EMPLOYMENT TRIBUNALS

Claimant: **Mr James Porter**
Respondent: **Birmingham City Council**

Heard at: **Birmingham**

On: **25 May 2021**
7 June 2021 (in chambers)

Before: **Employment Judge T Coghlin QC**
Dr G Hammersley
Mrs W Ellis

Appearances

For the claimant: **Miss Joanne Porter (the claimant's mother)**

For the respondent: **Mr Francis Mortin, counsel**

REMEDY JUDGMENT

1. The respondent is ordered to pay the claimant the sum of **£34,477.50**, comprising compensation for loss of earnings in the sum of £22,728.04, compensation for injury to feelings in the sum of £9,000, and interest in the sum of £2,749.47.

REASONS

Introduction

1. The tribunal gave judgment on liability, with reasons given orally, on 26 March 2021. The tribunal found two allegations of disability discrimination under section 15 Equality Act 2010 ("EqA") proven, namely (i) the claimant's dismissal, which was the result of the respondent's decision not to extend the claimant's fixed term contract, and (ii) the denial of the claimant of an opportunity to apply for a permanent role, which related to the respondent's failure to grant the claimant effective access to its "priority movers" list.

2. At the hearing on 25 May 2021 we heard evidence and submissions on the question of remedy. We received written and oral evidence from the claimant and, for the respondent, from David Billingham, and we were referred to documents from an agreed bundle prepared for use at the remedy hearing. Both parties made oral submissions and the respondent provided us with a written skeleton argument and an extensive bundle of authorities, to which we had regard. We were grateful to both representatives for the way in which they conducted the case.

3. At the outset of the hearing the following issues were identified (we have changed the ordering a little here):

    1. What financial loss, if any, has the claimant suffered as a result of the acts of discrimination found proven ("the proven discrimination"), having regard to the following questions:

        a. Absent discrimination, would the claimant have been offered an extension to his apprenticeship?

        b. Absent discrimination, would the claimant have been successful in an application for the substantive position of Estate Caretaker?

        c. Absent discrimination, would the claimant have obtained other work (other than that of Estate Caretaker) had he been included in the priority movers list?

        d. At what rate would the claimant have been paid had he remained in employment? (This was ultimately the subject of agreement between the parties).

        e. What period of financial loss should be awarded?

        f. Absent discrimination, would the claimant have been dismissed for misconduct?

    2. Did the claimant fail to take reasonable steps to mitigate his loss by finding alternative employment?

3. What if any personal injury has the claimant suffered as a result of the discrimination?

4. What if any injury to feelings has the claimant suffered as a result of the discrimination?

4. Although the question of contributory fault had been raised in the respondent's schedule of loss, it was not advanced in Mr Mortin's skeleton argument, and he confirmed to us that no such argument was pursued.[1]

Findings

5. The respondent invites the tribunal to assess compensation by asking whether the claimant would have suffered the same loss even in the absence of the acts of discrimination which have been proved. As the respondent submits:

> "C is to be put into the financial position he would have been but for the unlawful conduct of the employer (**Ministry of Defence v Cannock** [1994] IRLR 509, EAT [authorities bundle pg.6 & 44]).
>
> This is subject to issues of causation. The loss suffered by C must be directly attributable to the act of discrimination (**Coleman v Skyrail Oceanic Ltd** [1981] IRLR 398 [authorities bundle pg.58 & 62 (para 13)]).
>
> In calculating compensation according to ordinary tortious principles the ET must take into account the chance that R might have caused the same damage lawfully if it had not done so on discriminatory grounds. (**Livingstone v Rawyards Coal Co** (1880) 5 App Cas 25, 'damages … to put the party who has been injured … 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'.)
>
> In the context of discriminatory dismissals, which if the ET considers the failure to renew the contract as having the same effect, R submits that this then also requires the ET to ask the '**Polkey**' question, namely what would have happened if there had not been a discriminatory dismissal? (in line with **Abbey National plc and Hopkins v Chagger** [2009] IRLR 86, EAT [authorities bundle pg. 71 & 104].) If there was a chance that the dismissal would have occurred in any event even if there had been no discrimination, as R submits is the case here, then in the normal way that must be factored into the calculation of loss."

6. In considering the question posed by **Chagger** in the discrimination context, we have had regard to the principles set out in the context of **Polkey** reductions in unfair dismissal cases. In **Software 2000 v Andrews** [2007] ICR 825 at [54], Elias P summarised the relevant principles as follows:

> "(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that

[1] We note that the concept of contributory *fault*, as such, is not relevant to a claim of discrimination; and no argument of contributory *negligence* was run.

requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The section 98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it-the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615; (d) that employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

7. Elias P's references to s98A Employment Rights Act 1996 are no longer of relevance since that provision has since been repealed, but the remainder of the guidance given in this excerpt remains good law and we have taken it into account. We shall return to some further related case-law below.

Issue 1(a): Extension of apprenticeship?

8. The respondent's position is that in the absence of discrimination it would not have extended the claimant's apprenticeship.

9. As we found at the liability stage, there were four reasons for this decision, as seen at page 154 of the liability hearing bundle by which the decision not to extend the claimant's fixed term contract was communicated to him:[2]

> "(1) Failure to successfully complete your Estate Caretaking Apprenticeship and obtaining a Level 2 qualification in Cleaning and Support Services.
>
> (2) Sickness during the Apprenticeship totalling in excess of 110 working days
>
> (3) Failure to follow the sickness procedure.
>
> (4) Currently under investigation for allegedly sending abusive and threatening texts to a Birmingham City Council employee."

10. The only one of these factors which was unlawfully discriminatory was item (3): we found that the conclusion that the claimant had failed to follow the respondent's sickness procedure related, among other matters, to a failure to make contact or to be readily contactable by telephone and the claimant's difficulty in communicating by telephone was a thing arising from his disability. Item (4) was a matter which it was quite inappropriate for the respondent to take into account when considering whether to allow the claimant's contract to expire, since it related to an allegation of misconduct which had not been fully investigated. But though it was *unfair*, it was not *discriminatory* for the respondent to take it into account.

11. But even leaving both items (3) and (4) out of account, we find that items (1) and (2) in themselves were such that the respondent would not have extended the claimant's contract. As we found at the liability stage, the claimant's extensive absences were not connected with his disability, and there was no obligation on the respondent to make reasonable adjustments in relation to either items (1) or (2). The claimant had made some progress during the course of his apprenticeship but the feedback which he received throughout, as summarised in the concluding feedback received from his supervisors and tutors, was not good. The respondent does not have a general practice of extending apprenticeships, and Mr Billingham's evidence, which we accept,

[2] For ease of reference we have used numbers to replace the bullet points used in the original text.

was that this had never before happened in the case of any apprentice during his time as the housing manager with responsibility for apprentices, which is to say since 2016. We find that there was nothing in the claimant's performance or circumstances which would have led the respondent, in the absence of discrimination, to have made an exception for the claimant and to have extended his apprenticeship. There was no realistic possibility of this happening, and we approach the assessment of compensation accordingly.

Issue 1(b): The claimant's application for the substantive position of Estate Caretaker

12. The respondent operates a "Priority Movers" ("PM") scheme. The relevant policy provides as follows:

> "Once a decision has been made that an employee is at risk of redundancy, or their fixed term contact is due to end, their line manager must talk to them about whether they wish to be registered as a priority mover. … HR Services … will email the employee to explain the priority mover process, and detail how to register with the Redeployment Pool on WMJobs, the council's online recruitment portal used to view and apply for vacancies."

13. Given that his fixed term contract was ending, the claimant was entitled to be treated as a priority mover for a period of 12 weeks, and the essence of the second element of discrimination found proven by the tribunal was that he was not informed, and as a result remained unaware, of his entitlement to apply for roles through the PM scheme. This, coupled with the requirement under the PM scheme for the employee to actively look for and apply for roles under the scheme, meant that the claimant was denied access to the scheme.

14. The PM scheme provides:

> "There is no restriction on the grade of vacancy that a priority mover or medical priority mover can apply for. They can apply for vacancies at a higher, lower or same grade.
>
> If a priority mover, or medical priority mover, accepts a new job at a lower grade, they will be entitled to pay protection.
>
> A priority mover, or medical priority mover, must be able to demonstrate that they are a reasonable match for the vacancy or opportunity that they have applied for.
>
> However, if the job would result in a promotion, they must be able to demonstrate the full level of skills, knowledge and experience detailed in the person specification for the role.
>
> If a priority mover, or medical priority mover, is the only suitable applicant for a vacancy, they will be invited to attend a meeting with the hiring manager to explore how their skills and experience meet those required for the role, and to discuss any gaps.

> A gap is defined as a shortfall in an employee's skills and experience to do a job that can be addressed through appropriate training, development and support, in a reasonable period of time, and at reasonable cost.
>
> If there are a number of potentially suitable applicants for a vacancy, a competitive selection process will take place. This will include an interview and other types of assessment relevant to the role.
>
> A recruiting manager must consider priority movers and medical priority movers before lateral mover applicants and any other internal or external candidates."

15. As is clear from this, the PM scheme confers a valuable advantage on those who come within it.

16. The claimant, unaware as he was of the PM process, did not apply for the Estate Caretaker role, which was the substantive role to which all the apprentices in his cohort were ultimately seeking to be appointed. All of the other fifteen apprentices applied, but the claimant did not. We are satisfied that had he been told of the process, he would have applied for the position.

17. The respondent however argues that the claimant would have been unsuccessful even if he applied.

18. As part of the selection process, apprentices who applied for the Estate Caretaker roles were scored against various criteria by David Bilingham and David Prosser. The process was not competitive, in the sense that there was no maximum number of apprentices who could be offered substantive roles. The applicants were scored on the feedback given in the workplace by their supervisors/managers, under the headings Attendance, Timekeeping, Attitude, Work Standard, Reliability, and Values & Behaviours; on the feedback given in the college setting by their tutors under the headings of Course Work, Attitude & Behaviour, and Attendance & Timekeeping; and finally on the content of their interviews. 10 marks was available for each of these ten categories, so in total there were 100 marks available. There was a cut-off of 70/100. The eleven apprentices who scored 70 or more were offered positions; the four who did not were not.

19. In or around August 2019, before his apprenticeship ended, written feedback was given in relation to the claimant by Mr Mohammed Afzal and Mr Steve Vincent as his manager and supervisor respectively, and by his course tutors Pat O'Mara and Bernadette McDermott. As we found in reaching our conclusions at the liability stage, we are satisfied that this feedback represented the fairly-expressed and genuinely-held

views of those individuals about the claimant's performance. Since the claimant did not apply through the PM process, these marks were never translated into numerical scores by Mr Billingham and/or Mr Prosser, but for the purpose of this remedy hearing Mr Billingham undertook such an exercise retrospectively. Through this process Mr Billingham gave the following scores for the claimant:

"Within the workplace

Attendance – 1 Time Keeping – 8 Attitude – 7 Work Standard – 5 Reliability – 4 Values & Behaviours – 5. We treated this evidence

Within college

Course Work – 5 Attitude & Behaviour – 9 Attendance & Timekeeping – 5"

20. Mr Billingham observed that this produced a score of 49/90, so that even if the claimant had excelled at interview and obtained a score of 10/10 in it, he would have been left with an overall score of 59/100 and so would have fallen some way short of the 70 marks required for a job offer. (The mean score achieved at interview by the other candidates was 8: three scored 10, four scored 9, four scored 8, and one each scored 7, 6, 5 and 3).

21. We approached this part of Mr Billingham's evidence with a good deal of caution. We were keenly alive to the possibility that given that he was conducting a retrospective exercise in the context of a remedy hearing he might, perhaps subconsciously, downplay the claimant's performance in the scores that he gave. We therefore closely considered the marks which he gave and the evidence underpinning them, and compared them with the equivalent approach taken to marking other candidates on the basis of the written feedback given to them. We are satisfied that the scores attributed to the claimant in Mr Billingham's retrospective exercise do indeed represent a fair and accurate assessment of the scores that he would have received had the scoring been done at the time. On behalf of the claimant it was not suggested that the mark given by Mr Billingham under any particular heading stood out as being unfair. Indeed in some respects Mr Billingham's approach in this hypothetical exercise if anything erred on the side of generosity to the claimant. We concluded that Mr Billingham's retrospective exercise served as a useful way (and in the circumstances the most reliable way) of assessing how the claimant would have fared had he applied for an Estate Caretaker role through the PM process.

22. We were mindful that the feedback given in respect of the claimant's "Reliability" by Mr Afzal included reference, among other things, to the claimant struggling to maintain contact while off sick, feedback which was influenced at least in part by the claimant having difficulty communicating by telephone, which as we found at the liability hearing was a thing which arose in consequence of his disability. But even if one were to adjust the mark given by Mr Billingham under this heading to discount for this, as generously as one reasonably might, from 4/10 to 8/10, it would not be sufficient to take the claimant into the territory where he had a realistic prospect of success in applying for the substantive role. We conclude that he did not have such a realistic prospect, and accordingly we accept the respondent's submission that compensation should not be awarded by reference to the lost opportunity to obtain the Estate Caretaker role. The claimant had no realistic chance of obtaining that role, given the negativity of the feedback provided in respect of him.

Issue 1(c): Other roles through the PM process

23. Access to the PM process would not just have entitled the claimant to apply for a role as Estate Caretaker. It would also have allowed him to apply for any other vacancies which were available during the 12 weeks when he was on the PM list. The claimant told us, and we accept, that had he known of the PM list and his entitlements under it he would have actively applied for roles through the PM process.

24. The respondent did not provide any evidence of either the vacancies that were in existence, and for which the claimant might have applied via the PM process, during the relevant period, nor of the number of individuals who were on the PM list and therefore potential competitors for any vacancies.

25. The respondent also gave no evidence about whether the four apprentices who had been unsuccessful in applying for substantive Estate Caretaker roles had applied for other vacancies through the PM process. In his oral evidence Mr Billingham confirmed that one of them remains employed by the respondent; he thought that he had not applied for his current role via the PM scheme, but he was unsure, and we found his evidence on this uncertain and speculative.

26. In **Virgin Media Ltd v Seddington** UKEAT/0539/08 the EAT (Underhill P) held that the burden is on the employer to raise the argument that there was no suitable alternative employment that the employee could or would have taken. If the employer raises a

prima facie case to this effect, it is then for the employee to say what job, or kind of job, he believes was available and to give evidence to the effect that he would have taken such a job.

27. In **King v Royal Bank of Canada** [2012] IRLR 280 the EAT (HHJ Richardson) stressed the importance of the respondent adducing evidence on the point:

> "85. … it seems to us that it was for the respondent to produce evidence as to what vacancies existed during the period over which it ought to have consulted the claimant. These were 'the basic facts about alternative employment' (see **Virgin Media** above) which were within the respondent's knowledge but outside the knowledge of the claimant who, as we have seen, was placed on gardening leave at the outset and not even shown the August vacancy list. Both parties would then be in a position to adduce evidence about the suitability of those vacancies; and it is in practice unlikely that anything would turn on the burden of proof. We do not accept Mr Sheridan's submission that it was for the claimant to adduce evidence or make specific submissions as to vacancies after 11 August; on the contrary it was for the respondent to produce evidence about what vacancies arose if it wished to limit the claimant's period of loss on the basis that she would not have been employed in the long term. Nor do we accept Mr Sheridan's submission that the claimant is seeking to raise a new point which was not argued below. It was her case that her loss of earnings should not be limited to a short period; as **Software 2000** and **Virgin Media** show it was for the respondent to adduce relevant evidence as to vacancies if it wished to make this point good. …
>
> 89. We will accept, for the purposes of this appeal, that the respondent has not kept vacancy lists from 2008. This is not, however, a point which carries great weight with us. The respondent, having accepted in its response that the dismissal was unfair on procedural grounds, should have put before the tribunal evidence as to vacancies over the whole period when proper procedures would have been carried out. It was not satisfactory to put forward a list which was no more than a snapshot in early August, taking no account of any consultation period. Moreover even if the respondent has not kept vacancy lists it ought to be able to show what posts were filled in the latter part of 2008; and if any of these were suitable for the claimant why she was not told of them or offered them."

28. We consider that in this case, since the respondent wished to contend that the claimant would not have obtained alternative employment through the PM process, it was for the respondent to adduce evidence – or at least to point to evidence adduced by the claimant - to make that point good. The evidence which would be needed in order for the respondent to establish a prima facie case on this point would include information about the vacancies which were in existence during the relevant 12 week period, and the individuals in the PM process who might have been the claimant's competitors for such roles. Such evidence was in the exclusive control of the respondent, and it put none of it forward. We cannot safely or properly assume that a local authority of the size and nature of the respondent (which according to the ET3 employs 12,000 staff) had no appropriate vacancies in the relevant 12 week period. In such circumstances we concluded that the respondent has not established a prima facie case that the claimant would have been left without work in any event.

29. We are conscious that, as the appeal courts have stressed, we should not be overly hesitant in engaging in speculation, where appropriate, when making hypothetical findings of fact about the world that never was. But what we are not prepared to do is to accede to the respondent's invitation to speculate, in its favour, about the world *as it in fact was*, a matter on which the respondent has the relevant evidence but has not put it forward.

30. We therefore reject the respondent's assertion that the discrimination made no difference to the outcome, and proceed on the assumption that had the claimant been given access to the respondent's PM process, he would have obtained work through it.

Issue 1(d): Rate of pay

31. The rate at which the claimant would have been paid had he obtained a new role through the PM process is of course inevitably a matter entailing an element of speculation and a broad-brush approach is unavoidable. It is common ground that had he obtained an Estate Caretaker role the claimant would have been paid at the rate of £18,065 pa gross until 31 March 2020 (equivalent to £15,820.04 net using the online tool thesalarycalculator.co.uk), and from 1 April 2020 to 31 March 2021 at the rate of £18,562 pa gross (equivalent to £16,262.16 net).[3] We take that as the rate at which the claimant would have secured work had he been allowed access to the PM process.

Issue 1(e): Period of loss

32. The claimed period of loss, runs from 2 October 2019 until 18 April 2021, the day before the claimant began his new gardening role. We see no basis on which to say that the claimant would not have remained in the respondent's employment (or equivalently remunerated employment elsewhere) during the relevant period and we make an award in respect of the full period. Credit must be given for the sums earned by the claimant during this period.

Issue 1(f): Misconduct dismissal?

[3] Rates of pay from 1 April 2021 onwards had not been set at the date of the remedy hearing. We assume that the rate of pay remains the same for the period 1 April to 18 April 2021.

33. The respondent argued that compensation should be reduced to reflect the possibility that the claimant would have been lawfully dismissed for gross misconduct in any event. This relates to the sending of abusive text messages to Mr Billingham on 4 May 2019. They read:

> "How dare you hond my mrs Amy for where she lives it's James by the way, you shouldn't be doing that if you ever do that again I will ripe you goatie beard of your face if you ever do that again do not push me mr Dave Birmingham and do not push my gf causing us trouble for you to find me when I'm in pain and I'll you idiot"
>
> "Idiot you are, twat"
>
> "Dickhead your Mrs would love that try it"

34. These texts, referring to Mr Billingham contacting the claimant's partner Amy while he was off sick, and one of them saying "it's James by the way", do purport to come from the claimant. But they were not sent from the claimant's phone but from that of another employee, JK.

35. An investigation was started by the respondent, and the claimant was interviewed on 17 July 2019. The investigation was not concluded before the claimant's employment ended.

36. The respondent has lost or destroyed the notes of the claimant's interview.

37. JK, from whose phone the abusive texts were sent, was not apparently interviewed.

38. In these circumstances we are not persuaded by the respondent that there was any real chance that the claimant would have been dismissed for gross misconduct. Beyond their content, there was no evidence at all linking him to the sending of the texts. We decline to reduce the claimant's compensation on this basis.

Issue 2: Mitigation of loss

39. At the time of his dismissal on 1 October 2019 the claimant was signed off work, the fit note specifying "ongoing stress and anxiety" and "left shoulder pain." That fit note expired on 5 October 2019 and the claimant's evidence, which we accept, is that he was fit to work from that point on.

40. Thereafter the claimant made numerous applications for jobs and registered with job agencies, but he obtained work only sporadically and for short periods, in roles including warehouse operative, machine operator, picking and packing, driving and delivering, and as a landscape operative. By the time of the remedy hearing he had secured employment as a gardener, which according to his schedule of loss he commenced on 19 April 2021, and we do not understand him to be claiming future losses beyond that date.

41. The respondent's case (which it is fair to say was not pressed hard in either cross-examination or oral submissions) is that the claimant failed to take reasonable steps to mitigate his loss. We do not accept that submission. As we have said, the claimant applied for numerous jobs, and signed up with agencies. He obtained work on a number of occasions but the jobs were not long-lasting. The respondent did not point to evidence of any vacancies for which he might have applied but failed to apply, or suggest any further steps that he might have taken to obtain alternative employment. We are in any event satisfied that the claimant took all reasonable steps to mitigate his loss.

Issue 3: Personal injury

42. The claimant argued that he suffered personal injury as a result of the discrimination to which he was subjected. He points out that he was prescribed citalopram (an antidepressant) at some point after the loss of his job with the respondent. It is not clear when this was prescribed, since full medical records were not provided, but his GP notes that as of 13 June 2020 his mood was "well controlled on citalopram", suggesting that the claimant had by that point been taking it for some time. His dosage at that point was 20mg per day. There is no medical evidence of a diagnosis of depression or of any other psychiatric illness following the termination of the claimant's employment, and it would be unsafe for us to infer a diagnosis from the fact that citalopram was (at some point) prescribed.

43. Moreover, we have no medical evidence as to the causation of any condition (such as depression) which may have led to the prescription of citalopram. That issue of causation is one which in this case would need to be approached with some care, for a number of reasons. First, because the claimant had been complaining of anxiety, stress and depression in January 2019, many months before the proven acts of discrimination, and his fit notes in January and September 2019, again pre-dating the

discrimination, also refer respectively to stress, and stress and anxiety. Second, it is notable that after his dismissal on 1 October 2019 the claimant was, on his own case, fit to work from 5 October 2019 and thereafter, whereas he had been unfit prior to that, which might tend to suggest that his condition if anything improved rather than worsened at the time of his dismissal. Third, the claimant was concerned at this time about various matters, most notably a perceived lack of support from the respondent, which we have not found to be discriminatory.

44. In the circumstances we cannot properly conclude, in the absence of clear medical evidence, for us to make a finding that the claimant was caused any personal injury by the acts of discrimination which we have found proven.

Issue 4: injury to feelings

45. The claimant found his omission from the PM process, when he learned of it, upsetting and frustrating. He said (and we accept) that his dismissal and the denial of his opportunity to find alternative work through the PM process left him feeling very sad and that he did not want to carry on with life any more, and he lost confidence.

46. The loss of employment affected his confidence and self-esteem, and he also suffered for the loss of the stable routine which employment brought with it (a factor of particular importance to him due to his Asperger syndrome). Further, the loss of income affected his home life, not least because he had a young daughter to provide for.

47. On the other hand the claimant was not so badly affected that he was unable to work for other employers; on his own evidence he was able to, and did, apply for and (from time to time) obtain and carry out work in the period from October 2019 onwards. There was no suggestion or evidence of any actual planning or attempts at self-harm or suicide. As we have said, he was prescribed antidepressant medication, but there is no evidence of exactly when, and there is no evidence (for example by way of GP notes) as to the factors which led to the prescription of that medication. The claimant was fortunate to have the support of his partner who helped him to recover.

48. In assessing the claimant's injury to feelings, we take into account that he was upset by more aspects of the respondent's conduct than just the two acts of discrimination which we have found proved. As we have noted, he believed that there had been a lack of support from the respondent, and was very upset by this, but we did not find this lack of

support to amount to an act of discrimination. The fact that the respondent relied on the claimant's difficulty in communicating by telephone was not in itself at the centre of his concerns, though we accept that they did cause a measure of upset. But what did affect him more was the loss of his employment, which was a direct result of that discrimination, and that loss of employment significantly affected him in the ways which we have described.

49. We consider that this case, involving the loss of a job of a person for whom the stability and routine of employment was a matter of particular importance, is one which falls at the lower end of the middle **Vento** band. We do not consider that an award in the lowest band, as urged on us by the respondent, would properly reflect the impact of the respondent's unlawful discrimination on the claimant. We award £9,000 in respect of injury to feelings.

Conclusions

50. The claimant's award is as follows:

Loss of earnings

2 October 2019 to 31 March 2020: 0.4986 years @ £15,820.04	£7,887.87
1 April 2020 to 18 April 2021: 1.0493 years @ 16,262.16	£17,063.88
Less sums received by way of mitigation:	(£2,223.72)
Total loss of earnings:	£22,728.04
Interest on loss of earnings:[4]	£1,534.32
Injury to feelings	
Injury to feelings	£9,000.00
Interest on injury to feelings:[5]	£1,215.14
Total:	**£34,477.50**

[4] 8% pa from mid-point of period from termination to date (0.8434 years).

[5] 8% pa from termination to date (1.6877 years).

Employment Judge Coghlin QC
7 June 2021