



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Evans

Respondent: GE Capital Funding Services Limited

Heard at: Cardiff remotely via video **On:** 11th January 2021
(Chambers discussion, oral
judgment and reasons:
15th March 2021)

Before: Employment Judge Howden-Evans
Mr D Ryan
Mrs M Humphries

Representation:

Claimant: Ms Annand (Counsel)

Respondent: Mr Morgan (Solicitor)

JUDGMENT having been sent to the parties on 12th April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In the Reserved Judgment on Liability, the Tribunal has made declarations that the Respondent had:
 - a. subjected the Claimant to disability discrimination by failing to comply with its duty to make reasonable adjustments (Sections 20, 21(2), 25(2)(d), 39(2)(c) and 39(5) of the Equality Act 2010);
 - b. contrary to s39(2) Equality Act 2010, treated the Claimant unfavourably because of something arising in consequence of her disability (s15 Equality Act 2010); and

- c. contrary to s40(1)a and s26 of Equality Act 2010, harassed the Claimant by unwanted conduct related to her disability.
2. At the Remedy Hearing on 11th January 2021, we heard evidence on oath from the Claimant and considered the written report of Dr Sally Braithwaite Consultant Psychiatrist dated 19th September 2020 who had been jointly instructed by the parties.
3. We heard closing submissions from Mr McKay, counsel for the Respondent and Ms Annand, counsel for the Claimant.
4. By closing submissions, the issues to be determined by the Tribunal were as follows
 - a. **Recommendations** - s124 Equality Act 2010 provides the Tribunal may make recommendations with the purpose of obviating or reducing the adverse effect of discrimination on the Claimant. Whilst parties were invited to suggest appropriate recommendations, no recommendations were identified by either party, so the Tribunal has declined to make recommendations in this case.
 - b. **Injury to Feelings award** – The Respondent refers us to the fact that most of the acts of discrimination were unintentional and asserts that acts that were not discriminatory may have caused some of the distress the Claimant experienced. Mr McKay reminded the Tribunal that we have to be careful to only compensate for Injury to Feelings that flow from the discriminatory acts and reminded us to be careful not to accidentally double compensate - ie award compensation for Injury to Feelings for damage that has already been compensated as part of the Personal Injury award. The Respondent contends Injury to Feelings should be bottom of Vento band 2 ie nearer £22,500.

The Claimant contends the Injury to Feelings award should be in the region of £30,000 and seeks an additional award of £10,000 for aggravated damages caused by the Respondent initially contesting the issue of disability in these proceedings.

- c. **Compensation for Personal injury** – In light of Dr Braithwaite’s opinion and prognosis, the Claimant invites us to make an award at the top of the moderately severe bracket - ie up to £51,460. The Respondent submits the injury caused by the acts of discrimination was an exacerbation of an existing condition and invites us to consider whether this injury had concurrent causes and suggests a reduction of up to 70% to take into account the Claimant’s pre-existing condition and any impact from other causes. The Respondent asserts the appropriate award is top of the moderate scale or bottom of the moderately severe scale - ie around £17,900.
 - d. **Costs of medical treatment** - The Claimant seeks to recover the costs of private medical treatment recommended by Dr Braithwaite

– a course of treatment with a specialist Consultant Psychiatrist, followed by a course of either Transcranial Magnetic Treatment (“RTMS”) or Electro Convulsive Therapy (“ECT”). The Respondent submits the duty to mitigate loss suggests the Claimant should look to the NHS to have this treatment in the first instance.

- e. **Loss of Earnings** - Both parties accept the Claimant's employment is anticipated to end on 31st December 2021 when the Claimant's entitlement to health insurance payments will cease. The Claimant asserts she will be unable to work in any capacity until 31st December 2021 and from that date onwards is only likely to be able to work part time (up to 20 hours per week) and in a role that is likely to pay minimum wage rather than the salary the Claimant had earned with the Respondent. The Claimant asserts she will experience an ongoing loss of £12,040.60 per annum until normal retirement age (aged 68) and contends we should use a multiplier of 18.92 under the Ogden Tables to calculate loss of earnings with a discount of - 0.25%. In addition, Claimant seeks compensation for loss of bonus and benefits and pension.

Mr McKay on behalf of the Respondent asserts that in May 2017 the Claimant's depression was mild enough that the Claimant was considering returning to work in an alternative role. Mr McKay submits that when proceedings have been resolved this will assist the Claimant's recovery such that career long loss is not appropriate. The Respondent submits the Claimant may be able to return to full time work at some point in the future or might have decided to work part time in any event without the discrimination. Respondent accepts loss of earnings for 1 or 2 years but suggests beyond that the Tribunal must make allowance for other contingencies.

- f. **Basic Award for unfair dismissal** – The Claimant submits that when her permanent health insurance benefit is exhausted in December 2021, her employment with the Respondent will need to be terminated as the Claimant will not be able to return to work. The Claimant seeks the basic award for unfair dismissal.

The Respondent asserts it is premature to consider whether there has been an unfair dismissal as there has not been a dismissal.

Findings of Fact

5. The Claimant is a married lady, with three children that were aged 9, 12 and 18 years old at the time of the first act of discrimination (in Autumn 2013), at which point in time the Claimant was 41 years old. By the time of this liability hearing (Spring 2021) the Claimant was 48 years old.
6. As noted in the Liability Judgment the Claimant commenced employment as an Accounts Receivable Specialist with the Respondent, GE Capital Funding Services Limited on 5th March 2012. She was initially employed on a part-time contract working 17.5 hours per week. In December 2013 her contract was changed to a full-time contract.

7. By June 2016, when she commenced sick leave, the Claimant's salary was £22,691 per annum (gross weekly pay of £436.38; net weekly pay of £343.20). In addition, she was entitled to a bonus every quarter which equated to an annual payment of 10% of gross pay.
8. Since 14th June 2016, the Claimant has been on long-term sick leave and has been unable to return to work. She was initially signed off work with work related stress. For the first six months of this sickness absence, June to December 2016, she was entitled to (and received) her full salary. In December 2016 she transferred to the Respondent's Permanent Health Insurance scheme which paid 75% of her gross salary; this scheme is capped at 5 years cover, which means the Claimant will cease to receive income under the scheme in December 2021.
9. In May 2017 a clinical psychologist confirmed the Claimant was experiencing recurrent depressive disorder.
10. Parties jointly instructed, Dr Sally Braithwaite, Consultant Psychiatrist, seeking her professional opinion as to the causes of the Claimant's ill health and her prognosis. In particular, Dr Braithwaite was asked to provide an expert opinion as to whether the Claimant had suffered injury to her health as a result of the discriminatory acts and whether the Claimant's current symptoms stem from her original diagnosis of underlying anxiety disorder and depressive disorder. Dr Braithwaite examined the Claimant on 8th August 2020 and 18th September 2020 and prepared a report of 26 pages. The Tribunal are grateful to Dr Braithwaite for the care with which she has prepared this detailed and comprehensive opinion. We accept this evidence is the best evidence available to us as to the causes of the Claimant's ill health and likely prognosis.

The Claimant's health prior to the acts of discrimination

11. The Claimant has experienced episodes of anxiety disorder, social phobia and depression on and off since 1999. She has taken anti-depressant medication for "*virtually all [her] adult life*".
12. We note from the Claimant's account of her health that historically, prior to the acts of discrimination she had at times experienced panic attacks, chest pains, tearfulness, an inability to feel pleasure, sleep problems, feelings of hopelessness, heightened anxiety, loss of appetite and/or difficulty concentrating, but, with the help of a low dosage of anti-depressant medication, the Claimant had been able to manage her condition and lead a normal life.
13. We note that when the Claimant started work with the Respondent, she was taking 20mg of Citalopram (anti-depressant) per day.
14. The Claimant explained that historically she has found it easier to work part time, to support her health and when her employment commenced with the

Respondent, she was working 17.5 hours per week, for the first 21 months of her employment.

15. Between 15th October 2021 and 19th November 2012, the Claimant was off work due to the sudden death of her father.
16. The Claimant returned to work in November 2012 (without a phased return to work or reduction in workload) and continued working her usual part time hours.
17. During Spring 2013 the Claimant was often in tears at her desk and experienced chest pains; Ms Lewis noticed the Claimant was in tears and on one occasion noted the Claimant was rubbing her chest.
18. On 14 May 2013, the Claimant was diagnosed as having a major episode of depression due to the death of her father and a family disagreement. In addition to this diagnosis, her Consultant Psychiatrist, Dr Harris, notes the Claimant was worried about her work.
19. In May 2013, on medical advice, the Claimant started taking 37.5mg Venlafaxine daily. She also told Ms Lewis that she had been referred for counselling and might need to start work earlier, to leave earlier to attend counselling sessions.
20. Between 6th August 2013 and 15th October 2013 the Claimant was off work with anxiety and chest pains.
21. On 12 August 2013, the Claimant's GP notes the Claimant is more depressed and notes she is stressed at work. The Claimant's dose of Venlafaxine was increased to 150mg daily.
22. In September 2013, the Claimant's GP records the Claimant is having psychological counselling and her mood is improving.
23. By 15th October 2013 the Claimant was well enough to return to work.

The acts of discrimination

Item 1b: Not referring the Claimant to occupational health in Autumn 2013: the failure to make reasonable adjustments claim

24. We noted this practice placed the Claimant (and others that share her disability) at a substantial disadvantage in comparison with colleagues that do not have a disability, in that, because she actually had a disability, the Claimant had not only been denied an opportunity to have her needs assessed, she had also been denied an opportunity to have her disability identified and recognised at an earlier stage. Further, and in the alternative, the lack of an occupational health report and any recommendations that it may make bit harder on a person with a disability (whose health condition is likely to be having a substantial and long-term impact on their ability to

perform day-to-day activities) than it does on a person who does not have a disability.

25. In the Liability Judgment we concluded referring the Claimant to occupational health in October 2013 was a reasonable step, that the Respondent ought to have taken, to avoid the Claimant's substantial disadvantage. Ms Lewis failed to make reasonable adjustments for the Claimant disability when she adopted a practice of not referring the Claimant to occupational health despite prolonged periods of sick leave.
26. In October 2013 the Claimant returned to work (without a phased return to work or reduction in workload) and in fact her workload increased substantially as she was expected to take on extra client accounts despite being a part-time member of staff. The colleague she job-shared with started maternity leave adding to the workload pressures on the claimant.
27. In December 2013 her contract was changed to a full-time contract working 37.5 hours per week. The claimant's workload was one of the heaviest workloads in the team – for instance, immediately before Christmas 2013, she was given a particularly difficult account to add to her portfolio and ended up missing the Christmas party as she was struggling to get to grips with this account.
28. The Claimant only took 1 day of sick leave in 2014 – this was the day of her acute medical emergency which required hospital treatment. The Claimant worked long hours throughout 2014, (in part as Ms Lewis had falsely stated the Claimant was subject to a performance improvement plan, which the Respondent subsequently found to be an act of bullying). In 2014 the Claimant lost 2 stone in weight (becoming a UK dress size 6) and regularly experienced chest pains.
29. Dr Braithwaite, Consultant Psychiatrist, notes the failure to refer the Claimant to Occupational Health in Autumn 2013 was likely to have exacerbated the Claimant's health condition - although the Claimant's mental health improved for a short period it was not possible for the Claimant to sustain this improvement and her mental health deteriorated significantly in September 2014 when there was an acute life threatening medical emergency (for which the Claimant was treated at hospital) in the context of work stress.

Item 4: Ms Lewis's comments in August 2015: Harassment claim

30. The Tribunal found that Ms Lewis told the Claimant she *"needed to cope better with her anxiety and think of the impact she was having on the rest of the team"* - we accepted this was not deliberate harassment, but was unwanted conduct related to disability which had the effect of violating the Claimant's dignity. Ms Lewis's use of these words deeply upset the Claimant as they were referring to her mental health condition and implying that in some way the Claimant could control her anxiety.
31. The Claimant continued to work full time in 2015, with her only time off work being in September 2015 when she had a short period of time off following her hysterectomy.

32. Dr Braithwaite notes Ms Lewis' comments in August 2015 exacerbated the Claimant's symptoms of anxiety and depression and would have enhanced her sense of inferiority and hopelessness. It also made the Claimant anxious about taking further time off work.

Item 5a and 5b: Ms Lewis's comments on the Claimant's appraisal in March 2016: Harassment claim and discrimination arising from disability claim

33. The Tribunal were satisfied that being described as demonstrating "*resistance and anxiety to changes*" was unwanted conduct related to disability that had the effect of creating a hostile environment for the Claimant. The Tribunal accepted the Claimant was very upset that this comment was recorded on the Respondent's internal HR management systems and would be considered by people she hadn't even met when she applied for positions internally. As the Claimant had ongoing anxiety, and had previously experienced disability harassment from Ms Lewis, the Tribunal considered it was reasonable for this comment in the Claimant's appraisal to have this effect on the Claimant.
34. In addition to finding this act was disability related harassment, the Tribunal also found this act was discrimination arising from disability (s15 Equality Act 2010). We found being described as demonstrating "*resistance and anxiety to changes*" could amount to unfavourable treatment, as it was being referred to in negative terms. When we considered "What was the reason for this negative treatment?" we were satisfied that when she was using these words, Ms Lewis had in mind, consciously or unconsciously, the Claimant's levels of anxiety. Ms Lewis described observing the Claimant was "clearly getting wound up" about the new CMI tool. Ms Lewis was treating the Claimant unfavourably because of something (the Claimant's levels of anxiety) which arose in consequence of her disability. The Tribunal found Ms Lewis knew of the Claimant's disability at that point in time. Whilst there may have been a legitimate aim, namely improving performance via appraisal, this was not a proportionate means of achieving this. It was totally unnecessary and inappropriate to link "anxiety" to negativity about change.
35. Shortly after this comment, the Claimant told Ms Lewis that she felt Ms Lewis was treating her differently from other members of the team, in the way she spoke to the claimant sometimes, and that other members of the team had noticed this too.
36. Dr Braithwaite notes the discriminatory comment in the Claimant's appraisal exacerbated the Claimant's depression. She notes from the GP records that by June 2016 the Claimant was suffering increased anxiety and stress and was experiencing chest pains and tingling sensations in her arms on her journey to work and when thinking about work.

Item 6: Ms Lewis's comments to the Claimant on 13th June 2016: Harassment claim and discrimination arising from disability claim

37. At any one time, the claimant would have a number of clients, whose overdue invoices she was actioning. In 2016, one of the claimant's "clients" was Mr Ozdemir, a Regional Sales Director with the respondent. In cross examination, Ms Lewis accepted that Mr Ozdemir could be a demanding client and accepted Mr Ozdemir had sent the claimant 48 emails during the period 31st May and 9th June 2016 and that the claimant had told her that, whilst she liked Mr Ozdemir, she found Mr Ozdemir to be overly demanding.
38. The Tribunal found that on 13th June 2016 Ms Lewis said to the Claimant *"When you were off sick others had to deal with your workload"*. This was said in response to the Claimant explaining she was feeling pressured by her workload. The Tribunal found that being told your disability ill health absence has burdened your colleagues is unwanted conduct related to disability; it made the Claimant feel bad. We were also satisfied that this was unwanted conduct related to disability – it was referring to the Claimant's disability-related sick leave and was making her, a person with anxiety, feel bad about being unable to work during that period.
39. When we considered whether this unwanted conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, we noted the context in which these words were spoken - the Claimant was being given a 'dressing down' for not having attended Mr Ozdemir's conference call, something that Ms Lewis had been told by her own boss, who was "fuming". When the Claimant tried to explain she couldn't cope with the level of work she was being expected to do, Ms Lewis was dismissive of this replying "We're all feeling the pressure". Ms Lewis knew the Claimant experienced anxiety. The Tribunal found that when she said, "When you were off sick others had to deal with your workload", Ms Lewis was having a dig at the Claimant. Given this and Ms Lewis's previous behaviour, the Tribunal found this was unwanted conduct that had the purpose of creating a hostile environment for the Claimant.
40. Dr Braithwaite notes this comment would have inhibited the Claimant from raising further concerns and created an unapproachable, unsupportive and hostile work environment which was likely to compound the Claimant's distress about not coping and in turn exacerbate her anxiety and depressive symptoms. Dr Braithwaite notes that further chest pain was noted in the GP records relating to this time.
41. We also note that the day after this comment, the Claimant started sick leave and has not been able to return to work since.

Item 7b: Practice of requiring employees in the Claimant's department to run a case load of a prescribed amount of work: failure to make reasonable adjustments claim

42. The Tribunal have found that the Respondent, via Ms Lewis, had a practice of requiring employees in the Claimant's department to run a caseload of a certain level of work; Both the Claimant and an employee without a disability

would find it challenging to keep up with the levels of work that the Claimant was expected to undertake. However, the Claimant was at a substantial disadvantage as she found the CMI tool that she was expected to use to process the work exacerbated the symptoms of her anxiety, making it harder for her to maintain the level of work she needed to complete.

43. The Tribunal found the Respondent failed to make reasonable adjustments to this practice, in that it ought to have monitored and adjusted the level of the Claimant's workload. This would not have entailed making significant operational changes – it might have meant the Claimant undertaking lower levels of work at times when her anxiety was causing her greater difficulties, but the Tribunal were satisfied this was a change the Respondent could have accommodated without any real difficulty.
44. Dr Braithwaite notes if the Claimant's workload had been responsive to her fluctuating symptoms this would have prevented a further deterioration in the severity of her symptoms and would have assisted her greatly. As it was the Claimant felt she was applying as much effort as she could but was still failing, which made her feel worthless and hopeless.

Items 12 & 14a: On 13th January 2017 & 27th January 2017, Ms Smith's repeated suggestion for the Claimant to have a reconciliation with Ms Lewis: discrimination arising from disability claim

45. In the Liability Judgment, the Tribunal noted that by this point in time, Ms Smith and Ms Lewis had both seen the occupational health report which recommended the Respondent consider the feasibility of redeploying the Claimant to a new work environment and manager. The occupational health report did not suggest reconciliation or envisage a return to work with Ms Lewis. The grievance had upheld a complaint of bullying. The Claimant had previously declined the offer of a reconciliation. The Tribunal accepted that in these circumstances, yet again, on two separate occasions, suggesting the Claimant consider a reconciliation (even with support in place), could be perceived as being pressured to return to the same manager and did amount to unfavourable treatment.
46. The Tribunal accepted Ms Smith had a legitimate aim in trying to support the Claimant to return to work, however, pressuring a person to have a reconciliation with a manager that has been found to have bullied them, when this contradicted occupational health advice, could not be said to be a proportionate means of achieving this aim.
47. Dr Braithwaite notes this repeated suggestion would have caused unnecessary disquiet and further anxiety for the Claimant and further negatively impacted on the Claimant's mental health condition. In particular she notes the impact this had on the Claimant's ability to sleep at that point in time.

Items 21b: The Respondent's decision on 1st August 2017 to instigate capability proceedings (formal absence management) in relation to the Claimant.: Discrimination arising from disability

48. In the Liability Judgment, the Tribunal accepted that Ms Hoeckel's letter of 1st August 2017 was the start of formal absence management proceedings (that ultimately could have led to the Claimant's dismissal) and that this amounted to unfavourable treatment.
49. We found that one of the reasons Ms Hoeckel had written this letter was because the Claimant had made reference to seeking advice from a lawyer, during their conversation on 27th July 2017. A further significant reason why Ms Hoeckel had written this letter was the Claimant's long-term ill health absence which was something arising in consequence of the Claimant's disability. We found that starting formal absence management proceedings in this manner (ie as a response to an employee making reference to seeking advice from a lawyer) could not be a proportionate means of achieving a legitimate aim.
50. Dr Braithwaite concluded this act was very likely to have exacerbated the Claimant's symptoms of anxiety and negatively impacted on her mental state by further creating a hostile work environment. 8 weeks earlier Dr Campbell had diagnosed the Claimant as having Recurrent Depressive Disorder (mild).
51. This discriminatory act had a profound impact on the Claimant's health and exacerbated the Claimant's condition significantly as noted in paragraphs 60 to 66 of Dr Braithwaite's report.

Overall impact of the discriminatory acts

52. Dr Braithwaite's notes the Claimant's depression was milder in nature prior to October 2012 when the Claimant appeared to be able to function well and was able to work part time. Following the shock and grief of her father's death in October 2012 Ms Evans depression deteriorated and had become more severe – Dr Braithwaite's opinion is that the Claimant was moderately to severely depressed in May 2013 but did partially respond to Venlafaxine medication in September 2013.
53. Dr Braithwaite concludes that whilst the Claimant suffered from anxiety and depressive disorder prior to the discriminatory acts, her previous symptoms were of a milder level of severity and her daily functioning was significantly better than her present condition. The Tribunal notes the Claimant had been able to work part time for a number of years and full time for 2 ½ years immediately prior to 13th June 2016.
54. Dr Braithwaite's opinion is that the Claimant currently suffers from Recurrent Depressive Disorder, current episode severe without psychotic symptoms and Generalised Anxiety Disorder.
55. The Tribunal notes that since 14th June 2016 (ie for 4 ½ years), the Claimant has been on long-term sick leave and has been unable to return to work. She was initially signed off work with work related stress. In May 2017 a clinical psychologist confirmed the Claimant was experiencing recurrent depressive disorder.

56. In February 2017 the Claimant started Cognitive Behaviour Therapy (“CBT”) and attended 16 sessions via Nuffield Health.
57. In May 2018 the Claimant was examined by Dr Thomas, a Consultant Psychiatrist who notes the Claimant was taking antidepressant medication and describes her as having symptoms typical of severe depression at that point in time. She was referred to a therapist for ongoing intensive psychological work.
58. In August 2018, the same psychiatrist reports “*despite the increase in intensity of psychopharmacological treatment [the Claimant] remained very depressed*”. The Claimant’s medication was changed to 40mg of Citalopram (daily) and 75mg of Pregablin (twice daily), which the Claimant continues to take in 2021.
59. In August 2018 the Claimant started CBT Therapy with Dr Godfrey; the Claimant has continued to have CBT with Dr Godfrey every month or few weeks since that time. As a result of Covid 19 restrictions these sessions changed from face-to-face meetings to telephone meetings.
60. The same psychiatrist (Dr Thomas) examined the Claimant in July 2020 and notes the Claimant continued to see her therapist on “a very regular basis” and take her antidepressant drug at its maximum dose and anti-anxiety drugs. The psychiatrist reports that in July 2020 the Claimant was suffering with an episode of major depression that was moderate to severe in intensity.
61. In July 2020 the Claimant was reporting as still having difficulty sleeping with multiple waking in the night, extreme anxiety and low mood in the early morning, feelings of exhaustion during the day and very high levels of anxiety and panic attacks. She continues to experience chest pain, pain in her arms and tingling in her fingers. She has nightmares and constantly worries about herself and her family’s safety.
62. The Claimant continues to have difficulty coping with everyday aspects of life, finding it difficult to do simple things around the house or attending to herself such as showering or getting dressed. She has not “dressed up” for years. She is not able to find interest or pleasure in anything and cries for much of the day. The Claimant continues to experience panic attacks; Dr Braithwaite noted on one occasion this was triggered by the Claimant seeing a full laundry basket of unwashed clothes.
63. The Claimant experiences poor concentration and is not able to focus to be able to read or watch a film. When she watches TV, if she sees someone that remotely resembles her former manager, the Claimant experiences nightmares the following night about it.
64. The Claimant continues to experience strong feelings of helplessness, hopelessness and negativity and feels she has no quality of life. She worries about her family and feels guilty for the impact her health is having on their lives.

65. The Claimant does not feel able to go food shopping alone. She has on occasions accompanied her husband shopping, but Dr Braithwaite reports the last time she had done so, some weeks previously, the Claimant had experienced a panic attack, feeling she could not breathe, at the tills.
66. Dr Braithwaite notes the Claimant has been pushing herself to take the dog for a walk in her local area and has occasionally been able to buy a pint of milk from her local shop. The family had been taking it in turns to cook and the Claimant has been able to cook and eat food when it is her turn.
67. Dr Braithwaite notes that although the existence of previous symptoms are a risk factor, the acts of discrimination were in her opinion most likely to have caused the direct deterioration of the Claimant's symptoms and severity.
68. She notes (in September 2020) the Claimant is unable to return to work at present and is unlikely to be able to work for 12 months. She believes the Claimant is unlikely to ever be able to return to work for the Respondent. Dr Braithwaite's opinion is that the Claimant may recover her mental health sufficiently to work part time for a different employer in the future, but she notes that the Claimant now has a phobic avoidance of the Respondent's workplace, total avoidance of any geographical locations near to the previous workplace and an intense fear of meeting any of the Respondent's employees in that area.
69. Dr Braithwaite's opinion is that the Claimant has become phobic of office type environments.

"in my view she would be able, and only if she recovered significantly enough, to seek employment in a different role and location such as working outdoors or in an unrelated environment such as museum or art gallery.... garden centre or farm...I believe that she would only be able to work part time at a maximum of 20 hours per week".

70. In particular, the Tribunal notes Dr Braithwaite's description of the Claimant's condition (in September 2020) and the invasive treatment that will be necessary as part of her recovery, detailed at paragraphs 97, 98, 99 & 100 of her report. Given the deeply sensitive information contained in these paragraphs, the Tribunal has avoided repeating these in this judgment, but has this in mind in considering compensation for personal injury. The Claimant as described by Dr Braithwaite and as observed during the remedy hearing remains acutely unwell.

The Law

Remedies under the Equality Act 2010

71. s124 and s119 Equality Act 2010, provide an employment tribunal may make appropriate recommendations and may order the Respondent to pay the claimant compensation (ie any remedy that a High Court could grant in tort, including compensation for injured feelings and compensation for personal injury).

Basic Principles of Compensation

72. It is well established that compensation is based on tortious principles. The aim is to put the claimant in the position she would have been in, if the discrimination had not occurred. The award should only compensate the claimant for her loss caused by the discrimination; an employer does not have to compensate a Claimant for her injury in its entirety when the harm for which it was responsible was just one of many causes of the ill health (see *Thaine v London School of Economics* 2010 ICR 1422, EAT).
73. The Court of Appeal in *Sheriff v Klyne Tugs (Lowestoft) Limited* 1999 ICR 1170 confirmed that in a claim for damages for personal injury arising from discrimination, compensation is available for all harm arising “naturally and directly” from the act of discrimination
74. The Tribunal has to consider whether there are multiple causes of the harm, and if there are, whether the harm is divisible or indivisible. If the harm is divisible, the Tribunal must only award compensation for the part of the harm caused by the acts of discrimination.
75. The ‘eggshell skull’ principle applies to loss arising from discrimination. In other words, the discriminator must take the victim as he or she finds him or her. This means that even if the victim is unusually sensitive or susceptible, and the level of damage or loss sustained is therefore worse than it would have been for another individual, the discriminator will be liable for the full extent of the damage, loss or injury, so long as it can be shown that this flowed from the act of discrimination.
76. However, if Claimant has a pre-existing medical condition, the award for injury to feelings and personal injury should only reflect the exacerbation of the existing condition.

Injury to Feelings Awards

77. An Injury to Feelings award attempts to provide compensation for “*subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on*” caused by the discriminatory acts (per Lord Justice Mummery in *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102, CA)
78. In *Armitage, Marsden and H M Prison Service v Johnson* [1997] IRLR 162, EAT, Mrs Justice Smith gave the following oft-cited guidance:
- “(1) 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 at the tortfeasor’s conduct should not be allowed to inflate the award.*
- (2) Awards should not be too low, as that 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, to use Lord Bingham’s phrase, be seen as the way to untaxed riches.*

(3) Awards should bear some broad general 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.

(4) 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.

(5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made."

79. The starting point, when considering the amount to award for injury to feelings is the guidance and "bands" given by Lord Justice Mummery in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102. In *Da'Bell v NSPCC* [2010] IRLR 19, EAT, Judge McMullen QC confirmed the figures adopted in *Vento* should now be adjusted to reflect inflation. The Tribunal has also considered the Presidential Guidance: Employment Tribunal Awards for injury to feelings and psychiatric injury following *Da Souza v Vinci Construction* and updates.

80. The Tribunal has considered awards made in comparable injury to feelings and personal injury cases and is also aware of amounts recommended in the Judicial Studies Board Guidelines for personal injury awards. However, the tribunal are also mindful of EAT guidance that "*a comparative exercise has to be treated with some caution*", as the amount of injury to feelings will depend on the particular facts of each case.

Aggravated Damages

81. Turning to aggravated damages, these can be awarded where an employment tribunal is satisfied the Respondent has "*behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination.*" (see *Alexander v Home Office* [1988] IRLR 190, 193, May LJ) '

82. The Law Commission Report 247, on Aggravated, Exemplary and Restitutionary Damages, attempted to define aggravated damages:

*"the best view, in accordance with Lord Devlin's authoritative analysis in *Rookes v Barnard* [1964] AC 1129, appears to be that they are damages awarded for a tort as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum."*

83. In *Commissioner of Police of the Metropolis v Mr H Shaw* UKEAT 0125 /11/ZT, EAT, Mr Justice Underhill, emphasised that aggravated damages are compensatory; they should not be used to punish conduct. Mr Justice

Underhill explained the features that can attract an award of aggravated damages can be classified under 3 heads:

- a. the manner in which the defendant has committed the tort;
- b. the motive for it; and
- c. the defendant's conduct subsequent to the tort, but in relation to it.

84. The features identified affect the award of compensation because they aggravate the distress caused by the actual wrongful act. Employment tribunals should ask "*what additional distress was caused to this particular claimant, in the particular circumstances of this case, by the aggravating feature(s) in question?*"

85. Aggravated damages are an aspect of injury to feelings and may be expressed as a separate award or as an element of the injury to feelings award.

86. "*The ultimate question must be not so much whether the respective awards [injury to feelings and aggravated damages] considered in isolation are acceptable but whether the overall award is proportionate to the totality of the suffering caused to the claimant.*" Commissioner of Police of the Metropolis v Mr H Shaw UKEAT 0125 /11/ZT, EAT, Mr Justice Underhill.

Personal Injury

87. An employment tribunal has jurisdiction to award compensation for personal injury, including both physical and psychiatric injury, caused by the statutory tort of unlawful discrimination. (see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1991] ICR 1170).

88. In *HM Prison Service v Salmon* [2001] All ER (D) 154, EAT, Mr Recorder Underhill QC explained a tribunal can either make separate awards for Injury to Feelings and for Psychiatric Injury, or it can make an award for Injury to Feelings that includes compensation for the psychiatric injury suffered.

89. A tribunal must ensure that it does not accidentally compensate the same suffering twice (i.e. once under the Injury to Feelings award and again under the Psychiatric Injury award) as this would amount to a double recovery and would be an error of law. (see also *Commissioner of Police of the Metropolis v Mr H Shaw* UKEAT/0125/11/ZT, EAT).

90. In *Cuerden v Yorkshire Housing* ET1803654/08 the claimant suffered an exacerbation of an existing depressive disorder as a result of the employer's failure to make reasonable adjustments. An employment tribunal made a separate award for psychiatric injury and for injury to feelings but stressed that it had taken care to ensure that there was no double recovery.

91. The Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases ('the JSB Guidelines') provide guidance on the appropriate levels of awards for pain, suffering and loss of amenity. In the context of general psychiatric damage, the JSB Guidelines provides

three categories of appropriate levels of awards for 'Severe', 'Moderately Severe' and 'Moderate' injuries.

92. The Tribunal have been referred to *Olayemi v Athena Medical Centre and anor* [2016] ICR 1074, EAT, in which the employment tribunal found that the claimant had suffered from post-traumatic stress disorder (PTSD) as a result of discriminatory harassment. The tribunal awarded her compensation, including awards for injury to feelings and personal injury, and sums in respect of past and future losses. It made a 12.5 per cent deduction from the awards for personal injury, past loss and future loss on account of the fact that the claimant had suffered a previous episode of PTSD which had ended in 2003 (for reasons unrelated to the discrimination). The tribunal relied on a medical report which stated that 'the previous history of PTSD will have contributed to the tune of 10-15 per cent towards the causation of the present episode'. On appeal, the EAT held that the 12.5 per cent reduction could not be justified. The statement in the medical report appeared to be irreconcilable with other statements which indicated that the previous episode of PTSD left her 'predisposed' and 'vulnerable' and were it not for the events at work she would have been unlikely to have become ill. The tribunal had not explained why it considered that the previous episode of PTSD was a material cause of the more recent episode, as opposed to merely rendering the claimant vulnerable or susceptible to a further episode. If an employee has a predisposition to a psychiatric condition, that is not the same as having caused that condition. The claimant had established that the respondents' wrongdoing was a material cause of her psychiatric condition. It was no defence that she would not have suffered as she did but for her susceptibility or vulnerability to that psychiatric condition. If the claimant had not been discriminated against, some other trigger would have been required to cause her to relapse into illness, but no other trigger was suggested to be in play at the relevant time.

Cost of medical treatment?

93. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 which states: "*... in an action for damages for personal injuries ... there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service.*"
94. In *XYZ v Portsmouth Hospitals NHS Trust* [2011] EWHC 243 (QB) the trial judge said that he was satisfied, indeed sure, that the claimant would use private medical facilities and purchase private medication, so that the sums claimed were recoverable. In *Woodward v Leeds Teaching Hospitals Trust* [2012] EWHC 2167 (QB), it was held that on all the evidence, while the claimant had for the years up to trial relied on the National Health Service for care, it was more likely than not that when she had the means, which a damages award would give her, she would have her medical treatment provided on a private basis.

Conclusions

95. As the Respondent has not put follow up questions to Dr Braithwaite or called her to give evidence, to test her opinion, the Tribunal are satisfied

that we should accept her professional opinion as to the causes of the Claimant's ill health and her prognosis.

96. In relation to the causes of the Claimant's current ill health, Dr Braithwaite concludes

"86. Whilst [the Claimant] suffered from anxiety and depressive disorder prior to the occurrence of the [discriminatory events] her previous symptoms were at a milder level of severity and her daily functioning was significantly better than her present condition. She was able to undertake work part-time at that point.

87. Although the existence of previous symptoms of anxiety and depression are in themselves a risk factor for the reoccurrence of these symptoms in the future, the [discriminatory events] in my opinion are most likely to have caused a direct deterioration in her symptom severity which would not have been likely to have deteriorated so significantly without the [discriminatory events] occurring.

88. Although the symptoms in this sense could stem from the original diagnosis the actual deterioration of the symptoms in this case, was in my view directly caused by the [discriminatory events], not the previous existence of the condition.

97. When we consider the position, the Claimant would have been in without the acts of discrimination, we find in Autumn 2013 she was recovering from the moderate to severe depression she experienced after her father's sudden death. Her symptoms were responding to Venlafaxine medication and, whilst she was likely to continue to experience symptoms of anxiety and depression for the rest of her life, it was more likely than not that her symptoms would revert to being milder in nature such that she was able to manage her symptoms with medication and live a normal life. We note she did manage to return to work in Autumn 2013 and indeed at a later date her hours were increased to full time employment.

98. So the harm that we are awarding compensation for is the difference between:

- a. experiencing mild symptoms of anxiety and depression, that are controlled by medication, such that the Claimant was able to work and live a normal life;
and
- b. experiencing "Severe" depressive disorder, the symptoms of which we note in paragraphs 54 to 69, which denies the Claimant all enjoyment in life, prevents her from working and undertaking basic tasks and which will require invasive treatment to aid her recovery and from which she may never fully recover.

99. We note that Dr Braithwaite does not record that any other factors caused or contributed to the exacerbation of the Claimant's depression. We do not accept there have been multiple causes of the exacerbation of the Claimant's condition.

Personal Injury Award

100. When we considered the appropriate award for personal injury, as noted earlier in this judgment, we have taken into account:
- a. the Claimant's ability to cope with life and work;
 - b. the effect of the injury on the Claimant's relationships with family and friends and those she comes into contact with;
 - c. the extent to which treatment may be successful;
 - d. the Claimant's future vulnerability;
 - e. the Claimant's prognosis; and
 - f. the extent to which medical help has been sought.
101. We note that the Claimant had a pre-existing condition, but are satisfied that the acts of discrimination have caused a significant and serious exacerbation of her pre-existing condition. We note that in August 2020 the Claimant was described by Dr Braithwaite as experiencing severe depressive symptoms and severe and significant levels of ongoing anxiety. The Claimant has been unable to return to work since 14th June 2016 and is unlikely to ever be able to return to work in an office environment. Prior to commencing sick leave on 14th June 2016, the Claimant was working full time and had done so for 18 months.
102. We note that Dr Braithwaite cannot be sure that the claimant will recover from this injury. In paragraph 76 of her report, she states "*my prognosis for a full and total recovery from depression and anxiety symptoms remains guarded - this is due to the considerable time that she has been unwell and only partial clinical response to the treatment attempted so far*".
103. Dr Braithwaite notes "*when a patient has been unwell for many years with only a partial response to treatment, there are unfortunately no guarantees that they will recover fully in the future*".
104. We note the medication and the extensive invasive treatments that the Claimant may have to endure, to help treat her current illness, including electric shock therapy.
105. We are satisfied this exacerbation of her condition amounts to a moderately severe personal injury for which the appropriate award of compensation is at the top of the moderately severe bracket and is of £51,000.

Injury to Feelings award

106. We note that many of the acts of discrimination were unintentional - but we need to compensate the Claimant for the impact that these acts have had on her. An Injury to Feelings award attempts to provide compensation for "*subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, caused by the discriminatory acts* (per Lord Justice Mummery in *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR 102, CA

107. We have been careful to only compensate for Injury to Feelings flowing from the discriminatory acts. In particular we have in mind our findings in paragraphs 23 to 49 of this judgment and the 7 specific act of discrimination. We have disregarded any distress that might have been caused by having heavier workloads as colleagues left, the medical emergency in 2014, Ms Lewis falsely stating the claimant was subject to a PIP, the pressures of working for Mr Ozdemir as these were not acts of discrimination.
108. We have been careful not to accidentally double compensate the Claimant – In the personal injury claim we have taken into account the pain suffering and loss of amenity caused by experiencing that condition of ill health and undergoing treatment for it. In the Injury to Feelings award we have looked at each individual act of discrimination and assessed the feelings the Claimant would experience as a result of that act or omission. In particular we note:
- a. The comments in August 2015 enhanced the Claimant sense of inferiority and hopelessness and made the Claimant anxious about taking further time off work. She was deeply upset that Ms Lewis was implying that in some way the Claimant could control her anxiety.
 - b. The Claimant was very upset that the discriminatory comments on her appraisal were recorded on internal HR management systems and would be considered by people she hadn't even met.
 - c. The Claimant was very hurt that her anxiety was being linked to negativity to change and felt Ms Lewis was treating her differently from other members of the team.
 - d. The Claimant was very distressed when she was told her disability related absence had burdened others. This inhibited her from seeking help from the Respondent and created an unapproachable unsupportive and hostile work environment for her, such that she has been unable to return to work.
 - e. As reasonable adjustments weren't made, the Claimant felt she was making as much effort as she could but was still failing which added to her feelings of worthlessness.
 - f. The repeated suggestion that she attempt a reconciliation with a manager that had been found to have bullied her, when this contradicted occupational health advice, caused her significant distress.
 - g. The Respondent's decision to instigate absence management proceedings, caused tremendous upset and worry for the Claimant.
109. We note that there were a number of incidents and that a number of different employees had committed acts of discrimination. Having considered each of the incidents and the distress they caused the

Claimant collectively, we are satisfied that the appropriate ITF award is £30,000.

Aggravated Damages

110. We have declined to make an award for aggravated damages as we did not have sufficient evidence specifically explaining the additional distress that was caused by the Respondent's approach to defending the issue of disability.

Costs of Medical Treatment

111. Dr Braithwaite has identified courses of treatment that the Claimant is likely to need to become well enough to consider a return to work. These are complex and highly invasive methods of treatment.

112. Dr Thomas discussed similar courses of specialist treatment but noted that it may not be possible to obtain these on the NHS and is likely to be difficult to arrange.

113. We are satisfied that the Claimant is likely to need this treatment and is likely to have to pay for this treatment for it to be arranged in a timely manner. The Claimant needs this treatment without delay to be able to start her recovery and give her the best chance of returning to employment. It is appropriate for us to award compensation for the cost of this medical treatment as recommended.

Unfair Dismissal basic award

114. At present the Claimant continues to be employed by the Respondent, so we agree with the Respondent that it is premature for us to make such an award, as there has not yet been a dismissal.

Loss of Earnings

115. When it came to calculating the likely loss of earnings, we accept Dr Braithwaite's professional opinion; we accept the Claimant is unlikely to ever return to office employment or be able to earn a salary similar to the one she had with the Respondent. We accept the Claimant will be unable to work in any capacity until 31st December 2021 and from that date onwards she is only likely to be able to work part time (20 hours per week) and in a role that is likely to pay minimum wage rather than the salary the Claimant had earned with the Respondent.

116. We accept the Claimant will experience an ongoing loss of £12,040.60 per annum until normal retirement age (aged 68) (as set out in the Schedule of Loss). We accept it is appropriate to use a multiplier of 18.92 under Table 12 of the Ogden Tables to calculate loss of earnings with a discount of -0.25%. And that compensation for loss of bonus, loss of benefits and loss of pension contributions should be calculated in the same way.

117. We considered the possibility that the Claimant might have had to revert to part time work at some point in the future, even without the acts of discrimination. We accept that with the Claimant's pre-existing condition, there is a chance that she might have reverted to part time working. We also considered the possibility that the Claimant might recover her health enough to return to full time employment in the future. Again, we accept this is a possibility. Having discussed the likelihood of these, we accept it is appropriate to reduce the Claimant's future loss of earnings award by 20% to make allowance for these contingencies.

Interest

118. The Tribunal accept it is appropriate for the Claimant to be awarded interest at 8% per annum on past loss of earnings, bonuses and benefits from the midpoint between the first act of discrimination and the date of calculation.

119. The Tribunal accept it is appropriate for the Claimant to be awarded interest at 8% per annum on the personal injury award from the midpoint between the first act of discrimination and the date of calculation.

120. The Tribunal accept it is appropriate for the Claimant to be awarded interest at 8% per annum on the injury to feelings award from the date of the first act of discrimination until the date of calculation.

EMPLOYMENT JUDGE HOWDEN-EVANS

Dated: 28th July 2021

Reasons posted to the parties on
29 July 2021

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For Secretary of the Tribunals