



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr Faisal Abdi

**Respondent:** TC Facilities Management Ltd

**Heard at:** Cardiff (Hybrid) **On:** 2 November 2022

**Before:** Employment Judge R Brace

**Members:** Mr R Mead and Ms R Hartwell

**Representation**

**Claimant:** In person

**Respondent:** Mr Underwood (HR Consultant)

## REMEDY JUDGMENT

The unanimous decision of the Tribunal is that the Respondent is ordered to pay the following compensation to the Claimant as follows:

<b>Basic Award</b>	7 x £135.00	<b>£945.00</b>
<b>Compensatory Award</b>		
<b><i>Prescribed element</i></b>		
<b><i>Loss of wages to remedy judgment</i></b>		
Wages from 7 December 2020 to 10 January 2021 (6 weeks and 2 days)	6.4 x £135	£864.00
Plus average wages from 20 January 2021 to 2 November 2022 (93 weeks)	93 x £135.00	£12,555.00
<b><i>Total Prescribed Element</i></b>		<b>£13,419.00</b>
<b><i>Non Prescribed element</i></b>		
Future loss of earnings 2 November 2022 to 20 January 2023 (11 weeks 2 days)	11.3 x £135	£1,539.00

Loss of statutory rights		£500.00
Less Polkey reduction ACAS Code Contributory conduct	Nil	
<b>Total Non-Prescribed Element</b>		<b>£2,039</b>
Apply statutory cap (to prescribed and non prescribed element)		£7,020
<b>Total Unfair Dismissal</b>		<b>£7,965.00</b>
<b>Discrimination</b>		
Injury to feelings		<b>£18,000</b>
Interest on injury to feelings 833 days from 23 July 2020 to 2 November 2022 @8%		<b>£3,286.36</b>
<b>Total</b>		<b>£29,251.36</b>

### WRITTEN REASONS

1. This was a remedy hearing, following the liability hearing which had been heard over the course of four days on 25-28 July 2022 and where, following a chambers day for the Tribunal members on 16 August 2022, the reserved judgment had been finalised on 25 August 2022 and sent to the parties on 26 August 2022.
2. The remedy hearing was a hybrid hearing as the Claimant had presented with Covid-19 symptoms a few days prior and permission had been given for him to participate remotely by video (CVP). The Respondent's representative, the Tribunal and the clerk participated in person.
3. Directions for the remedy hearing had been given on 31 August 2022, which included directions for an additional Remedy Bundle and any additional witness statements relevant to remedy. The Tribunal therefore had before them a copy of the original hearing bundle and witness statements and, in addition, a remedy statement from the Claimant and a small Remedy Bundle of some 16 pages, which included the Claimant's remedy statement and schedule of loss. References to the Remedy Bundle in these written reasons are denoted by [RB ].
4. These written reasons were requested by the Respondent's representative after oral judgment had been given on the afternoon of the remedy hearing.

### Schedule of Loss

5. The Claimant's schedule of loss was based on a gross and net weekly pay of £135 per week, continuity of employment of 7 weeks and notice of 7 weeks. The Claimant had

included a sum for wrongful dismissal but he was reminded by the Tribunal that he had not brought such a claim.

6. The Claimant's schedule of losses included a compensatory award for unfair dismissal for past losses of £13,365 calculated as a 99 week period to the date of the remedy hearing, and future losses of a further 52 weeks of £7,020 on the basis that following the dismissal, the Claimant had felt suicidal, his health had deteriorated and that it would take him some time to find work again, more than the statutory cap of 52 weeks.
7. The Claimant claimed a 25% uplift for failure to comply with the provisions of ACAS Code of Practice and £20,000 plus interest for injury to feelings contending that he fell within the Middle Vento Band.
8. The figures for week's pay was accepted by the Respondent, as was the figure for the basic award.

### **The List of Issues**

9. The list of issues on remedy had been set out by Judge Brace at the case management preliminary hearing that had taken place on 7 October 2021.
10. At the outset of the hearing:
  - a. the Claimant confirmed that he was not seeing re-instatement or re-engagement as a remedy for his dismissal and was not seeking a recommendation as a remedy for his discrimination complaint; and
  - b. the Respondent confirmed that it was not seeking not argue that the Claimant could have mitigated his losses due to the evidence provided regarding the Claimant's health. Rather, that the Respondent should not be liable for the totality of the Claimant's financial losses and/or injury to feelings due to the Claimant's pre-existing conditions of PTSD, depression and anxiety.
11. The Respondent's representative was informed by the Tribunal that he was not being restricted by the Tribunal on what he could cross-examine the Claimant on, and reminded that if he did not challenge the Claimant's evidence on remedy, including mitigation, then he should be aware that the Tribunal may accept the Claimant's evidence.
12. The issues for determination at this remedy hearing were therefore agreed as follows:

### Remedy for unfair dismissal

- a. The Claimant does not wish to be reinstated to their previous employment or wish to be re-engaged to comparable employment or other suitable employment?
- b. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

- c. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.
- d. What should the terms of the re-engagement order be?
- e. If there is a compensatory award, how much should it be? The Tribunal will decide:
  - i. What financial losses has the dismissal caused the Claimant?
  - ii. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - iii. If not, for what period of loss should the Claimant be compensated?
  - iv. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - v. If so, should the Claimant's compensation be reduced? By how much?
  - vi. If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
  - vii. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
  - viii. Does the statutory cap of fifty-two weeks' pay or £86,519 apply?
- f. What basic award is payable to the Claimant, if any?
- g. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Remedy for discrimination or victimisation

- a. The Claimant is not seeking a recommendation.
- b. What financial losses has the discrimination caused the Claimant?
- c. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- d. If not, for what period of loss should the Claimant be compensated?
- e. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
- f. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
- g. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

- h. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- i. Did the Respondent or the Claimant unreasonably fail to comply with it?
- j. If so is it just and equitable to increase or decrease any award payable to the Claimant?
- k. By what proportion, up to 25%?
- l. Should interest be awarded? How much?

### **Findings of fact**

13. The Claimant was employed by the Respondent from 9 December 2013<sup>1</sup> until the termination of his employment on 20 January 2021<sup>2</sup>. The Claimant was 36 years' old at the date of termination of employment. He worked 15 hours per week and was paid the sum of £135 gross and £135 net per week.
14. The Respondent had conceded at the liability hearing, that only for the period from 19 October 2020 to 7 December 2020 had the Claimant been paid and that the Claimant had received no earnings from 7 December 2020 to the date of termination of employment on 20 January 2021, a period of 6 weeks and two days.
15. With regard to the Claimant's health, the Claimant has since the early 2000s, been diagnosed with chronic post traumatic stress disorder ("PTSD"), major depressive disorder, social anxiety and general anxiety disorder, for which he has received cognitive behaviour therapy and been prescribed anti-depressant medication from time to time.
16. This is not in dispute. It is accepted by the Respondent that the Claimant has lived for most of his adult life with those conditions after he had escaped civil war in Somalia in 2001.
17. Whilst the Claimant did have a period of time when he was off sick with stress at work in 2019, as reflected in the Fit notes provided in the liability bundle, no fit notes in respect of the Claimant's health in 2020, around the time of the events resulting in the discrimination, have been provided to this Tribunal.
18. The Claimant had been prescribed medication, including antidepressants from time to time since his diagnosis of PTSD and, for the purposes of this litigation we made the following findings based on balance of probabilities and on the evidence before us.
19. Focussing on the Claimant's more recent health the Claimant gave evidence, which was unchallenged and which this Tribunal accepted, that for the duration of his employment until around July 2020 his conditions, as described in §15 above, were stable. We also accepted that the Claimant enjoyed his job and that the routine of that role helped with his mental health.

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<sup>1</sup> §26 Liability Judgment

<sup>2</sup> §213 Liability Judgment

20. We have no records from the Claimant's GP prior to July 2020 but we accepted the Claimant's oral evidence, coupled with the documented evidence of prescribed medication as at July 2019 [RB14], that the Claimant had been on a dosage of Sertraline 50mg for a period of time from 2019 i.e. prior to the acts of discrimination. From our review of the GP records [174], we found that this dosage had been increased from 50mg to 100mg of Sertraline in September 2020.
21. When reviewing the GP records, it appears that the Claimant visited his GP regarding back problems in early 2020 but that there was no reference in the GP notes to any other issue that was troubling the Claimant at that time or none sufficient for the GP to make a note or record of it.
22. It appears that by 4 August 2020 the Claimant returned to his GP still complaining of back problems but that the Claimant reported no serious illness to his GP. The GP records reflect that on this date the Claimant told his GP that he felt well save for mental health, that he told his GP that his father had recently died and that he was anxious. He makes no reference at this time to work-related matters or again, none that the GP records.
23. The Tribunal noted that, for the first time within the GP records before us, in October 2020 the Claimant raised work related issues. It was noted the Claimant told his GP that he had been dismissed from work and the GP noted that the Claimant had indicated that he was feeling better.
24. Since 31 January 2021, Universal Credit has assessed the Claimant has having limited capability for work and work related activity and he has received PIP since April 2021 [RB9].
25. Notwithstanding the lack of reference to work-related matters within the GP notes, we did accept the Claimant's evidence, which was unchallenged by the Respondent's representative during cross-examination, that the discrimination that he had been subjected to has, over the two years since his dismissal, left him feeling hurt, extremely sad and betrayed. It has also led to him feeling 'ganged up' on leaving him, feeling distrusting of people in general and that he is now only willing to trust people in his close circle such as his cousin, his doctors and those who have assisted him in the local law centre.
26. We also accepted the Claimant's unchallenged evidence that when he is in shopping centres and sees managers speaking to staff, he has to leave and take himself away from that situation and sit back in his car, when he feels himself having a panic attack.
27. The Claimant had also given evidence however that the discrimination had led to him feeling suicidal. It was difficult on the evidence before the Tribunal to wholly apportion those feelings to the discriminatory acts of the Respondent however.
28. The notes do not reflect that the Claimant raised suicidal ideation with the GP in 2020 or 2021, or that he had told his GP that he had made suicide attempts at that time. For the avoidance of doubt, at no time do the records indicate that the Claimant attempted

suicide. This is not surprising as the Claimant confirmed in live evidence that he had not disclosed this to his GP.

29. Indeed by December 2020, the Claimant was denying to his GP thoughts of self harm and suicide. The notes reflect that this was repeated in February 2021, when the Claimant reported to his GP that he had been unable to work due to anxiety and to '*multiple bereavements*'.
30. The medical evidence subsequent to the period covered by the GP notes in the Bundle, however does reflect that the Claimant has very sadly suffered from suicidal ideation since. Whilst the Claimant's evidence was that this was because of the discrimination, in January 2022 the Claimant's GP, Dr Lane [RB 10] had written confirming that the Claimant had experienced some very traumatic and tragic events that had affected both him and his family and that he continued to have memories of the Civil War and the impact it had on him and his family. He continued that that '*At times he found his stress and anxiety difficult to cope with. Symptoms can include suicidal thoughts*'.
31. The letter made no reference to discrimination suffered by the Claimant or indeed referenced work-related issues at all.
32. The Tribunal also considered it significant that on 26 July 2020 the Claimant's father had passed away in Somalia, coming just days after the Claimant had been suspended by Ashley Creel on 23 July 2020. The Claimant also spoke of his father's death in his disability impact statement [171-172], when the Claimant spoke of suicidal tendencies linked with his depression which had been exacerbated when his parents passed away in 2020, causing him to self harm and attempt suicide. He makes no reference to the discrimination.
33. The Claimant had also given live evidence during the liability hearing on cross examination, in the context of why he had not given the Respondent further examples of discriminatory comments. He had responded on two occasions that it was because he felt suicidal due his father's death. He did not refer to work-related issues. Further, in this remedy hearing, in response to questions as to why he had not raised suicide attempts with his GP, his first response was that he was in a 'bad state' and 'stressed' because he had just lost his father, before then indicating that it was also because of the discrimination.
34. The Tribunal therefore did not conclude that the Claimant's suicidal ideation was caused by the discrimination. Rather, the Tribunal concluded that the Claimant's suicidal ideation was caused by his traumatic past, existing health conditions and, in July 2020, the death of his father and that the discrimination at best, could only be said to have exacerbated the Claimant's existing injury, an injury caused by those non-work related reasons. We did not consider that it materially contributed to the Claimant's suicidal ideation.

### **Submissions**

35. The Respondent submitted that the financial losses claimed were unreasonable and that the Claimant should receive no more than 6 months' loss of earnings; that whilst it was not disputed that the Claimant's mental health was severe, that it was not fair

for the Respondent to be responsible for all the Claimant's losses, that what should be awarded was a fair and proportionate blame for the length of time that the Claimant had been off work.

36. The Tribunal was reminded that the Claimant had not been found to have been dismissed because of race and it was submitted that any compensatory award should be capped in any event, to unfair dismissal compensation of one year's loss of salary.
37. With regard to injury to feelings, the Respondent's representative focussed on lack of intent to discriminate and asked the Tribunal to consider an award for injury to feelings in the lower half of the bottom band of Vento.
38. The Claimant submitted that he has suffered deep depression and anxiety after the treatment from the Respondent and that he still was traumatised by the discrimination. He submitted that the dismissal and discrimination had left him distrusting of people in general and that his schedule of loss was accurate, that he would not have left his job with the Respondent in this way.

### **Issues on remedy and the law**

#### Unfair dismissal

39. For the purposes of unfair dismissal compensation, section 123 of the Employment Rights Act 1996 provides:
  - (1) Subject to the provisions of this section and sections 124 and 124A, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
  - (2) The loss referred to in subsection (1) shall be taken to include—
    - a. any expenses reasonably incurred by the complainant in consequence of the dismissal, and
    - b. subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
  - (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
40. In **Scope v. Thornett [2007] IRLR 155** the Court of Appeal guides us as to our need to engage in a certain amount of speculation in the appropriate circumstances in the words of Pill LJ at paragraph 34:

*“The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the*



*contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account.”*

41. And at paragraph 36

*“The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation.”*

42. The guidance on consideration of chance in the context of an unfair dismissal claim is summarised in and principles emerge from **Software 2000 Ltd v Andrews & Ors [2007] ICR 895** in that in assessing compensation ‘*the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal*’.

43. The Claimant must prove loss; the Respondent must establish a failure to mitigate loss.

#### Discrimination

44. The Tribunal’s powers in relation to remedy in a discrimination claim is set out in s.124 Equality Act 2010 which provides as follows:

The tribunal may

- a. make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate
- b. order the respondent to pay compensation to the complainant;
- c. make an appropriate recommendation.

45. An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate

46. The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

47. Any recommendations we make should be practicable and should be capable of being implemented and for that to be assessed.
48. Further, s.119 Equality Act 2010 confirms that compensation is awarded on a tortious basis and may include compensation for injured feelings. That is, so far as possible to put the Claimant into the position that he would have been had the act of discrimination not occurred (**Ministry of Defence v Cannock [1984] IRLR 509, De Souza v Vinci Construction UK Ltd [2017] EWCA Civ 879.** )
49. Financial compensation for discrimination is uncapped but the Tribunal is required to consider the question of the Claimant's loss.
50. In terms of injury to feelings in respect of the discrimination claim, the onus is on the Claimant to establish the nature and extent of the injury and guidance has been given in **Vento v Chief Constable of West Yorkshire Police (No2)** 2003 ICRR 318 CA which identifies three bands which have subsequently been updated to reflect inflation.
51. The Court of Appeal have confirmed that there is considerable flexibility within each band, allowing Tribunals to fix what they consider to be fair and reasonable and adjust compensation in the particular circumstances of the case. We are also reminded that an award for injury to feelings is intended to compensate for hurt and humiliation suffered by the Claimant and not on the seriousness of the discrimination.
52. **Hatton v Sutherland** [2002] ICR 613 **BAE Systems (Operations) Ltd v Konczak** [2017] IRLR 893 are relevant with regard to cause and material contribution to harm suffered.
53. Finally, as a Tribunal we are obligated to consider in interest on such awards and to state why an award has not been made even if the parties do not draw our attention to it.

### **Conclusions**

#### *Unfair Dismissal Basic Award*

54. We awarded the Claimant a Basic Award based on calculation of gross week's pay as defined in s.220 to s.229 Employment Rights Act 1996 capped at £135 and a multiplier of 7 applied (which was also agreed between the parties to be the appropriate multiplier) taking into account the Claimant's age at termination (36) and length of service (7 years).
55. The Basic Award is therefore calculated at **£945**.

#### *Unfair Dismissal Compensatory Award*

56. We concluded that it was just and equitable to award the Claimant a compensatory award for his unfair dismissal based on loss of earnings calculated at the rate of net pay of £135 per week (as claimed by the Claimant).

57. The Claimant has demonstrated his losses and we need to consider what losses we consider is reasonable to award and attributable to the dismissal. We accept, as the Respondent has conceded, that the Claimant has been unable to get another job to date. The Respondent has to take the Claimant as they find him, which is a vulnerable individual who has been unable to mitigate his losses to date due to his health condition. He is currently undergoing high intensity psychological therapy which started in September 2022.
58. Taking into account that this litigation after today is behind him and that such therapy is more likely than not going to be beneficial to the Claimant's health and enable him to return to work in some capacity, we considered it just and equitable to award the Claimant an amount for loss of earnings to date, together with future losses to the date that such therapy would likely end, which we would assess to be a further period of time to the two year anniversary of the Claimant's dismissal in January 2020. This would amount to 2 years loss of earnings.
59. We also award the Claimant the sum of £500 for loss of statutory rights and for the loss of earnings in respect of the nil pay received by the Claimant from December 2020 to the termination of his employment on 20 January 2021.
60. No submissions were made that there was a chance that the Claimant would have been fairly dismissed or that the compensation should be reduced by reason of contributory conduct (to the basic or compensatory award,) and we did not conclude that there should be any such reductions in any event.
61. However applying the statutory cap of one year this would reduce the financial losses awarded to the Claimant by way of compensation for financial loss to **£7,020**.

*Discrimination*

62. We make no recommendation and made an award of compensation only.
63. With regard to any financial losses in respect of discrimination, we do not conclude that the discrimination has caused the Claimant financial losses. Rather the unfair dismissal, which the Tribunal did not conclude was also discriminatory has caused the Claimant the financial losses. No further award for financial losses is therefore made.
64. In terms of injury to feelings, we repeat our findings at §25 and 26 of these written reasons and repeated that we accepted that the Claimant felt hurt, extremely sad and felt betrayed and felt ganged up on and bullied, feeling distrustful and upset, particularly when witnessing workplace interaction for others.
65. We took into account the length of time from the suspension, from July 2020 to the eventual termination of the Claimant on 20 January 2021, when the Claimant's concerns were repeatedly ignored, an extended period of hurt for the Claimant.
66. The Tribunal accepted that these were the injured feelings that the Claimant suffered as a result of discrimination and he continues to feel some 27 months after his suspension in July 2020.

67. We concluded that those feelings related to the discrimination and that in itself the Tribunal considered would place the Claimant in the middle band of Vento.
68. The more difficult issue is with the Claimant's suicidal ideation: whether the Claimant felt like that because of his discrimination or his personal circumstances including the death of his family and his own general well-being.
69. Whilst suicidal ideation and any attempts at suicide as a result of those feelings would put the Claimant in the more serious category of injury to feelings, possibly even top band of Vento, we are concerned that the evidence before us was that the Claimant had suicidal ideation as a result of his personal trauma including the death of his father, although we did conclude that the discrimination would more likely than not have exacerbated the Claimant's conditions.
70. In those circumstances we considered than an award of **£18,000**, in the middle of the middle Vento band, was appropriate in this case.

*ACAS Uplift*

71. In relation to the ACAS uplift, we did not hear any submissions on why we should uplift the award and we did not consider that there was anything in our findings which would have justified an increase in the award.

*Interest*

72. We have calculated and added interest on the Claimant's compensation running from the date of the Claimant's suspension on 23 July 2020. The period from 23 July 2020 to 2 November 2022 is 833 days

$$£18,000 \times 0.08 \times 833 \times 1/365 = \mathbf{£3,386.36}$$

*Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance, universal credit and Income Support*

73. The Tribunal has awarded compensation to the Claimant but not all of it should be paid immediately. This is because the Department for Work and Pensions ("") has the right to recover (recoup) any Jobseeker's Allowance, income-related Employment and Support Allowance, universal credit or Income Support which it paid to the claimant after dismissal. This will be done by way of a Recoupment Notice which will be sent to the respondent usually within 21 days after the tribunal's judgment was sent to the parties.
74. The Tribunal's judgment states the total monetary award made to the Claimant and the amount called the prescribed element. Only the prescribed element is affected by the recoupment Notice and that part of the tribunal's award should not be paid until the recoupment Notice has been received.
75. The difference between the monetary award and the prescribed element is payable by the Respondent to the Claimant immediately.

76. When the DWP sends the recoupment Notice, the Respondent must pay the amount specified in the Notice by the department. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the Respondent must pay the balance to the Claimant. If the Department informs the Respondent that it does not intend to issue a Recoupment Notice, the Respondent must immediately pay the whole of the prescribed element to the Claimant. The Claimant will receive a copy of the Recoupment Notice from the DWP. If the Claimant disputes the amount in the Recoupment Notice, the Claimant must inform the DWP in writing within 21 days. The Tribunal has no power to resolve such disputes which must be resolved directly between the Claimant and the DWP.

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Employment Judge Brace  
Dated: 7 November 2022

JUDGMENT SENT TO THE PARTIES  
ON 8 November 2022

FOR THE SECRETARY OF  
EMPLOYMENT TRIBUNALS  
Mr N Roche