EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Ms M de Morgado		Carolia Towers Ltd t/a Doubletree by Hilton Hotel – Tower of London

Heard at: London Central Employment Tribunal

On: 9 November 2021 (10 November in chambers)

Before: Employment Judge Adkin
Mr D Kendall
Mr R Baber

Representations

For the Claimant: Ms S Pankowski, Paralegal
For the Respondent: Mr D Northall, Counsel

JUDGMENT

(1) Damages for failure to reasonable adjustments pursuant to section 20-21 of the Equality Act 2010 are assessed as follows:

a. Injury to feeling £15,000;

b. Psychiatric injury £8,000;

c. Financial losses:

i. Net loss of income £7,102.42;

ii. Pension contributions £903.68;

d. Interest:

i. interest injury to feelings £4,885.48;

ii. interest on other losses £2,606.58;

(2) There is no ACAS uplift under s207(A) TULRC(A) 1992).

(3) "Grossing up" in principle applies following *British Transport Commission v Gourley* [1955] UKHL 4 but in practice we think it unlikely that this award will be subject to tax (see discussion below).

(4) The Respondent shall pay the Claimant the total of all sums above which is **£38,498.16**.

REASONS

Procedural matters

1. This was an a fully remote hearing by video-link (CVP).

2. The Tribunal made an adjustment for the Claimant's disabilities during cross examination, specifically offering regular breaks. At the Claimant's representative's request we undertook to ensure that she understood the questions that were being asked of her. In the event we did not have any doubt that she did understand questions being put. We asked if there was anyone with the Claimant to support her. It seemed that her elderly mother (or perhaps grandmother) was at home with the Claimant, although she was reluctant to involve her significantly, and this seemed to be a source of some distress.

3. A little less than an hour into the Claimant's evidence, she became distressed and expressed a dilemma as to whether to take medication for "body pain", given that she was struggling but that she had a concern that medication would make her drowsy. The Tribunal noted that up to this point she had given coherent, cogent and precise answers, and was able to recall from memory particular page numbers in a 800 page bundle giving answers in rebuttal of points made to her in cross examination.

4. We interposed the Respondent's witness and took a slightly early lunch to allow the Claimant to consider her options and give instructions to her representative.

5. After the lunch adjournment Ms Pankowski explained that she had taken instructions from the Claimant (who did not appear) and it was the Claimant's preference not to apply to adjourn the hearing, but rather to complete the hearing as a paper exercise.

6. The Tribunal did not consider that it would have been appropriate to adjourn, given that a hearing in January 2021 had been postponed, another hearing in July 2021 had been lost and it was unsatisfactory and unfair to both parties to delay the remedy outcome any further. We considered that there would be a

real likelihood that were the matter to be adjourned the Claimant would still struggle to deal with cross-examination.

7. Ultimately we dealt with the absence of the Claimant by Mr Northall taking a part of his submissions as highlighting documents that he would otherwise have highlighted through cross examination, followed by his substantive submissions supported by written submissions.

8. Ms Pankowski was able to respond to the series of points made by Mr Northall in her closing oral submissions. As to her substantive submissions, she relied upon her written submissions.

9. Exceptionally, we considered some written points made by the Claimant submitted on 10 November 2021. I gave the Respondent a right of reply. Mr Northall in a short written reply drew distinction between inadmissible new "evidence" in these submissions and references to documents, to which pragmatically he did not object. We accepted that distinction and agreed that this was the right approach in the circumstances.

10. Yet further written submissions were received from the Claimant's representative on 12 November 2021 by email, after the Tribunal had concluded deliberations. These submissions were not considered.

The Claim

11. The Claimant presented her claim on 29 August 2019.

12. The Tribunal found in a decision dated 27 November 2020 following a liability hearing in October 2020 that the Claimant succeeded in a claim of failure to make reasonable adjustments pursuant to section 20-21 of the Equality Act 2010 succeeds in relation to a failure to provide a permanent transfer to the reservations department in October 2018.

13. All other claims were dismissed.

The Claim

14. The Tribunal had access to the evidence considered at the liability hearing.

15. Additionally, we received an agreed remedy bundle in PDF format of 834 pages, a witness statement from the Claimant and a witness statement from Nicola Wilton, HR Business Partner for London on behalf of the Respondent.

16. We also received a 15 page supplementary remedy bundle entitled "Maria Medications".

Findings of fact

17. References (RB/473) indicates pages in the remedy bundle. (LB/123) indicates pages in the liability bundle.

Disability

18. Disability in general is not in dispute given an admission by the Respondent.

19. The Claimant's claim is that she has the following disabilities:

    19.1. Polycystic Ovary Syndrome ("PCOS");

    19.2. Anxiety;

    19.3. Depression;

    19.4. Adenomyosis;

    19.5. Irritable Bowel Syndrome ("IBS");

    19.6. Lower back pain; and/or

    19.7. Non-alcoholic fatty liver disease.

Background

20. The decision on liability contains details findings of fact, which are not repeated in their entirety here but a selection of findings relevant to remedy are repeated for ease of reference (paragraph numbers relate to the paragraph numbers in the written reasons on liability).

> 27. We accept that Ms Branley and Ms Schultz endeavoured to allocate the Claimant to these switchboard duties. It is clear, however that the Claimant was still expected to do the Front of House standing reception duties. At a meeting with Ms Branley on 22 June 2018 the Claimant continued to complain about standing all day which suggests that she must still have been doing significant amounts of front desk reception work at this stage.
>
> 55. It was confirmed in this meeting [on 15 October 2018] that the Claimant had moved to "Careline", that her hours had been changed and days changed to 5 days on and 2 days off. The Claimant said that Mina [Isaac] was "also helping". The Claimant reiterated that working 6 days in a row was not good. It did not allow her enough time to rest. There was a discussion about factors contributing to the Claimant's difficulties. It was identified that standing and long hours were contributing factors. This was the second time that the Claimant raised that standing and the hours she was working were causing her difficulties.
>
> 58. Given that the Claimant was again complaining about standing and her hours, and that she was being put on an attendance improvement plan, we consider that the Respondent,

acting reasonably, again ought to have made a referral to Occupational Health.

93. On 22 March 2019 the Claimant put in an extended appeal document, containing eight pages of close type in which she explains her difficulties with the outcome of the grievance. This document described the Claimant's difficulties in the main in a nuanced and careful way. She emphasises that some aspects of her grievance had been misinterpreted, for example she never stated that her requests for days off had been declined. She was concerned that this was likely to have caused resentment from Mr Isaac. She mentioned that she had a good relationship with Mr Isaac until November 2018.

94. She said that from October 2018 onwards, she was constantly being asked outside to help reception, essentially because the reception team was struggling due to being short of staff. She complained that this was at the busiest time and interrupted her work meaning that she could not perform efficiently and could not go to the restrooms when needed. …

260. We find that the Claimant was required to stand working at reception. She specifically complained about this at the meeting on 15 October 2018 and in the grievance appeal document submitted on 22 March 2019.

261. Sarah Branley accepted in her oral evidence that staff stood at reception.

265. We accept the Claimant's case that her lower back pain was exacerbated by standing at reception. This is supported by the contents of the attendance meeting in October 2018 [173] and the grievance appeal document dated 22 March 2019 [299].

…

269. … The Respondent had medical evidence of back pain by a certificate dated 7 June 2018 [151], the Claimant explained on 22 June 2018 that "standing all day" was contributing to the illnesses which were causing her absence [158]. It was a sufficiently serious problem to cause the Respondent at this stage to allocate the Claimant to careline duties.

270. In the week commencing Monday 24 September 2018 the Claimant was rostered back onto [standing] reception duties rather than Careline. After three days, on Thursday 27 September she went off sick for two days. The Claimant wrote to Mr Isaac saying that she needed to stop and take a rest.

271. The problem caused by standing was reiterating at the attendance meeting on 15 October 2018 [173]. This was acknowledged in correspondence on 16 October 2018. We find therefore that the Respondent knew that the requirement to

stand was causing the Claimant a disadvantage, since it was contributing to her absence.

272. We find that the Respondent had actual knowledge of the disability and the disadvantaged caused by the standing PCP.

273. It is not necessary therefore to consider "constructive" knowledge, but for the sake of completeness, in light of Mid-Staffordshire, we consider that the events in June, September and October 2018 should each have precipitated a referral to occupational health. Had such a referral been made in a timeous fashion, it would have been abundantly clear that the Claimant standing for long periods at reception was causing problems with her back.

…

284. The Respondent makes the point that the Claimant did not ask for role as a reasonable adjustment. It is clear from authority that this in itself is not a bar. We do not accept the argument that there was no information within the Respondent's knowledge causing it to think that offering the role could amount to an adjustment. All of the elements which caused the disadvantage were within the Respondent's knowledge. She had difficulty standing for reception roles. She was being pulled from the adjusted sitting down duty on Careline back onto front desk reception. This caused a further absence on 27-28 September, following absences which had been caused by standing before. A purely sedentary role such as Reservations would have been the solution to this.

285. It is argued that there is nothing to suggest a move to Reservations would have provided a material benefit that was not provided by Careline, nor that a reservations role would be more sedentary. Had the Claimant been left to work on Careline as Ms Branley envisaged, this submission would hold. Our finding, based on the evidence is that the Claimant was being either rostered onto Front of House or pulled away from the Careline work onto Front of House work.

286. We do not accept the evidence of Fiona Green that the Reservations role would have been positively detrimental given the greater pace of working life and demands of client, for three reasons. First, Ms Green admitted during her oral evidence that she had very little practical experience of the Front of House roles. We felt that the comparison she made with Reservations was therefore of limited value to us. Second, it was quite clear that the Front of House roles were at times extremely busy. Third, she had been identified as a good candidate for Reservation work by Ms Scorah the Reservations Manager.

287. Would they have avoided the disadvantage complained of?

> 288. The Claimant needed a seated role, without being asked to cover a standing role.

21. The Claimant, reasonably and appropriately, chased a referral to occupational health on 7 December and 11 December 2018 and 17 December 2018

22. The grievance appeal contained the following complaint about October 2018 (LB/299):

> "My role indeed exchange to Careline but, and from October onwards, I was constantly being called outside to help reception, which I never denied helping. This was one of the adjustments made has **I cannot be standing in front desk due to my back pain** and the fact I need to go constantly to the ladies."
>
> (emphasis added)

Reservation Agent's role

23. In September 2018 the Claimant applied for the position of Reservations Agent at the Hotel.

24. On 10 October 2018 the Claimant attended an interview for this role.

25. The Claimant's contention is that she should have been given a permanent transfer to a role in Reservations at this time as a reasonable adjustment. The Tribunal accepted this and found that the claim for failure to make reasonable adjustments succeeded.

Reservations apprenticeship

26. The Tribunal had to consider further the matter of a reservations apprenticeship. This is on the basis that the Respondent contended that the Claimant had failed to mitigate her loss by unreasonably abandoning an interest in a reservation apprenticeship which might have led on to a role in the reservation team. These findings largely adopt those already made at the liability stage, with some additions.

27. Following on from the interview on 10 October 2018, in the days after the Claimant and Ms Shaw had an email exchange about the possibility of the Claimant taking up a reservations apprenticeship. On 15 October 2018 Ms Shaw emailed the Claimant with information about the apprenticeship which was run through a third party provider called Lifetime Training (RB/374).

28. On 15 October 2018 the Claimant thanked Ms Shaw for sending the information (LB/177). Ms Shaw asked if she wanted to apply for the apprenticeship.

29. On 13 November 2018 Ms Shaw filled in a skills check for the Reservations Apprenticeship, and sent this to Cheryl Brown, copying the Claimant.

30. On 9 January 2019 the Claimant wrote by email that she was submitting a grievance, in which she complained about the treatment she had received by the management of the front desk and explaining why she was not pursuing the reservation apprenticeship option:

> "I was as well, about to proceed with my apprenticeship with the company, that would represent a career progression, better wages and a better work environment (considering my health limitations), which has not been incentivised by the management and, in consideration to the above, it is not going to move forward."

31. On 10 January 2019, Caroline Shaw received an email from Cheryl Brown, a representative at Lifetime Training, who confirmed that Maria had informed them that she was no longer interested in the apprenticeship, enquiring whether she was "still engaged with the apprenticeship journey" (RB/381).

32. On 14 January 2019 Ms Shaw replied to Ms Brown saying that the Claimant was now on long-term sick so she thought "not just now".

Sick absence

33. The Claimant submitted a sick note to her managers, as the GP had signed her off from 26 December 2018 to 8 January 2019. She mentioned in a covering email that she was due to undergo blood tests on samples and that there was an appointment with her specialist coming up in January. She suggested that after Wednesday she would come to the hotel to talk to them in person.

34. On 8 January 2019 the Claimant obtained a further sick certificate. Mr Mehta wrote to Ms Shaw to ask what the next steps on getting occupational health were. Ms Shaw responded immediately to say that although the Claimant had sent an email asking for an Occupational Health Assessment "this was never agreed on the back of previous discussions with her".

35. On 9 January 2019 Mr Mehta wrote to the employee relations team asking for guidance given that the absence looked as if it was now "long-term". He was advised to invite her in for a meeting.

36. There was a gap in the Claimant's UK based GP record between 4 January 2019 and the next entry on 16 December 2019.

37. The Respondent posits that the Claimant was in Portugal throughout this period. The Claimant admits that she had attended medical appointments in Portugal during 2019. To the extent that we think it is relevant, we find on the balance of probabilities that the Claimant was in Portugal during a substantial part of 2019.

Attempts to find work

38. The Respondent has highlighted the following social media communications written by the Claimant which we have received in evidence.

> "I have a husband, a cat and our company. I will be doing part time to have money now but I will look after our business" (LB/574) [December 2018]
>
> "Oh I am sorting out things…My husbands company and Brexit and so on" (C admitted during her evidence at the liability hearing that her husband at the time carried on a business called Oliveira Imports – see the reference within C's email folders at LB/124).
>
> "I am on holidays…Just at the airport going to Portugal…However I putted [sic] sick note for 2 weeks. I am due to start working on the 29th but I will [cuts off] (LB/496) [14 December 2018]
>
> "Hello dear, hope you are well, just so you know I have applied to some jobs and they might contact you." (LB/485) [26 January 2019]
>
> "So I will put sick not [sic] until I find another job and then I will put the quitting notice." (LB/569) [date unclear]
>
> "I am under sick note…I will renew it until I find new job and then I will quite [sic] [Laughing emojis] (LB/657) [17 December 2018]
>
> "Everytime I am applying to a job I have to let them know I have this shit and then I am not hired!" (RB/143) [10 February 2019]

39. The position of the Respondent is a degree of scepticism about the status of the Claimant during 2019. On the one hand she was submitting sick notes and receiving sick pay. On the other hand she appeared to be working on her partner's business and applying for other jobs.

40. That suspicion is deepened by some evidence that suggests that the Claimant was in fact living in Portugal rather than in the UK, and the Respondent's submission that the disclosure of bank statements has been inadequate or incomplete.

Bank statements

41. We were taken to bank statements of three accounts held by the Claimant.

42. Ultimately we did not find that there was anything remarkable or suspicious about these statements which appear to show receipt of benefits in the UK and some evidence of financial transfers to an account in Portugal. This is consistent with the Claimant being present in Portugal, as we have found above.

Resignation

43. Ultimately the Claimant resigned on 2 October 2020. We were not provided with a copy of the letter or email of resignation in the agreed remedy bundle.

44. We find that the circumstances of the failure to make reasonable adjustments in October 2018 and the lack of referral to occupational health which might remedy the situation led directly to what amounted to a breakdown in the employment relationship ultimately to the circumstances in which the Claimant understandably resigned.

Medical evidence

45. The Tribunal has tried to limit the amount of detailed medical information about the Claimant to that which is necessary to determine the claim, given that this these written reasons on remedy will be a public document. Nevertheless some medical information is relevant to this claim, given that it is the Claimant's contention that the failure to make reasonable adjustments (non-offer of reservation role) in October 2018 has made her ill and is the basis for her claim in excess of £9 million, which includes future loss of earnings and sums claimed for future treatment and insurance.

46. It is clear that the Claimant has a very complex medical picture with a number of physical and mental health difficulties and a degree of interplay between those conditions. She has received treatment or at least investigation from a whole series of different specialists either in the UK or Portugal, including psychologist, psychiatrist, endocrinologist, gynaecologist, dermatologist, cardiologist, , gastroenterologist and an osteopath.

47. The Claimant is estranged from her mother and was brought up by her grandparents.

48. She suffered from an episode of depression as early as 2014.

49. In October 2017 the Claimant suffered a traumatic event in her personal life, the details of which are not necessary for these purposes. This event seems to have had lasting sequelae.

50. She received a diagnosis of PCOS (polycystic ovary syndrome) in January 2018.

51. The Claimant, who has a high BMI, which has increased significantly since the beginning of 2015, has been described as "prediabetic".

52. The Claimant suffered from chronic low back pain. The first time this is mentioned in the UK GP record is June 2018.

53. In July 2018 the Claimant was seeking counselling arising from the traumatic event in October 2017 and was referred by her GP to the Brent primary care talking therapy service.

54. By June 2019 the UK GP record notes "previously diagnosed" liver disease, IBS, chronic pelvic, chronic joint and back pain, adenomyosis, PCOS (along with) anxiety, depression, insomnia, panic attacks, PTSD. It is unclear what the source of all of these diagnoses are, a point made by the jointly instructed expert. Sick certificates refer to stress, health related anxiety, diarrhoea, IBS,

pain, joint pain, abdominal pain, body pain, mild depression, mixed anxiety and depression, PCOS.

55. Dr Ferreira, a treating psychiatrist based at a hospital in Portugal diagnosed adjustment disorder (ICD-10:F43).

56. On 18 February 2020 the Claimant was discharged from CNWL Talking Therapies Service Brent, after 7 sessions of talking therapy treatment for anxiety and depression. The discharge letter contains the following:

> "when we spoke during your assessment appointment you described experiencing symptoms of depression and anxiety, particularly frequent distressing thoughts and worry. You also described your psychological difficulties relating to your caring responsibilities and work difficulties which began when returning to work soon after [traumatic event October 2017]. You reported that additional pressures had left you with less time to implement a self-care routine and engage in pleasurable activities."

57. In January 2021 a five year relationship came to an end with someone that in some contemporaneous documents the Claimant has described as her "husband", although they were not married. The Claimant reports that they remain in contact and "he's my best friend".

Reports of medical expert Dr McEvedy, Psychiatrist

58. The parties jointly instructed Dr Christopher J B McEvedy, Consultant Psychiatrist, who produced a report dated 9 July 2021 and an Addendum report dated 8 September 2021.

59. *First report* - in his first report the expert opined that there had been a decline in function over the last two and half years (i.e. since she stopped working in December 2018) and:

> "Given the degree of her mood disorder (mixed anxiety and depression) at present, I believe that she would struggle to apply for, obtain and retain employment at this time."

60. In his opinion the Claimant needs "graded rehabilitation" and a change in attitude (RB/458) rather than believing that she has a physical disability.

61. *Second report* - unfortunately in his first report Dr McEvedy had been given the impression by his instructions that the Careline role being carried out in October 2018 was a seated role. He had failed to appreciate that the Claimant was being required to carry out standing duties at reception whilst carrying out this role. He was invited to reconsider his conclusions in a letter from the Respondent's solicitor dated 28 July 2021 and a further letter dated 12 August 2021, which included a direction from the Tribunal inviting him to revisit particular paragraphs of the Tribunal's judgement.

62. In his Addendum report Dr McEvedy dated 8 September 2021 wrote:

> (RB/470-1) “Having reviewed the particular paragraphs in the Tribunal’s liability judgement of 27th November 2020 to which my attention is drawn, I can see that when writing my report, I did not fully appreciate that what is referred to in the original letter of instruction as the ‘seated back-office role on the “Careline”’ was in reality not a seated role, but involved significant amounts of standing duty on reception. Either that, or (it is not entirely clear to me) the Careline role was seated, but not protected, and its occupant could be drafted into work elsewhere, for example on Reception.
>
> …
>
> This does affect some of the conclusions in my original report ”

63. The Tribunal considers that in his addendum report Dr McEvedy correctly understood that the Claimant’s seated responsibilities were not protected and that she was being drafted into work on Reception, which required her to stand.

64. *Reason for original sick absence* – Dr McEvedy found that the reason for the sick absence was the failure to transfer to the Reservations role (RB/473)

> “in my view it follows that Ms De Morgado’s fitness to work (see answer to Question Part 2(b) above) is likely to have been impacted significantly by the failure to transfer to a true seated role in reservations. In other words, that she would <u>not</u> have been unfit regardless of the failure to transfer to the Reservations role.”

65. *IBS & PCOS* - his view remained unaltered that prolonged periods of standing could lead to an increase in back pain, but he could not see that the Claimant’s conditions other than back pain, specifically those identified by the Claimant IBS and PCOS "are likely to have been impacted either by a work role which involved more standing than otherwise, or by an increase in her lower back pain" (RB/471). In other words lower back pain was the only condition affected by the requirement to stand covering reception duties.

66. His view remained unaltered in the addendum report that only part of the reason for the Claimant’s initial period of sickness absence in December 2018 was attributable to the Respondent’s failure to transfer the Claimant to the Reservations role because two of the three stated reasons for absence could not "be reasonably linked to the circumstances of her work, or the fact that she was not in a desk job rather than standing at the reception desk" (RB/472). The three stated reasons were lower back pain, IBS and PCOS. It is only the lower back pain that he attributes to the difficulties caused by standing.

67. *Cause of current unfitness* - (RB/472) as to the failure to transfer C to a "true seated job" in Reservations

> "However, now appreciating that in fact the "seated back-office role on the Careline" involved significant amounts of standing, it must follow that the failure to transfer her to a true seated role in the reservations role is likely to have caused significant additional health problems for Ms De Morgado in the shape of an increase in her lower back pain, and therefore to have contributed significantly to her unfitness to work at that time; and since her loss of employment has led to her current unfitness to work it must follow that the failure to transfer work roles in 2018 is of relevance to her current unfitness to work as well."
>
> (Emphasis added)

68. The current unfitness to work is due to a mood disorder (mixed anxiety and depression) as set at page 11 of the expert's first report (RB/457). We interpret 'loss of employment' to be a non-technical reference to the Claimant ceasing to work at the Respondent in December 2018, rather than a reference to her resignation in 2020.

Report of Dr Marta Dias de Alemeida

69. The Tribunal has been provided with a translation of a report of Dr Marta Dias de Alemeida [RB/112] dated 3 December 2020. The report is headed "Psychological Information" and contains the following:

> "Maria has received psychological counselling from me since August 2020 at the Hospital CUF Sintra, on account of severe depression dating to 2018 as a result of clinical and work-related problems.
>
> Since 2018 she has not been able to work. Her condition is characterised by constant feelings of a lack of energy and a dysphoric mood state. She suffers from insomnia and considerable anxiety. She has also been diagnosed with fibromyalgia, a disabling disease that includes depression as one of its contributing factors and which causes severe, chronic pain in several parts of the body. In addition to this somatisation she presents with gastritis and irritable bowel syndrome, two other diseases in which psychological aspects related to depression are also very common.
>
> Her physical condition, which to a large extent has a psychosomatic origin, prevents her from leading a normal life. There are days when she finds it difficult to get out of bed and is not even been able to perform domestic tasks. In turn, this condition worsens her mental state, causing a feeling of despair which results in panic attacks.
>
> On account of this physical and mental condition it has not been possible for her to work, and she cannot fulfil the responsibilities of great attention to detail and concentration any work task entails. This makes her feel very anxious about her future. She

> is concerned about her disability and feels constantly diminished in the face of the chronic pain and the possibility of not being able to retain fluids. She is afraid she may be subject to aggressive behaviour or ridiculed by her colleagues. She has a well-founded fear of not being able to meet the expectations of any employment and therefore, to find herself without a way to support herself."

Other medical evidence

70. There is a translation of a pelvic MRI scan and an abdominal MRI scan carried out on 7 September 2020. It is difficult for the Tribunal to understand the significance of this document. We work on the assumption that these scans were available to Dr Pratas, below.

71. The report of an endocrinologist Dr Sonia Pratas dated 16 December 2020 [RB/115], who identified "polycystic ovary syndrome, adenomyosis, hepatic steatosis, hyperuricaemia, fibromyalgia, irritable bowel syndrome and chronic gastritis" among other difficulties, the precise detail of which is not necessary for these purposes to set out.

72. The Tribunal has also considered the translation of the report of Diana Ramalho, an osteopath at SalusCare dated 22 December 2020 [RB/114] who identified severe low back pain and typical fibromyalgia pain.

LAW

Heading

73. Pecuniary and non-pecuniary losses which flow "directly and naturally" from discrimination are properly recoverable under "but for" causation principles: *Corr v IBC Vehicles Ltd* [2008] 1 AC 884. Such losses are recoverable even if the loss was not reasonably foreseeable: per Pill LJ at [37] in *Essa v Laing Ltd* [2004] ICR 746.

74. The 'eggshell skull' principle of the law of tort (delict) also applies in cases of unlawful discrimination: a discriminator must take their victim as they are: *Olayemi v Athena Medical Centre* [2016] ICR 1074.

75. Where it is satisfied that there is some prospect that a non-discriminatory course would have led to the same outcome an ET must reduce damages accordingly: *Abbey National plc and Hopkins v Chagger* [2009] ICR 624. A Tribunal must avoid incorporating another guise of unlawful and/or discriminatory conduct in the *Chagger* exercise. On the other hand any hypothetical exercise relating to future employment in the absence of discrimination must relate to the actual respondent employer not a "reasonable employer" *Abbey National Plc v Formoso* [1999] IRLR 222.

76. An employee's decision to resign may constitute a *novus actus interveniens* and break the chain of causation, notwithstanding the employer's earlier

discrimination: *Osei-Adjei v RM Education Ltd* (2013) UKEAT/0461/12. In that case however at the time of termination of employment the Claimant was fit to return to work, his job was open to him and all reasonable adjustments had been made or would be made.

77. A victim of unlawful discrimination may suffer stress and anxiety to the extent that psychiatric and/or physical injury can be attributed to the unlawful act. In that situation it has been confirmed that the employment tribunal has jurisdiction to award compensation, subject to the requirements of causation being satisfied, see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, [1999] ICR 1170, CA.

Apportionment

78. An ET should consider whether a particular part of suffering can be apportioned to the unlawful conduct: *BAE Systems (Operations) Ltd v Konczak* [2017] IRLR 893: This may include an award to reflect exacerbation or aggravation of a pre-existing injury. An ET is nonetheless entitled to include that discrimination which renders a vulnerable individual ill is truly indivisible (*Konczak*). The question of divisibility is a question of fact.

CONCLUSIONS

79. A number of the points raised in the Claimant's witness statement and also in the submissions document put forward on her behalf relate to what she has characterised as a "toxic environment" at the Respondent's workplace. She has continued to reiterate in her remedy evidence allegations that we have not found amounted to unlawful discrimination.

80. There is no liability in this case for a general "toxic environment", but only specifically a failure to make reasonable adjustments arising from the decision to appoint a different employee to the reservations team in October 2018. This was to address the disadvantage caused to her by standing duties which she was being asked to carry out.

81. We have not assessed any compensation on the basis that the workplace generally made her ill.

Medical evidence

82. Both parties have made criticisms of the jointly instructed expert.

83. Mr Northall suggests with regard to the addendum report that the expert Dr McEvedy has misunderstood the Tribunal's finding with regard to standing duties during her Careline role. We disagree. At [RB/471] we consider that the expert has correctly identified the situation found by the Tribunal i.e. that the Careline role was seated, but not protected and its occupant was being drafted into work on reception which required her to stand. We remind ourselves that at paragraph 270 of the liability decision the Claimant was

actually rostered on reception duties rather than Careline for three days. These were unambiguously standing duties, which was immediately followed by her going off sick.

84. We therefore consider that the expert in his addendum report has considered the correct factual matrix, and do not accept Mr Northall's submission that these conclusions need to be approached with caution.

85. A crucial opinion of Dr McEvedy is that the Claimant is out of work because of the absence of adjustment which has led to her current unfitness to work. Her current unfitness to work in his opinion is due to mood disorder (mixed anxiety and depression). Dr McEvedy is a consultant psychiatrist and a physician with appropriate expertise, which was scrutinised in earlier case management of the remedy part of this claim. We consider that he is an appropriate expert to comment on the Claimant's inability to work due to mental-health difficulties. We have the benefit of the report of Dr Marta Dias de Alemeida.

Injury to feeling

86. In respect of claims presented on or after 6 April 2019, the Vento bands are: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

87. The Claimant claims £45,000 (item 5, RB/428).

88. We consider the following factors in making a decision about injury to feeling.

89. We have considered the points put on behalf of the Respondent at paragraph 29 of Mr Northall's skeleton argument. We accept in particular that it can be said that the failure was not malicious.

90. We find that, contrary to the Respondent's position that this was a lower band case and that it is appropriate to make an award in the middle band.

91. On the other hand, this is not a case of a campaign of discriminatory harassment or anything like. It does not merit an award in the upper band.

92. The effect of the Respondent's breach is broader than simply not offering the Claimant an alternative role on a particular date. She had been made adjustments in her work, i.e. to work on the Careline and not standing work at reception. Having made this adjustment, there was a change of position by those managing the Claimant who was requested to do standing work at reception again. We accept that this was probably unintentional and caused by poor communication following a change of management. Nevertheless this was caused by a management failure. This was the situation which caused a substantial disadvantage and was a "U-turn" on adjustments that had been previously implemented. It was this disadvantage, which was an

ongoing state of affairs, that caused the requirement for reasonable adjustments to arise.

93. The practical effect on the Claimant was that she was no longer able to carry on doing the duties that she was being asked to do, and ultimately, although it did not end her "career" it did lead ultimately the end of her employment with the Respondent.

94. The Claimant repeatedly chased an occupational health appointment, which in our view was a reasonable and obvious step to be taken, and this was not implemented by the Respondent, in circumstances where it seems that the cost of this referral was a consideration. In our view our assessment of injury to feeling must take account of this element. The Claimant was reasonably chasing a resolution in an appropriate way. The Respondent failed to deal with it. In those circumstances we are not surprised that by January 2019 she had given up this positive approach of trying to seek resolution and instead submitted a grievance.

95. For these reasons we consider the injury to feeling in this case more substantial than has been advanced on behalf of the Respondent.

96. We find that the effect on the Claimant was aggravated by the Respondent's failure to deal with her reasonable requests that there should be a referral to occupational health. This is not an award of aggravated damages, but rather aggravating features which feed into our assessment of the appropriate level of injury to feeling awards.

97. We find that the appropriate award is somewhere in the middle of the middle Vento band. Taking account of our finding with regard to personal injury, given that there is inevitably some overlap, we find that the appropriate amount is **£15,000**.

Personal injury

98. The Claimant has claimed £56,000 for psychiatric injuries (item 6, RB/428).

99. The Claimant plainly had mental-health difficulties before the index incident of discrimination. She had a history of depression going back as far as 2014. There are multiple "stressors" including a dramatic event in October 2017, her deteriorating physical health in particular PCOS and fibromyalgia and her caring responsibilities. She plainly found the workplace stressful in particular following the change in her management in 2018. These factors do not sound in damages since they are not factors caused by an unlawful act.

100. Against that complex background, however we do find, based on the evidence of the jointly instructed medical expert, also supported by the report of the Dr Dias de Alemeida, that the Claimant has suffered an aggravation of her pre-existing "psychiatric" conditions (particularly anxiety and depression) as a result of being out of the workplace.

101. In our assessment the appropriate period to consider this aggravation injury is principally 9 December 2018 to March/April 2020, at which point she would have had to cease working and be furloughed in any event. This is a period of approximately 18 months during which we find she would have been in work but for the discriminatory omission.

102. We find that this is in to the Judicial College Guidelines Category 4(A)(c) *Moderate* suggesting an award in the range £5,500 to £17,900. We do not consider it falls into the category above (Moderately Severe) given that the narrative refers to permanent or long-standing disability. That is not this case which we find is aggravation of pre-existing conditions for a finite period for the reasons given above. We have also considered that there are other stressors and for this reason it does not follow that the entirety of the Claimant's ill-health in the period December 2018 to April 2020 can solely be laid at the door of the Respondent. This mitigates against an award at the upper end of the range.

103. Doing the best we can in what is inevitably a broad brush assessment we find that a figure of **£8,000** for general damages for personal injury is the appropriate award**.**

Medical treatment test and examinations

104. The Claimant claims £10,000 for "past medical treatments test and examinations", which is described as factoring medical insurance on £900 a year (item 7, RB/428).

105. We have not had evidence drawn to our attention to substantiate this claim. The burden is on the Claimant to prove her loss.

106. Dr McEvedy's evidence suggests that the Claimant requires graded rehabilitation. We have not been provided any evidence however of the cost of such rehabilitation. We work on the basis that the Claimant is entitled to future treatment either on the NHS or in equivalent state provided provision in Portugal.

107. In any event we do not have the evidence on which to make an award for private health provision.

Financial losses

108. The Claimant claims a basic award of £22,303.44 (item 1, RB/425) and a compensatory award (item 2, RB/426) of £1,302,950.

109. A basic award in concept is misconceived, since this is not a claim of unfair dismissal. However we have considered the differential between what the Claimant would have been paid but for discrimination and what she actually received in salary, sick pay and benefits.

110. We find on the balance of probabilities that had the Claimant been transferred to the reservation team in October 2018 she would have continued in employment until the events of the Covid-19 pandemic in late March 2020

onward. We find that this is consistent with the opinions of Dr McEvedy in his addendum report dated 8 September 2021, in particular his answers to questions 3 and 4.

111. We consider it likely on the balance of probabilities that she would have had some sick absences, but the absences caused by lower back pain as a result of carrying out standing duties would not be a feature of her absence, and bearing in mind the duty on the part of the Respondent to make reasonable adjustments in respect of absences connected to her disability, we do not find that the Claimant would have been dismissed under the Respondent's attendance management process.

112. At that time in autumn 2018 we find the Claimant was ambitious and well motivated. We find that she would have found this new role and the possibility of career progression a positive motivating factor. Given that she is an intelligent person who speaks multiple languages, we find it likely that this was an environment in which she would have performed well.

113. We do not find that there was an appreciable likelihood of the Claimant being dismissed at all before October 2020 and do not find it just or equitable to make a percentage deduction compensation to reflect this possibility.

Income 'but for' the discrimination: effect of Covid-19 & redundancy

114. We have had to consider the hypothetical situation of the Claimant taking a role in the reservations department and what would have occurred as a result of the Covid – 19 pandemic.

115. We accept the evidence of Ms Nicola Wilton the Respondent's HRBP at this remedy hearing, that as a member of the reservation team the Claimant would initially have been placed on the government furlough scheme on 80% of her income in March 2020.

116. We also accept that thereafter the Claimant would have been subject to a redundancy consultation in August 2020 as result of a reduction in size the reservation department caused by the very substantial reduction in travel to central London as a direct result of the Covid-19 pandemic.

117. The effect of the redundancy exercise was to reduce a team of one reservation manager with three team members to one reservation manager with one team member. The one team member who succeeded and retained their role through this exercise had 13 years' service with the Respondent and significant prior experience with guest services. She had leadership qualities and had helped to train and develop new team members. She had experience working at the Respondent's Hilton Park Lane hotel for 11 years

118. In the circumstances described by Ms Wilton, which we accept, we find that the Claimant would have been made redundant, due to the fact that she was competing against someone with substantially more experience and length of service and particular skills as set out by Ms Wilton in her statement.

119. We have considered that some allowance might have been made for the Claimant's disability, a point made by Ms Pankowski in cross examination. Indeed Ms Wilton confirmed that absences relating to disability would not count against the Claimant in that redundancy exercise. Given however that we accept Ms Wilton's evidence that there was one standout candidate with a high level of relevant experience, even making allowances for the Claimant's disability, we find that she would have been made redundant as other members of the reservation team were.

120. We have considered whether there was a possibility that the Claimant would have been the one successful non-managerial member of the reservations team not to be made redundant. In the circumstances we do not find that there was an meaningful likelihood of this and therefore it is not appropriate to attempt to factor in some possibility of the Claimant continuing in employment.

Mitigation of loss

121. We acknowledge the Respondent's doubts over the Claimant's conduct in 2019, specifically that she was in Portugal and working for her partner's business.

122. We find that the Claimant was in Portugal for a substantial part of 2019. In fact she explained this to the Respondent at the time during the grievance appeal process that it was aiding her recovery. We accept this. She was not well as other evidence suggests. The Claimant was somewhat vulnerable. Unfortunately for the Respondent the eggshell skull principle applies. We do not find it particularly surprising that the Claimant who was unwell wanted to be with her family in Portugal.

123. As to working for her partner's business, based on the bank statements we have evidence of payments being made by the Claimant to her partner and small payments being received by her from him. We have not come to the conclusion that these are anything other than amounts associated with a domestic partnership. We have not come to the conclusion that the Claimant was deriving substantial income from her partner's business, albeit that she may have been assisting him from time to time.

124. We have considered some of the message exchanged with friends which have been highlighted to us in this hearing. We detect a note of bravado in the Claimant's comments about the Respondent. She suggests that she has been looking for other work. We find that she was looking for other roles, but we do not find that this ever came to fruition. This seems to us to represent activity directed at mitigating her loss by trying to find another role. If, as it seems from one of these communications, the Claimant mentioned to prospective employers that she was having difficulties in the workplace, which dissuaded them from employing her, ultimately we do not find that this was her fault. She had been discriminated against.

Calculation of net wages lost

125. Calculating the Claimant's loss, we have adopted the detailed calculation contained within the respondent's counter schedule described as "Scenario B" which has been prepared based on a detailed calculation schedule provided by the Respondent's payroll function (RB/435). We prefer this calculation to that set out in the Claimant's updated schedule of loss, given that the latter uses gross figures, rather than net figures. This represents the net loss from hypothetical appointment to Reservation Agent Role until redundancy took effect with the termination date of 30 October 2020, following a period of furlough. The loss is £24,110.

126. From these sums must be deducted the benefits received by the Claimant. Based on the figures contained in the column 'MM Benefit' the table annexed to the Claimant's Updated Schedule of Loss (RB/431), she received £17,007.58 in benefits during the period April 2019 to October 2020.

127. We find therefore that the net financial loss to the Claimant is £24,110 *less* £17,007.58 which gives a net loss figure of **£7,102.42** for the period to the end of October 2020, which represents the end of the period of the Claimant's loss.

Pension loss

128. The Claimant claims £167,700 for loss of pension (item 3, RB/427). This substantially represents future loss, which does not apply based on our findings.

129. We accept the loss of pension contributions figure calculated by the Respondent (RB/436) in the sum of **£903.68**.

130. This represents loss up to October 2020. There is no further pension loss beyond this point.

Acas uplift

131. The Claimant has applied a 25% uplift in her schedule (narrative RB/425).

132. It is a fact that the grievance appeal process was not completed. Was this an unreasonable failure on the part of the Respondent? We have concluded that it was not.

133. The outstanding pay problem was addressed by the Respondent separately. There were practical problems caused by the Claimant being in Portugal. The Claimant wanted a recorded video hearing. We do not consider that the Respondent acting unreasonably in refusing to agree to this request.

134. It is unfortunate that the grievance appeal process foundered, but ultimately we have not concluded that this was due to the Respondent acting unreasonably. Accordingly we are not ordering that there be an ACAS uplift.

Interest

135. Interest on the injury to feeling award is calculated from mid October 2018 to the date of the remedy hearing as 8% x (1486/365 days) = £4,885.48.

136. Interest on all other compensation is calculated from the mid point between mid October 2018 and the date of the remedy hearing as 8% x (743/365 days) = £2,606.58.

Grossing up

137. This is claimed by the Claimant under the heading "payment to cover taxes that will be due".

138. The Claimant is in principle entitled to receive sums that would be taxed "grossed up" so that the net sum received by her is as we award.

139. In practice however it is unclear to us whether she will reach any appropriate tax threshold. The injury to feeling and psychiatric injury awards are not subject to tax, since these awards relate to matters before termination of employment and accordingly are not awards "on termination". The remaining awards are relatively small, the Claimant is not currently in employment.

140. In the event that the Respondent proposes to deduct tax from the award, it should gross up the sums such that the net amounts received by the Claimant comply with the Tribunal's order.

Heads of claim rejected by the Tribunal

141. The Claimant claims a figure of £1,302,950 for "obstructing career progression".

142. We have found in this case that there is no future loss, nor any loss beyond October 2020, when we accept she would have been made redundant even had there been no failure to make reasonable adjustments.

143. Accordingly compensation for future loss of the effect on the Claimant's future career does not apply.

Other heads of damage

144. The Claimant claims item (4) £3 million for "unlimited compensation for disability discrimination, failure to make reasonable adjustments" (RB/427) and (8) £1,312,500 for future treatment not covered by medical insurance (RB/428). It is claimed that this is to "keep her alive from the damages done to her health conditions whilst working for the Respondent" and by reference to not being employable in the future.

145. We have made an award for general damages for personal injury representing a period of aggravation caused in part by the requirement to work standing up and in part due to being out of her employment in the period 9 December 2018 to the dates in 2020, point at which we find she would have

been initially furloughed then dismissed by reason of redundancy in any event.

146. The Claimant has not proved her case on medical expenses.

147. In any event there is no ongoing loss which would give rise to an award for future medical expenses.

148. As to future employability, we do not find that the Claimant has established that she is prejudiced in the labour market as a result of the injury. She has received general damages for the aggravation of her symptoms for a restricted period for the reasons given.

149. We do not find that this loss or the effect of it goes into the future. We do not find that the Respondent is liable to compensate the Claimant for any losses stretching into the future.

150. It is to be hoped that the conclusion of this litigation will in itself remove a significant source of stress.

Legal costs

151. There is an allusion to legal costs in the Claimant's schedule of loss. We have not received a formal application for costs from either party. Costs do not follow the event as in other forms of litigation. It is not clear to the Tribunal that there is any basis for the Claimant to pursue costs under rule 76 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").

T. C. Adkin

Employment Judge Adkin

Date 15.11.21

WRITTEN REASONS SENT TO THE PARTIES ON

16/11/2021.

FOR THE TRIBUNAL OFFICE

Notes

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shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

Appendix 1 – Calculation of Benefits received by the Claimant for the period April 2019 to October 2020 (Source: column MM Benefit, Updated Schedule of Loss, RB/431)

724.45

448.44

680.40

664.07

280.94

408.35

141.38

575.01

198.65

146.20

1,011.37

375.95

292.40

368.95

146.20

146.20

146.20

392.03

146.20

372.89

403.92

348.00

425.25

1,049.90

1,049.90

1,049.90

1,049.90

814.83

1,049.90

1,049.90

1,049.90

17,007.58