990 (SI 1990/479), which runs on sums payable by virtue of a tribunal decision, at the rate specified in the Judgments Act 1838, s 17.

Whistleblowing – note on interim remedies

52. Under s.128 ERA an employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and that the sole or principal reason for the dismissal is because he made a protected disclosure (s.103A ERA) may apply to the tribunal for interim relief. The question to be determined in this summary procedure, is whether the employee is 'likely' to succeed at a full tribunal in his claim that the employer dismissed for making protected disclosures related to a health and safety incident.
53. ‘Likely’ in this context means more than a reasonable chance of success; a higher degree of certainty than 51% is required. Underhill J confirmed in *Ministry of Justice v Sarfraz* [2011] IRLR 562 that the test is still the high threshold set many years ago in *Taplin v Shippam Ltd* [1978] ICR 1068, EAT that a claimant needs a “pretty good chance of success”.

54. Such an application can have the effect of focussing an employer’s mind very quickly on the dispute as under s.128 ERA the tribunal *shall* determine the application for interim relief as soon as practicable after receiving the application. The employer must be given at least seven days’ notice of hearing and the power to postpone is limited to where there are ‘special circumstances’. So an application for interim relief can cause an employer to have to marshal its evidence about the reason for dismissal within a few days. That could force an early settlement in a difficult or complex case, but does have the potential to backfire if an employment judge rules at the outset of the case that it is not ‘likely’ to succeed.

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