EMPLOYMENT TRIBUNALS

Claimant: Mrs V Nimoni

Respondent: London Borough of Croydon

Heard at: **London South Employment Tribunal**

On: **21-23 November 2022**

Before: **Employment Judge Ferguson**

Members: **Mr M Cann**
Ms N Murphy

Representation
Claimant: Ms F Nimoni (Claimant's daughter, lay representative)
Respondent: Mr D Green (counsel)

INTERIM REMEDY JUDGMENT having been sent to the parties on ***6/12/22*** 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

INTRODUCTION

1. This remedy hearing took place before a differently-constituted Tribunal panel to the one that dealt with the liability hearing because Employment Judge Hyams-Parish had been appointed as a Circuit Judge in the interim.

2. In a Reserved Judgment sent to the parties on 17 January 2022, the Tribunal (Employment Judge Hyams-Parish, Ms E Thompson and Mr C Wilby) upheld the Claimant's complaints of unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments. It also found that the compensation awarded to the Claimant should be reduced by 20% on the grounds of contributory fault. Complaints of harassment and indirect discrimination were dismissed.

3. A remedy hearing was listed on 1 June 2022 before the original panel but it was adjourned because the Claimant had been diagnosed with pancreatic cancer in May 2022 and medical evidence about her prognosis was required because it was relevant to her claims for future loss of earnings and pension loss.

4. In preparation for the hearing before us on 21-23 November 2022 the parties obtained an oncology report from a Single Joint Expert, Dr Falk. The report was pessimistic about the Claimant's prognosis and life expectancy. Dr Falk's conclusions were based on his view that the Claimant would not, "on the balance of probabilities", be a candidate for surgery. During submissions on the second day of the remedy hearing it materialised that the Claimant had very recently had a scan that was likely to have a significant bearing on the question of surgery. The Claimant applied to adjourn all issues relating to future loss of earnings and pension loss until further medical evidence could be obtained. The application was not opposed and we granted it.

5. This judgment is therefore limited to all heads of loss relating to the period up to the date of the judgment (23 November 2022). Issues relating to losses after that date and pension loss were adjourned to a further hearing on 27-28 February 2023 and directions were given for further medical evidence. The parties were encouraged to attempt to resolve the remaining heads of loss without the need for a further hearing.

6. The Claimant has been represented throughout by her daughter, whose professionalism and dignity in these unbelievably difficult circumstances has been commendable.

BASIC AWARD FOR UNFAIR DISMISSAL

7. The basic award was agreed at £2,675.40 less 20% for contributory fault: **£2,140.32**.

COMPENSATION FOR DISCRIMINATION

8. The Tribunal found the Claimant's dismissal on 16 August 2019 amounted to discrimination arising from disability and that the Respondent failed to make reasonable adjustments by, among other things, failing to move the Claimant into a vacant Grade 4 administrative role and failing to provide her with the necessary training for any such role.

<u>Loss of earnings to date</u>

9. The Claimant is now 60 years old. She has not worked since her dismissal and claims loss of earnings to the date on which she would have retired, in May 2029.

10. The Respondent's primary argument is that the Claimant cannot recover loss of earnings for the whole of that period because she would have "been required to leave" the Respondent's employment in any event by April 2020 because of her various physical health problems. It is not in dispute that the Claimant suffered a number of different physical medical issues in the period from shortly before her dismissal until April 2020. It had been suggested by the Claimant

that her physical health issues were caused by the stress she was under as a result of the discrimination by the Respondent. That was not pursued in submissions by the Claimant's daughter, who accepted there was no medical evidence for such a finding, and we do not make any finding that the Respondent's conduct caused or contributed to the Claimant's physical health problems.

11. In April 2019 the Claimant had a transient ischaemic attack ("TIA" or mini-stroke) that required her to take two months off work. She returned to work thereafter but her health continued to be monitored and she had a number of medical appointments in the year that followed. The appointments the Claimant had relating to cardiac problems or hypertension, in October and November 2019 and February 2020, were not in response to any medical emergency. They were effectively follow-up investigations following the TIA.

12. The episode in February or March 2020, when the Claimant had another suspected TIA, was serious enough for her to attend A&E. Follow-up investigations were not conclusive about whether it was a TIA, but there is no evidence of it having had a longer term impact on her ability to work than the first TIA.

13. The Claimant attended her GP with worrying symptoms in April 2020 but again there was nothing to suggest that these were long-term and not manageable through treatment or adjustment to her current medication.

14. We note that in May 2022, when the Claimant was diagnosed with pancreatic cancer, the hospital records state that was "medically very well otherwise". There is no suggestion that the symptoms of the cancer itself, rather than the treatment for it, would have affected the Claimant's ability to work.

15. We also take account of our own observations of the Claimant's presentation during the hearing. We note that she has attended every day of both the liability and remedy hearings. She did not require any adjustments for any physical health issues and there was nothing that would suggest she was physically unwell.

16. We accept that the Claimant would have had some sickness absence as a result of the cardiac and neurological issues, but none of them either alone or cumulatively amounted to a long-term incapacity to work. There is nothing to suggest she would have been off sick for a lengthy period except possibly in February and March 2020, but we do not accept the absence would have been for more than two months. The Claimant was entitled to sick pay of full pay for 6 months and half pay for 6 months in any 12-month period. We have also heard from the Claimant how keen she was to keep her job at Croydon. She was very dependent on her job. We do not accept she would have left her role voluntarily before today's date because of any physical health issues.

17. Nor has the Respondent established that the Claimant would have been fairly dismissed on capability grounds at any stage before today's date. The Tribunal has already found in its liability judgment that there was no basis for a *Polkey* deduction. The liability hearing took place in September 2021, more than two years after the Claimant's dismissal, so it would have been open to the

Respondent to argue that the Claimant would have been dismissed on health grounds within a certain period after her dismissal and before the hearing. The issue cannot be reopened at the remedy hearing. Even if the Respondent were permitted to pursue this argument, we are not satisfied that the Claimant's absences would have justified a fair dismissal on capability grounds.

Mitigation

18. In the alternative the Respondent argues that the Claimant was well enough to work after her dismissal and she failed to mitigate her losses. It is not in dispute that the Claimant did not apply for any other jobs until January 2021.

19. In Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498, the EAT said that where there is a substantial issue as to failure to mitigate, an employment tribunal should ask itself:

    19.1. what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;

    19.2. whether the claimant did take reasonable steps to mitigate loss; and

    19.3. to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.

    While these three questions are logically distinct, they are linked, and the evidence that bears upon them overlaps. The burden of proof is on the employer in respect of all three.

20. We have considered the evidence of Dr Chereji, the jointly instructed psychologist. It is not in dispute that the Claimant is currently unfit to work because of her mental health issues.

21. Dr Chereji says:

    "7.1.3 Mrs Nimoni has been struggling with pervasive low mood following the dismissal from work. The symptoms of depression had a gradual onset since her return to work after a period of sick leave following the work accident in 2016. The main determining factors at that time were exposure to a work environment that she describes as isolating and hostile towards her, anxiety to express her concerns to the management, lack of control over her role, ongoing uncertainty regarding her role. The catalyst has been the dismissal from work in 2019, which she perceived as a significant loss both for financial and self-identity reasons. Therefore, Mrs Nimoni's episodes of depression have become more of a recurrent nature. They can last for more than two weeks, and she have days when her mood can pick up.

    …

    7.6.1 It is hard to separate the depression triggered by her current health situation from the depression triggered by the work

situation. Mrs Nimoni is trying to separate them as she feels more in control of her illness by doing the right medical treatments. In my view, her physical health condition is a secondary trigger that has intensified the symptoms of the existing depressive mood. Mrs Nimoni's existing thinking processes are related to hopelessness and helplessness for her health. She worries for the general impact it has on her family and the prognosis of the treatment, she doubts her ability to work and lacks perspective for future in career, she experiences loss of self-identity and purpose through work. All these could be important factors in determining the reoccurrence of depression in the future. They also reflect Mrs Nimoni's lack of readiness and confidence to apply for another job in the foreseeable future.

7.6.2. In my view it is difficult to state that a full recovery will be possible, mainly in the context of a chronic illness which could anyway impinge on her ability to return to work until full recovery or partial remission of illness can be achieved from a medical perspective. As the oncological report says, "typically 50%" of people can return to work within 6 weeks from treatment, depending on the physical symptoms they experience.

…

7.14.1 In paragraph 7.6. I have laid out some of the contributing factors to the exacerbation of Mrs Nimoni's depressive symptoms between 2019 and present. There has been a cumulative effect of the adverse events on Mr Nimoni's mental health difficulties."

22. Dr Chereji does not specify whether the Claimant was too unwell to work or apply for jobs in the whole period from August 2019 to the date of her report, but there is no indication that the Claimant's condition significantly worsened during that period, and as noted above she is currently unfit to work or apply for work. We also take account of the Claimant's own evidence about her mental state during this period. In her witness statement for the remedy hearing, she described her mental state after her dismissal as follows:

> "I lacked motivation to do anything and I was in a deep state of depression. I couldn't even muster the energy and the motivation to apply for benefits, let alone apply for jobs. My self-esteem was crushed after being unfairly dismissed and being treated unfavourably because of something arising in consequence of my disability."

23. The Claimant said in her oral evidence that her daughter and husband were concerned because it got to the stage where she did not even want to wash or dress. They therefore persuaded her to start applying for jobs because they thought it might help her to feel better. We note that the Claimant was in receipt of Job Seekers Allowance for six months before she started applying for jobs which suggests she was, or ought to have been, able to seek work sooner, but the Claimant's daughter explained that because of the pandemic she had no regular reviews with the Job Centre and in reality the Claimant was not well

enough to look for work. She was assessed as unfit to work by the DWP in March 2022.

24. In light of that evidence, together with Dr Chereji's report, we do not accept the Claimant failed to take reasonable steps to mitigate her losses to date.

25. Even if the Claimant had been well enough to apply for jobs between August 2019 and January 2021, we are not satisfied that she would have been successful in finding any other work. She had not been successful in finding redeployment within the Respondent, who considered her unsuitable for any administrative role, and when she did apply for work in early 2021, she made around 40 applications and was only invited to two interviews which were both unsuccessful. We note that the Tribunal found that it would have been a reasonable adjustment to provide training to the Claimant to help her into a new administrative role. The Claimant would not have had that opportunity from any new employer.

26. The Claimant is therefore entitled to compensation in full for her loss of earnings to today's date, subject to the 20% deduction for contributory fault.

27. Calculation of the loss of earnings is not disputed:

    Loss of earnings to date: £19,303 net annual pay x 3.27 years = £63,120.81
    Less benefits received (£11,335.81) = £51,785
    Less 20% = **£41,428**

Personal injury/ Injury to feelings

28. It is not in dispute that the Claimant has suffered psychiatric injury as a result of the discrimination for which she is entitled to damages. Nor is it in dispute that she suffered hurt feelings. There is some dispute, however, as to the appropriate level of compensation for both pain, suffering and loss of amenity ("PSLA") and injury to feelings, and as to whether the amount should be reduced on the basis that some of the factors that caused the injury were not acts of discrimination.

29. There is almost complete overlap in this case between PSLA and injury to feelings and we consider it appropriate, to avoid double recovery, to award a global figure for injury to feelings that includes damages for PSLA.

30. The applicable Vento brackets 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);
- an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

31. As for PSLA, the Judicial College Guidelines (16th Edition) provide, so far as relevant:

Chapter 4 - Psychiatric and Psychological Damage

Section (A) - Psychiatric Damage Generally
The factors to be taken into account in valuing claims of this nature are as follows:

(i) the injured person's ability to cope with life, education, and work;
(ii) the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;
(iii) the extent to which treatment would be successful;
(iv) future vulnerability;
(v) prognosis;
(vi) whether medical help has been sought.

(a) Severe
In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor.

£54,830 to £115,730

(b) Moderately Severe
In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases involving psychiatric injury following a negligent stillbirth or the traumatic birth of a child will often fall within this bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.

£19,070 to £54,830

(c) Moderate
While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.
Cases of work-related stress may fall within this category if symptoms are not prolonged.

£5,860 to £19,070

(d) Less Severe
The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter.

£1,540 to £5,860

32. The Claimant's witness evidence about the extent of the impact on her was not challenged. We have considered the factors in the Judicial College Guidelines as follows:

    32.1. *The injured person's ability to cope with life, education, and work*. This was severely affected. The Claimant is unfit for work as a result of her psychiatric injury. As for her ability to cope with life, it is not in dispute that the Claimant expressed suicidal thoughts at one stage in November

2018. While this was triggered by the appointment of a more junior colleague to a role she had applied for, which the Tribunal (at the liability hearing) did not accept should have been offered to the Claimant, the agreed statement of facts for the liability hearing recorded that the first aider was called on that occasion because the Claimant became distressed "at the prospect of being dismissed". We therefore accept that this particular symptom was, at least in part, caused by the discrimination.

32.2. *The effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact*. Dr Chereji's report records a substantial effect on the Claimant's social life.

32.3. *The extent to which treatment would be successful*. Dr Chereji says the following:

> "7.11 Yes, with appropriate psychological intervention of counselling for depression or CBT for depression she could return to work as soon as the client and her clinician would agree it was the right time. Returning to work is the purpose of any psychological intervention as it gives the individual a purpose and meaning for living, which would contribute to their mental health recovery. It is an essential part of the intervention to ensure the global functioning of the individual is being achieved by the end of therapy."

32.4. *Future vulnerability*. This is an issue in the Claimant's case because Dr Chereji has explained that the Claimant's mental health has been affected by her physical health problems, and the Claimant is now having to deal with a life-changing diagnosis for which she is also receiving counselling.

32.5. *Prognosis*. Dr Chereji has not given a clear opinion on the prognosis but there is no doubt that this is a long term condition; she says the Claimant could achieve recovery "before 2029". The condition is not, however, considered to be permanent.

32.6. *Whether medical help has been sought*. The Claimant has not sought any medical help for her mental health issues.

33. We are satisfied that this falls within the category of "moderately severe", but it is not a permanent disability. It is at the lower end of the bracket.

34. Looking at the Vento bands, given the level of the Claimant's psychiatric injury, the length of time she was subjected to a process that led to her dismissal, which the Tribunal found to be discriminatory, and the fact that dismissal is inevitably a very significant event, especially for a person of the Claimant's age, we are satisfied that a global award in the upper bracket is appropriate. It is not the most serious discrimination, or the most severe effect, that we can envisage. But it is serious enough to be in the middle of the upper bracket. The mid-point between £26,300 and £44,000 is £35,150. That is the award we make for injury to feelings, to include damages for PSLA.

<u>Apportionment</u>

35. The Respondent argues that both the Vento and the PSLA award should be apportioned 50/50 between tortious and non-tortious loss. The Respondent points to a number of "triggers for the Claimant's current state of mind" that are not tortious conduct on the part of the Respondent. These include the Claimant's original accident in 2016, the episode on 22 November 2018 when she felt suicidal and events during the Tribunal proceedings. The Respondent also points to Dr Chereji's reference to the impact of a work environment that the Claimant considered to be "isolating and hostile", which was not the basis on which the Claimant succeeded in her claim.

36. The leading authority on apportionment is this type of case is BAE Systems (Operations) Ltd v Konczak [2018] ICR 1. Underhill LJ, giving the leading judgment with which the other justices agreed, said the following:

> "71. What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.
>
> 72. That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is "indivisible": if it was suffered as a result of two torts, each tortfeasor is liable for the whole, and any question of the relative degree of "causative potency" (or culpability) is relevant only to contribution under the 1978 Act. It is less easy in the case of psychiatric harm. The message of *Hatton* is that such harm may well be divisible. In *Rahman* the exercise was made easier by the fact (see para. 57 above) that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of the aggravation. The most difficult type of case is that posited by Smith LJ in her article, and which she indeed treats, rightly or wrongly, as the most typical: that is where "the claimant will have cracked up quite suddenly, tipped over from being under stress into being ill". On my understanding of *Rahman* and *Hatton*, even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury –

> though, importantly, if (as Smith LJ says will be typically the case) the claimant has a vulnerable personality, a discount may be required in accordance with proposition 16."

37. This is not a case where, as in Rahman v Arearose Ltd [2001] QB 351, the medical report distinguishes between different elements in the Claimant's overall condition and their causes. Dr Chereji's report at paragraph 7.1.3 (see above) identifies a number of causes without attributing specific harms to them.

38. The work accident in 2016 is what started the Claimant's depressive symptoms and they had a "gradual onset" from that date onwards. The Claimant also does not dispute that the events she relied upon as harassment in her claim, which did not succeed, had a very significant impact on her mental health.

39. We have considered carefully whether any rational apportionment is possible on the medical evidence. We found this very difficult given the way in which Dr Chereji's report is expressed. We do not criticise Dr Chereji for this. Somewhat inexplicably, she was not asked to address the question of whether, or to what extent, the Claimant's psychiatric illness was caused by the acts of discrimination. This is not a case where we could clearly say that the Claimant had a pre-existing condition that was exacerbated by the acts of discrimination. We do think, however, that it is a fair reading of the report that the Claimant was already suffering from depression to some extent before the acts of discrimination, but the dismissal, as the "catalyst", was by far the most significant cause of her current depressive illness. We consider that that provides a rational basis to reduce the award to the Claimant by 20%, i.e. in effect, 80% of her depressive illness was caused by the events leading up to her dismissal and the dismissal itself.

40. As for the matters which the Claimant complained of and did not succeed in the Tribunal, although we accept that those were causative factors, there is no rational basis on which we could divide the *harm* to the Claimant, as opposed to the causative contribution. It is clear from Konzcak that it is only the divisibility of the *harm* that can lead to apportionment of damages. We only have Dr Chereji's report to go on. There is no basis on which we could say that any particular part of the Claimant's illness was caused by discriminatory or non-discriminatory conduct.

41. We therefore award the Claimant 80% of the amount we have assessed for injury to feelings (including personal injury):

> 80% of £35,150 = £28,120
> Less 20% for contributory fault = **£22,496**

ACAS uplift

42. The Claimant says we should apply an uplift to the compensatory award because the Respondent unreasonably failed to comply with the ACAS Code by failing to respond to a grievance she submitted on 4 July 2019.

43. The document she relies on is an email sent to Steve Iles, who was conducting her final capability hearing, copied to various other managers, which read:

> "Dear Steve,
>
> I hope this email find you well.
> It was my pleasure meeting you yesterday, I just I wish it was in different circumstances.
>
> Please, would you be so kind to send me the notes from the Final Attendance Review Meeting held on 2nd Jul '19.
>
> Also, just for your information, the Travel Training Team gathered for prearranged Team Meeting on 3rd Jul '19 at 10am and I wasn't informed. I wonder if there is reason for this exclusion. I think I deserve an explanation. I have asked Monica Clarke (Team Manager) why I wasn't invited to the team meeting. She answered that 'it wasn't an important meeting'. 'Don't you think that I deserve to be part of the Team? I am deeply concerned about management behaviour towards me. Just to clarify, I returned to work on 17th Jun '19 and that was enough time to inform me about any plans and meetings. Yet again, I was left excluded and isolated by my own team.
>
> This situation makes me extremely sad.
>
> After all I am a Croydon Council employee and I deserve be treated equally Not only have management failed with their duty of care for three years but I am being ignored and isolated to the extent that my fellow colleagues can only approach me to talk to me only when managers are away from their desks.
> This situation puts enormous pressure on my physical and mental health."

44. The Claimant now seeks to argue that the "duty of care for three years" and the "situation" referred to in the final paragraph related to the Claimant's possible dismissal, and this was therefore a grievance about the matters on which she succeeded in the Tribunal.

45. We do not accept that. We consider that on any natural reading of the email the Claimant was seeking to raise two issues: her exclusion from a team meeting, and the fact that she was being "ignored and isolated". Neither of those matters were found to be acts of discrimination.

46. Even if we were wrong about that, we do not consider this is a case where the Respondent could be said to have unreasonably failed to comply with the Code. It is not in dispute that the Respondent did not respond to the email. The Respondent accepts that was regrettable. The duties under the Code only arise, however, where the employee raises a formal grievance. Paragraph 32 of the Code states:

> "If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a

manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance."

47. The Claimant accepted she was aware of the Respondent's grievance procedure, and had previously raised a grievance via her union representative. The Respondent's procedure provides for informal resolution of complaints before the formal route would be taken. There is nothing in the email to indicate that the Claimant intended this to be a formal grievance under the policy. The duties under the Code either did not apply, or it was not unreasonable for the Respondent not to have treated this is as a formal grievance.

48. We therefore do not award any uplift.

TOTALS

Basic award
£2,140.32

Compensatory award to date of judgment (23 November 2022)
Loss of statutory rights: £250
Loss of earnings to date: £51,785
Injury to feelings: £28,120
= £80,155
Less 20% contributory fault = **£64,124**

Interest on compensatory award
The Claimant argued that interest should run from the first act of discrimination, which occurred on 30 October 2018. We do not agree. On the basis that the dismissal was the catalyst for the injury to feelings/ psychiatric injury we consider the date of dismissal is the appropriate date from which interest should be calculated. For loss of earnings, interest is calculated from the mid-point between the date of dismissal and the date of the judgment.

8% x 3.27 years on non-pecuniary award (£22,696) = £5,937.27
8% x 3.27 x 0.5 (mid-point) on loss of earnings (£41,428) = £5,418.78
Total interest = **£11,356.06**

Total compensatory award
£75,480.06

Total award before grossing up
£77,620.38

Grossing up
The grossing up calculation was agreed on the basis that £61,545.09 of the award constitutes taxable income. After grossing up the total sum awarded is: **£91,545.09**.

Employment Judge Ferguson

Date: **23 January 2023**

REASONS SENT TO THE PARTIES ON

Date: **01 February 2023**

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FOR THE TRIBUNAL OFFICE