Case Number: 2201583/2018 & 2206097/2018 **(V)**

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs B Mirikwe	**v**	**HM Passport Office**

Heard at: London Central (by CVP)

On: 23 and 24 November 2020

Before: Employment Judge A James
Mr G Bishop
Mr D Clay

Representation

For the Claimant: Mr T Walker, counsel

For the Respondent: Mr M Green, counsel

This has been a remote which has been requested by the parties. The form of remote hearing was video link, namely CVP.

JUDGMENT ON REMEDY

(1) The claimant is entitled to a basic award of £10,764;

(2) Mitigation of earnings – had the claimant made reasonable efforts to mitigate her losses, the claimant would have been earning up to 50% of her salary between 6 and 12 months after her dismissal, 75% of her salary between 12 and 18 months, and 100% thereafter.

(3) Mitigation of pension losses – had the clamant made reasonable efforts to mitigate her losses, it would have taken the claimant three years to find a job in the public sector with equivalent pension benefits. In percentage terms, we find that she would have been 'earning' pension benefits of 1/3 after 12 months, 2/3 after 2 years, and 100% after three years.

(4) Polkey - based on the past history, we conclude that there was a 50% chance of the clamant being fairly dismissed after 6 months, a 90% chance within 12 months and 100% within three years.

(5) Loss of earnings period - the clamant is entitled, bearing in mind (2) and (4) above), to loss of earnings of 100 per cent for the first 6 months, 50 percent for the next 6 months and 10% for the final 6 months (which takes us to 18 months when we say the claimant should have found similarly paid work).

(6) Period for loss of pension - bearing in mind (3) and (4) above (the mitigation and *Polkey* conclusions), the claimant is entitled to 75% of £24,366 x 2.32% x 23.79 in the first year (i.e. 6 months at 100% and the next 6 months at 50%). Then for the next two years, 10% x 2.32% x 23.79 x 2 years x the actual wage the claimant would have been earning had she remained a civil servant (which figures the respondent should be able to provide).

(7) Death in service benefit - the claimant is not entitled to any compensation to date as she has not paid for an equivalent policy. From the date of the judgment, the calculation, based on the Liverpool Victoria (LV=) figure is £14.34 pcm. We conclude this should be calculated for the same period as the loss of wages. Given that the claimant should have mitigated that by eighteen months and she was dismissed on 19 June 2018, she is not due anything for this element of her losses.

(8) The appropriate level of compensation payable for loss of statutory employment rights is £350 in this case.

(9) Civil Service Compensation Scheme payment - the CSCS payment should not be deducted from the compensatory award payable.

(10) Injury to feelings – the appropriate level of the injury to feelings award is £9,750 in this case.

(11) The parties have agreed to cooperate in finalising and agreeing a final total figure. If they require the tribunal to make an order for the agreed amount, or to make a determination of it in the absence of agreement, they should apply in writing to the tribunal.

WRITTEN REASONS

The Issues

1. The issues to be determined on remedy are as follows:

1.1 Is the claimant entitled to a basic award and if so, how much?

1.2 In relation to the compensatory award:

1.2.1 has the claimant made adequate efforts to mitigate her losses, both in relation to wages and pension?

1.2.2 what would have happened if the claimant had not been dismissed – the *Polkey* argument?

1.2.3 what should the future loss of earnings period be?

1.2.4 what should the period of pension loss be?

1.2.5 what is the clamant entitled to for loss of death in service benefit and over what period?

1.2.6 what should be awarded for loss of statutory employment rights?

1.2.7 how should the Civil Service Compensation Scheme payment be treated; in particular, should it be deducted from any compensatory award made?

1.2.8 what is the appropriate injury to feelings award in the circumstances of this case?

2. Counsel for both parties agreed that the tribunal should make findings of principle in relation to the above issues, and the parties would then attempt to agree a figure. If the parties require any further orders or judgments from the tribunal, they will apply in writing.

The hearing

3 The hearing on remedy took place over two days. Evidence and submissions on remedy were dealt with on the first day. The tribunal heard evidence from the claimant alone. Deliberations took place on the second day. Judgment was reserved. It was agreed that we would deal with the broad issues of principle, and that the parties would then be given an opportunity to agree the actual figures, either by agreement, or by making written submissions.

4 There was an agreed remedy bundle consisting of about 150 pages. We were also referred to a limited number of documents in the original ET bundle. A limited number of pages were added just before the hearing although that did not cause any particular difficulties for either party.

5 The hearing took place by CVP, with the panel in a tribunal room at London Central and the parties and representatives joining by CVP.

Factual findings

Judgment on liability

6 We have considered our judgment on liability and have taken the following paragraphs into account when arriving at our decision on remedy.

7 In the Judgment section it is recorded:

The claims succeed for unfair dismissal (s 98(4) Employment Rights Act 1996); the claims under s 15 Equality Act 2010 in relation to (a) the imposition of the First Written Attendance Warning on 19 October 2017 and (b) the claimant's dismissal; the reasonable adjustment claims (s 20 Equality Act

2010) in relation to (a) the alteration of trigger points for attendance management purposes; (b) moving the Claimant to a quiet work area with reduced sensory stimulus, including the Claimant's previous work bay/avoidance of bright lights; and (c) the provision of an adapted keyboard and screen protector.

8 [39] - *According to paragraph 49 [of the AMP], there are six exceptions where sickness absence will automatically not count towards consideration trigger points. These include, where an employee has a disability and reasonable adjustments which will enable the employee to return to work have not yet been considered or made; or where there is a qualifying injury at work. Paragraph 49 also states that 'discretion may be awarded in other cases, subject to evidence-based decisions by line-managers' … The claimant was not waiting for reasonable adjustments to be carried out which would enable her to return to work, at the time that the warning was issued. As noted below, her absence was not a qualifying injury for reasons which are set out in the September 2017 OH report.*

9 [125] - *Her fit-note expired on 3 July 2018. The claimant informed us that that was not renewed, but we note from pages 704/5 of the bundle, that the GP notes record that a further fit note was issued for the period 4 July to 31 August 2018. The claimant had of course been dismissed by then.*

10 [181] – *Ms Sauer specifically confirmed that the perceived issues between the claimant and the management team were a significant factor in her decision to dismiss. As is clear from the above however, those 'perceptions' were based in reality. There was an exceptional number of matters affecting the claimant's perception of her work situation and giving rise to an understandable sense of grievance. <u>Ultimately, unless she was able to put those behind her on return to work, her continuing employment was under threat.</u>* (our emphasis)

11 [182] - *The claimant could have returned on a stage two final written warning, which would have meant it was relatively easy to bring matters to a head, were she to be absent for short periods on a regular but sporadic basis following her return, and/or if she were she to take another lengthy period of sickness absence thereafter.*

12 [187] - *Finally, we consider Ms Sauer's conclusion that the claimant would not be able to maintain effective service. There was clearly a question mark about that.*

13 <u>[202] – trigger points</u> - *As for the appeal hearing, we note that this was dealt with by Mrs MacLeod as a complete rehearing. Mrs MacLeod informed us and we have accepted that she considered the sickness absence record of the claimant, in deciding to confirm the warning. By this stage the claimant had had 14 days absence, in less than 12 months, even if the 6.5 weeks following the accident had been disregarded (which Mrs MacLeod did not). The claimant told us in evidence that she considered that increasing the trigger point to 9 days would have been reasonable. Mrs MacLeod's evidence was that trigger points are not increased to more than 12 days (i.e. double). <u>Even if the trigger points had been increased therefore, and the 6.5 weeks absence following the accident was disregarded, whether completely or in part, a warning could still reasonably have been given.</u>* (Our emphasis)

14 [211] - *We therefore conclude that there was a failure to make a reasonable adjustment at this time. The fact that it would probably not have made any difference ultimately to the dismissal outcome or the FWAW does not affect our conclusion as to whether or not the adjustment should have been made.* (Our emphasis)

15 [221] - *Whilst these matters were potentially minor, compared to the move of her workstation etc (i.e. issues 15b and c), they were still adjustments which should have been carried out. The continuing failure to agree these adjustments from 12 February 2018 onwards amounted to failures to make reasonable adjustments.* (Our emphasis)

Findings of fact from the remedy hearing

The claimant's sickness absence record

16 The claimant had been absent on grounds of sickness for substantial periods, prior to her dismissal. The Claimant was absent on sickness grounds for 37 days in 2016; and for 25 days in 2017, up to the time of her seven-month absence which commenced in November 2017. In the last six and a half months before her long-term absence for low mood, she was absent on six separate occasions with migraine. During the last three months before her long-term absence she was absent for nine days, due to migraines.

Mitigation

17 The claimant informed us that she was fit to work, from the date that her fit note ran out on 3 July 2018 onwards. However, as noted above, the documentary evidence available in the claimant's GP notes contradict that. The claimant's evidence on this when questioned was unsatisfactory. However, as noted above, the claimant was dismissed on 19 June 2018, and the panel accepts that would have adversely affected her health. The claimant was however able to look for work from 31 August 2018.

18 The claimant stated at the remedy hearing that she made 15 to 20 applications per month from July/August 2018 onwards. We do not accept that the claimant ever made that number of applications per month, at any stage. The claimant's evidence in that regard is simply not credible, for reasons that follow. We find that the claimant made only a limited number of applications between September 2018 and January 2020.

19 The claimant told us that she gave the information about her applications to her solicitor from the time she was dismissed onwards. Were that the case, we believe that evidence would have been placed before us. There was no such evidence. The applications that are evidenced, between May 2019 to December 2019, are 10 applications in total. All of these were for care work. None were for administrative positions. The claimant told us that her computer was hacked and she has therefore lost her record of applications made prior to May 2019. Her statement that the records were lost as a result of that hacking is inconsistent with what the clamant told us about her providing information to her solicitor from around the time of her dismissal. The claimant also stated in evidence that she was applying for administrative roles too. Again, the documentary evidence simply does not corroborate that, for the above 7- to 8-month period. We find, on the balance of probabilities, that

between September 2018 and January 2020, the claimant was making on average about one application per month, occasionally two per month, mainly in care work, and only for a small proportion of administrative jobs, if any.

20 The claimant last worked in the care sector about twenty years ago. The applications we were referred to were for managerial roles, on a similar salary to the claimant's salary with the respondent.

21 Around the time of the liability hearing in January 2020, the claimant started to make much more of an effort to find work. She registered with a number of agencies and started to make more applications, for administrative jobs as well as care work, in the private sector as well as the public sector, including local government, universities and the NHS.

22 The respondent provided evidence which showed that on one day alone on 20 March 2020, there were over 100 admin jobs available in the area the claimant was looking for jobs within. Assuming on the balance of probabilities that only half were suitable, that is still 50 jobs the claimant was potentially qualified to apply for, on just one day.

HMPO roles

23 The claimant did not apply for civil service jobs throughout this period. The claimant had indicated that she would be seeking reinstatement to her role, just prior to the liability hearing starting in January 2020. The respondent put before us evidence regarding two jobs, in HMPO, which were available in or around September 2018 and May 2019. Claimant told us she did not want to go back to work for HMPO; but as stated above, that was not her stated position until just before the remedy hearing. The clamant also told us that she could not return to work for civil service for 12 months. We were not shown any document confirming that was the case. We find that it was more likely that the 12-month rule referred to by the claimant was such that if she returned within 12 months, she would have to pay back the CSCS payment. If so, that period would have expired on 19 June 2019.

24 The claimant also told us that she felt she could not return to HMPO because of the shame and humiliation she felt, following her dismissal. As noted above however, the claimant was requesting reinstatement, until just before the time of the liability hearing. Her previous managers would not have managed her, had she returned to work. Ms Barkley was on long-term sick, Mr Dalon had moved to the eighth floor, and Ms LaSalle had moved to another employer.

Other civil service roles

25 As to why the claimant did not apply for other civil service jobs, the claimant's evidence was that she would have had to give both her staff name and staff number and the same for her line manager, had she applied for a civil service role. The claimant believed that she had to give the name and staff number of Karen Barkley and not the name of her manager at the time of her dismissal, Mr Miah, because he did not know the claimant as he had never really managed her due to her absence. We shall return to that in our conclusions.

University study?

26 The claimant was taken to an email dated 14 July 2020 about a Mental Health Supported Living Manager Position. This states:

To: Emma Leck <emma.leck@servicecare.org.uk>

Hi,

I can give my University reference. As you can see I studying in University at the moment. All I can tell you is, I can do that job I applied for closing my eyes. However, it is up to you. (sic)

…

27 The claimant told us that she was not studying at University, that this was a typographical error, and what she meant to say was that she could give a reference from when she did study at University in about 2000. We were wholly unconvinced by the claimant's explanation in this regard, which was not credible, given the use of the words 'at the moment'. It maybe that the claimant had said she was studying at university in order to explain why she was out of the job market; on the other hand, it maybe she has been studying at university. Ultimately however, our conclusions on the issues before us are not dependent on our findings on this question so we say no more about it.

Interview with London and Quadrant

28 The claimant has had one job interview, since her dismissal, for London and Quadrant, who provide accommodation for vulnerable adults. The clamant left after only three days' work as she considered that her health and safety was compromised. She had to work alone with male service users; she was the only female employee going into their homes. We accept her evidence in this regard and it does not therefore break the chain of causation.

29 In the applications that the claimant has made for employment, in the section "why did you leave your previous job", the claimant has stated that she was sacked.

30 From January 2020 onwards, there is evidence of 33 jobs that the claimant applied for. The claimant relies on job alerts from the agency 'Indeed'.

31 Throughout the period since dismissal, the claimant told us, she was not looking for zero hours contract work or part-time work. We accept that.

Injury to feelings

32 As for injury to feelings, the claimant says at paragraphs 18-20 of her statement to this hearing:

18 I have been affected psychologically by the discrimination I have suffered. For example, I have withdrawn from visiting friends, families, church, and going to parties with friends. I hardly sleep, and when I do, I wake up in cold sweat, as I am ashamed in case people find out that I was sacked from my job of over 17 years.

19 Sometimes when friends and neighbours call and ask me why am I not at work, I have no choice but to tell them that I am working from home. The discrimination and dismissal makes me feel less of a person.

20 I am in constant pain in my heart. I have this sense of failure in my heart that won't leave me. I feel very confused and hurt, have lost my confidence and trust in others and I am easily irritated. I take my pain out on my family, especially my children.

The Law

Mitigation

33 A claimant is expected to try to 'mitigate her losses' following a dismissal. This means she must make reasonable attempts to find alternative work within a reasonable period. It is for the respondent to prove that a claimant has failed to mitigate her losses.

Polkey

34 A tribunal must consider whether any adjustment should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; and paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825. That often involves speculation on our part; the authorities indicate that we must do speculate – it is part of our role when deciding on remedy.

Pension loss

35 We were referred to the Seven Steps Model, set out in the Employment Tribunal's *Principles for Calculating Pension Loss' (4th Edition 2017*) – see paragraph 5.53 (p.65). We have adopted that approach in calculating the pension loss. It is open to us to find that the period of pension loss is longer than the period for loss for wages. A tribunal is entitled to reduce the pension losses so calculated, on the basis of contingencies, such as the likelihood of the claimant remaining in employment had she not been dismissed, and if so for how long.

Death in Service Benefit

36 The benefit payable on death for serving civil servants is twice pensionable pay, which was £24,336 as at 31 March 2017. The appropriate measure of this loss is the cost to the claimant of providing that benefit in the future – see the Headnote of *Knapton v ECC Card Clothing Ltd [2006] ICR 1084*.

Loss of statutory employment rights

37 This is usually awarded at a rate of between £350 and £500, depending on a claimant's wage at the date of dismissal.

Deduction of payments made by employers on termination

38 We were referred to a number of authorities on this issue. In *Bradburn v. Great Western Railway Co. (1874) LR. 10 Ex. 1*, it was held in an action for injuries caused by the defendant's negligence that the sum received by the plaintiff on an accident insurance policy could not be taken into account in reduction of damages. Bramwell B. said, at p. 2:

"The jury have found that the plaintiff has sustained damages through the defendants' negligence to the amount of £217, but it is said that because the plaintiff has received £31 from the office in which he insured himself against accidents, therefore the damages do not amount to £217. One is dismayed at this proposition."

Pigott B. said, at p. 3:

"The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it." (ET's emphasis)

The reason for the decision in *Bradburn v. Great Western Railway Co* was said by Asquith LJ in *Shearman v. Folland [1950] 2 KB. 43*, at 46 to be:

"If the wrongdoer were entitled to set off what the plaintiff was entitled to recoup or had recouped under his policy, he would in effect be depriving the plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself."

In *Payne v. Railway Executive [1952] 1 KB 26*, a sailor injured in a railway accident as a result of negligence on the part of the defendant received a disability pension from the Royal Navy. The Court of Appeal declined to allow the defendant to set off the amount of the pension against the damages payable by the defendant. Cohen LJ at pp. 35-36, cited with approval the statement by the trial judge, Sellers J:

"The plaintiff has become entitled to the pension by reason of his naval service, it being one of the benefits such service affords. The pension would have been paid if the accident had been without any negligence on the part of the railway's servants. It was argued for the plaintiff that a pension must be disregarded in making the assessment just as insurance is to be disregarded, and that as a matter of principle a Wrongdoer should not get the benefit of the fortuitous circumstance that the plaintiff was serving in the Royal Navy at the time and had consequently received a pension. I agree with that contention. Just as the wrongdoer cannot appropriate to himself the benefit of the premiums paid by the injured party to cover accident risks so he cannot, I think, appropriate the benefits accruing from the injured party's service which similarly entitles him to those benefits." (ET's emphasis)

39 In *Smoker v London Fire and Civil Defence Authority; Wood v British Coal Corporation [1991] AC 502*, Lord Templeman said the following from 542C onwards:

In Parry v. Cleaver [1970] A.C. 1 a police constable was severely injured by a motor car driven negligently by the defendant and became entitled as of right to a pension on being discharged from the police force fer disablement. This House held by a majority of three to two that the police pension should be ignored in assessing the plaintiff's financial loss. All the

authorities which I have mentioned were discussed in the speeches in this House. Lord Reid at p. 13, said that Gourley's case reaffirmed the rule that the plaintiff cannot recover more than he has lost but did not deal with sums which came to the plaintiff as a result of the accident but which would not have come to him but for the accident:

> "In two large classes of case such sums were disregarded - the proceeds of insurance and sums coming to him by reason of benevolence. If *Gourley's case* had any bearing on this matter it must have impinged on these classes. But no one suggests that it had any effect as regards sums coming to the plaintiff by reason of benevolence, and I see no reason why it should have made any difference as regards insurance."

Lord Reid said, at pp. 14—15:

> "As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust, and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor . . . . Then I ask - why should it make any difference that he insured by arrangement with his employer rather than with an insurance company? In the course of the argument the distinction came down to be as narrow as this: if the employer says nothing or merely advises the man to insure and he does so, then the insurance money will not be deductible; but if the employer makes it a term of the contract of employment that he shall insure himself and he does so, then the insurance money will be deductible. There must be something wrong with an argument which drives us to so unreasonable a conclusion. It is said to make all the difference that both the future wages of which he has been deprived by the fault of the defendant, and the benefit which has accrued by reason of his disablement come from the same source or arise out of the same contract. This seems to be founded on an idea of remoteness which is. I think, misconceived." (ET's emphasis)

Lord Reid dealt with the nature of a contributory pension. He said at p. 16:

> "it is generally recognised that pensionable employment is more valuable to a man than the mere amount of his weekly wage. It is more valuable because by reason of the terms of his employment money is being regularly set aside to swell his ultimate pension rights whether on retirement or on disablement. . . . The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income. But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance. Like every other kind of insurance, what he gets back depends on how things turn out. He may never be off duty and may die before retiring age, leaving no dependents. Then he gets nothing back. Or he may, by getting a retirement or disablement pension, get much more back than has been paid in on his behalf. I can see no relevant difference between this and any other form of insurance. So, if insurance benefits are not deductible in assessing damages and remoteness is out of the way, why should his pension be deductible? Then it is said that instead of getting a pension he may get sick pay for a time during his disablement perhaps his whole wage. That would not be deductible, so why should a pension be different? But a man's wage for a particular week is not related to the amount of work which he does during that week. Wages for the period of a man's holiday do not differ in kind

> from wages paid to him during the rest of the year. And neither does sick pay; it is still wages. So during the period when he receives sick pay he has lost nothing . . . . A pension is intrinsically of a different kind from wages. . . . a pension is the fruit. through insurance. of all the money which was set aside in the past in respect of his past work." (ET's emphasis)

40 The Headnote of *Knapton v ECC Card Clothing Ltd [2006] ICR 1084* states:

> *On appeal by the claimants—-*
>
> *Held, allowing the appeal in part, (1) that, when assessing a compensatory award under section 123 of the Employment Rights Act 1996, pension payments received by a claimant should not be deducted, whether the pension scheme was contributory or non-contributory and whether it was occupational or private; and that the employment tribunal erred in regarding the pension payments as analogous to incapacity and sickness benefits, instead of as a protected fund on which the claimants could draw early or later according to their needs following their unfair dismissals.*

41 At paragraph 25 the EAT states:

> *Finally, we have been referred to the analysis of damages given by the editors of McGregor on Damages, 17th ed (2.003), para 19-003:*
>
> > *"Turning to the case of compensatory damages, which is much more important because it represents the norm, there is at the very start a basic, though somewhat latent, distinction between contract and tort. This distinction is in the general rule which is the starting point for resolving all problems as to measure of damages. The distinction is latent because the leading formulation of the general rule is sufficiently wide to cover contract and tort equally: this formulation is that the claimant is entitled to be put into the same position, as far as money can do it, as he would have been in had the wrong not been committed. In contract, however, the wrong consists not in the making but in the breaking of the contract and therefore the claimant is entitled to be put into the position he would have been in if the contract had never been broken, or in other words, if the contract had been performed. The claimant is entitled to recover damages for the loss of his bargain. In tort, on the other hand, no question of loss of bargain can arise: the claimant is not complaining of failure to implement a promise but of failure to 'leave him alone'."* (ET's emphasis)

Injury to feelings

42 We were referred to the well-known *Vento* guidance and subsequent updates contained in Presidential Guidance and Addendums to that, the latest of which take into account both inflationary increases and the *Simmons v Castle* uplift. *The Third Addendum to the Presidential Guidance* dated 27 March 2020, sets out the following guidance on the bands:

> *A lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.*

42. We were also referred to a number of helpful examples by Mr Green, which are included in Annex A to this judgment.

Conclusions

43 Bearing in mind the facts found and relevant legal principles, we have arrived at the following conclusions.

Basic Award

44 It is agreed between the parties that the claimant is entitled to a basic award of £10,764. We are content to endorse that.

Mitigation – wages and pension

45 The claimant has failed to take adequate steps to mitigate her losses. In particular:

45.1 The claimant has spent much of the period since her dismissal, when applying for jobs at all, applying for care work rather than administrative work, despite her having not worked in the care sector for over 20 years

45.2 In addition, despite the above, the claimant has applied for managerial jobs in the care sector, roles which she was unlikely to be appointed to, without updating her experience, skills and knowledge in that line of work.

45.3 The claimant has not applied for any work within the civil service, even though it was her case that she wanted reinstatement, until the time of the liability hearing in January 2020. Since the claimant may have had to repay all or part of the CSCS payment during the first 12 months after her employment, we find that it would have been understandable for her not to do so for that period and arguably that would have increased her loss, not mitigated it. However, between 19 June 2019, and the beginning of 2020, it was open to the claimant to do so.

45.4 It was not reasonable for the claimant to assume that she had to give the name and staff number of her previous manager, Karen Barkley. It would have been reasonable for her to give the name of Mr Miah, her manager at the time of her dismissal. This was something the claimant should have been aware of; in any event, it was something she could have taken advice on, from her trade union and/or her solicitors.

45.5 The claimant made very limited applications for work, at the rate of one or two per month, between her dismissal and January 2020.

45.6 The evidence of the respondent that on just one day in March 2020, there were approximately 50 administrative jobs which the claimant could have applied for.

45.7 The claimant declined to look at jobs which would have involved zero hours contract or part-time work. Given her predicament, we consider that it would have been reasonable for the claimant, from 2019 onwards, to have registered with a number of agencies, in order to carry out care work to update her skills and knowledge and experience, if she was interested in retaking up her career again in that area; or in relation to administrative work. We conclude that had the clamant taken reasonable steps, she would have been able to ‘get her foot in the door’ and greatly increase the likelihood of her finding work.

45.8 As for the claimant saying she was sacked in her applications, the client could simply have said for example that ‘her employment ended’. If she was then invited for an interview, the claimant could have provided an explanation as to why her employment ‘ended’. That is what she did when she went for an interview with London and Quadrant, and having given an explanation, they offered her the role.

46 We conclude that if the claimant had made reasonable efforts to mitigate her losses, she would have been earning up to 50% of her salary between 6 and 12 months after her dismissal, 75% of her salary between 12 and 18 months, and 100% thereafter.

47 As for pension losses, in order to mitigate her pension losses, the claimant would need to be employed in the public sector. We find that if the clamant had made reasonable efforts to mitigate her losses, it would have taken the claimant three years to find a job in the public sector with equivalent pension benefits. In percentage terms, we find that she would have been 'earning' pension benefits of 1/3 12 months after dismissal, 2/3 after 2 years, and 100% after three years.

Polkey - what would have happened if the claimant had not been dismissed?

48 We refer to paragraphs 33 to 45 of the liability judgment, which set out the relevant provisions of the attendance Management Procedure (AMP). We also concluded that if she had not been dismissed, the claimant could have been placed on a Final Written Warning after the 8 June 2018 attendance meeting. The basis for saying this is that we found in our liability decision that the claimant would have been placed on a first written attendance warning, even if the trigger points had been adjusted and even if the meeting had taken place as required by the policy. Further, the claimant's absence from November 2017 was not because of a failure to make reasonable adjustments at that stage – that came later. Rather, it was because of her perception of the adverse way in which she was being managed. That may have been understandable, but it was not, on the whole, due to any acts of discrimination the claimant succeeded on (the trigger points issue and the giving of a First Written Warning without a meeting).

49 The key adjustment of changing the claimant's workstation was an adjustment which the respondent was willing to carry out. Had the claimant returned to work on 4 July 2018 at a new workstation, with trigger points adjusted, the exceptions provided in paragraph 49 of the policy would not have applied (see the facts section above).

50 Had the trigger points been adjusted to 9 days (which was the claimant's suggestion at the liability hearing); or even to 12 days - the targets under the AMP for the three months would have been 2.25 (say 2.5 days) to 3 days, and over a 9-month period, 6.75 (say 7) to 9 days. Rounding up, this means that if the claimant had 2.5 to 3 days absence in the first 3 months, or 7.5 to 9 days, in the first 9 months, it is likely that she would have been dismissed. This is to be compared with the claimant's sickness absence history, as set out above - 37 days in 2016, and 25 days in 2017, up to her lengthy period of sickness absence, from November 2017 onwards.

51 Based on past history, we conclude that there was a 50% chance of the clamant being fairly dismissed under the AMP after 6 months, a 90% chance within 12 months and 100% within three years.

Future loss of earnings period

52 Bearing in mind both these and the mitigation conclusions, the compensation for loss of earnings is limited to 100 per cent for the first 6 months, 50 percent for the next 6 months and 10% for the final 6 months (which takes us to 18 months when we say the claimant should have found similarly paid work).

Pension loss – method and period for which payable

53 We consider it is appropriate in this case to work out the pension loss on the basis of a variant of the seven-step method. Bearing in mind our conclusions in relation to mitigation and the Polkey arguments, the pension loss is payable at 100 per cent for the first six months, 50% for the next six months, and 10% for the remaining two-year period, which takes us to the end of the three-year period within which we say the claimant should have been able to find a job with a comparable pension.

54 We note that Mr Green argued that the claimant's pension scheme only accrued extra benefits, for each complete year of service. We disagree with that submission. We were not taken to any document suggesting that was the case, and the documents that were in front of us, namely the 6 November 2018 letter from Civil Service Pensions, in relation to both the CSCS payment and the claimant's accrued benefits under the Alpha Pension Scheme, indicate that the claimant accrued benefits under the Alpha scheme for the whole of the proportion of the year that she was employed, whilst she was a member of that scheme.

55 Given that the losses extend over a three-year period, we consider that it is appropriate to use a variant of the seven-step method, on the basis that if we were simply using a contribution method, that would quite significantly reduce the benefit payable. Each year in the scheme is worth 2.32%, according to the Pension Loss Guide.

56 For each extra year in the scheme, the pension benefit accrued would have been £24,366 x 2.32% x 23.79. Bearing in mind the Polkey and mitigation conclusions, the claimant is entitled to 75% of £24,366 x 2.32% x 23.79 in the first year (i.e. 6 months at 100% and the next at 50%). Then for the next two years, 10% and none after that period. Those calculations should be based on the actual wage the claimant would have earned had she remained a civil servant (which figures are known to the respondent).

Death in service benefit

57 The claimant is not entitled to any compensation to date as she has not paid for an equivalent policy. From the date of the judgment, the calculation, based on the LV= figure is £14.34 pcm. We conclude this should be calculated for the same period as the loss of wages. Given that the claimant should have mitigated that by eighteen months and she was dismissed on 19 June 2018, she is not due anything for this element of her losses.

Loss of statutory employment rights

58 We consider that £350 is an appropriate amount, given the claimant's earnings at the date of her dismissal.

Civil Service Compensation Scheme payment

59 We refer to the authorities above and in particular, the parts we have emphasised.

59.1 We conclude that it is the claimant's contract of employment as a civil servant that entitled her to the benefit.

59.2 The claimant was dismissed by reason of inefficiency. It was that which entitled her to receive the benefit - it is still however her contract which is the cause of her receiving it.

59.3 The fact that the payment is discretionary is nothing to the point. Discretion must be exercised rationally and fairly and it was (we were not referred to the case of ***Bragganza*** but the principles in that case would apply here). It is not a question of whether the civil servant dismissed for inefficiency will receive a payment; the question is what percentage of the potential payment they are entitled to receive.

59.4 The claimant would have been entitled to the benefit of the CSCS payment, even if her dismissal was not unfair or discriminatory. In the same way as a person insured for losses arising from an accident is entitled to the benefit of her insurance policy, whether the accident is caused by negligence or not.

60 In all the circumstances, we conclude that the CSCS payment should not be deducted from the compensatory award payable in respect of a statutory tort. The payment is analogous to a payment under an insurance policy.

61 Finally, the fact that the benefit is non-contributory does not change the position, in the same way that it does not change the position, for example, whether benefits payable under a pension scheme are contributory or non-contributory either. Civil servants earn a potential entitlement to the benefit by carrying out their duties. It is part of their benefits package, albeit a benefit they only become entitled to if they are dismissed, amongst other things, by reason of inefficiency.

Injury to feelings

62 Each counsel argues that this is a middle band ***Vento*** case. We agree. The claimant was accepted as being disabled from October 2017 onwards and it only from that date that the injury to feelings could have started to arise, from matters for which the respondent is responsible.

63 We accept the claimant's evidence about the hurt she feels. However, we also accept Mr Green's argument that in determining the appropriate level of the injury to feelings award, we must try to disentangle the hurt and upset the claimant felt due to the acts of discrimination we have found proven, from the hurt she felt because of her general employment situation. As we have set out at length in the liability judgement, that sense of hurt and upset resulted from numerous events that happened to her; but most of those were not themselves acts of discrimination.

64 In relation to the claims which succeeded, the keyboard/screen was not provided between February and June 2018 when the clamant was on sick leave in any event and is a minor issue; the issue in relation to the trigger points was from November 2017 onwards, but again was a minor issue since the warning would have been imposed in any event, and the appeal decision on that warning was a reasonable one. The main issues are the failure to move the claimant from a low sensory input work environment, which the respondent should have agreed to do from April 2018 and implemented when the claimant was able to return to work; and her dismissal.

65 It is the claimant's case that she was able to work from the beginning of July onwards (although the GP notes show that she was not actually fit to work until September onwards). There was no medical evidence put before us to suggest any continuing stress or ill health from that time onwards as a result of the discrimination that occurred.

66 We have been helped by the examples set out in Annex A. Bearing those in mind, we conclude that the appropriate injury to feelings award in this case, bearing in mind inflation and the *Simmons and Castle* uplift, is at the lower end of the middle band, a figure of £9,750.

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Employment Judge A James
London Central Region

Dated 16 December 2020

Sent to the parties on:

16/12/2020

For the Tribunals Office

ANNEX A – INJURY TO FEELINGS CASES TRIBUNAL REFERRED TO

Zebbiche v Veolia ES (UK) Ltd (London Central) (Case No 2201863/2011) (13 February 2012, [2012] EqLR 382) — ITF £4,000
The claimant was a street sweeper who suffered from depression, anxiety and panic attacks caused by crowds. He suffered discrimination when the respondent dismissed him because of his sickness absence caused by his disability and in not making reasonable adjustments when it failed to consider his GP's note stating that he was fit to return or consider obtaining a further medical report because it did not want him to return. The respondent, which is a large employer with substantial resources, failed to consider a phased return to work and/or a return to work on reduced hours or whether there were jobs available on quieter streets. However, the dismissal was a one-off event with time limited consequences because, as it turned out, the claimant was still not fit to return to work.

Miss Morgan v NGE Music Ltd (London East) (Case No 3200313/2017) (17 August 2018, unreported) — ITF £4,150
The claimant's dismissal was found to be an act of discrimination arising from disability. However, the claimant having gone on a three-week holiday when she had been given permission to go for only two weeks, was found to have been 100 per cent likely to be dismissed at the same time in any event. The ET concluded that it would be wrong to discount an award for injury to feelings just because a claimant's feelings would have been hurt (here by dismissal for gross misconduct) regardless of the unlawful act. The claimant had pre-existing depression and anxiety and suffered an exacerbation of that because of her dismissal. She reported feeling guilty and worthless, having lost confidence and stopped socialising for 'a little while'. She also felt unable to return to the music industry. The ET held that this was a one-off act of discrimination – albeit that dismissal is a significant act. They concluded that the mid-point of the lower Vento band should be awarded.

Mr Z Baran v Mario Iasi and Salvatore Iasi t/a Bel-Vedere Ristorante Italiano (Watford) (Case No 3306950/2018) (24 January 2020, unreported) — ITF £10,000.
The claimant, a chef, was diagnosed with pancreatic cancer and found by the tribunal to have been unfavourably treated by the respondent when he was summarily dismissed upon telling his employer of his cancer diagnosis. The claimant lost his job and his home, which was provided to him by the respondent as part of his employment. The effect of the dismissal was very upsetting. There were other stresses in his life, not least the shock of the cancer diagnosis and also issues with his wife's pension and longstanding health problems with his. The claimant was diagnosed with depression and prescribed anti-depressant medication for the first time in his life.

Burt v New Forest District Council (Southampton) (Case No 3102112/2011) (22 October 2012, [2012] EqLR 1161) — ITF £12,000
The claimant, a refuse loader, had been dismissed including for a failure to attend certain disciplinary meetings. At an appeal hearing the respondent was made aware that the claimant had been suffering from a severe depressive disorder. It therefore had constructive knowledge that the claimant was disabled. The

claimant was discriminated against by the respondent failing to make reasonable adjustments for his disability (it should have sought further information from the claimant's GP before confirming the decision to dismiss) and treating him less favourably for a reason relating to his disability (dismissing him when his failure to attend the meetings related to his depression). Having provided the appeal hearing with highly sensitive personal information it would have been a very distressing experience to have that evidence effectively rejected. The appropriate award was in the middle Vento band.

Restarick v Portsmouth Hospitals NHS Trust (Havant) (Case No 3104239/2011) (23 October 2012, unreported) — ITF £12,000 (and Recommendation at para [1359])

The claimant was a Community Midwife. She has spina bifida occulta and her left leg was amputated below the knee. Shortly after her return to work the respondent decided to dismiss the claimant because it believed that she could not perform 70% of her role. The respondent failed to make reasonable adjustments. The claimant was distressed and in a state of shock because she never considered that she would be treated in that way. She thought she would be welcomed back and supported. This was not one of the most serious cases but it was not minor, isolated or a one-off. It was a middle Vento band case.