# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| Ms Nicola Hinds | **v** | Mitie Limited |

**Heard at:** Cambridge

**On:** 23 February 2024 and 19 March 2024
**In Chambers:** 28 March 2024

**Before:** Employment Judge Tynan

**Members:** Mr M Brewis and Mr D Hart

**Appearances**
**For the Claimant:** In person
**For the Respondent:** Mr Bidnell-Edwards, Counsel

# RESERVED REMEDY JUDGMENT

1. The Respondent shall pay the Claimant a basic award of **£6,528** in respect of her unfair dismissal.

2. The Respondent shall pay the Claimant the sum of **£20,000** as compensation for injury to feelings as a result of discrimination, together with the further sum of **£7,123.29** by way of interest on that sum for the period 16 October 2019 to 28 March 2024 (1,625 days).

3. As regards the further compensation to be awarded to the Claimant in respect of her successful discrimination complaints, the award shall be calculated on the following basis:

    3.1. The Claimant shall be compensated in respect of her past and future loss of earnings for the period from 6 September 2021 to 5 April 2025;

    3.2. The Claimant's past and future loss of earnings shall be calculated on the basis that but for her constructive dismissal she would have continued in the Respondent's employment in the role of Programme Manager, alternatively in a comparable role with identical remuneration to that of the Programme Manager;

3.3. The compensatory award shall include the following additional elements:

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| i. | Loss of statutory employment rights: | **£500** |
| ii. | Job search related expenses: | **£15.49** |
| iii. | Travel expenses for job interviews: | **£294.84** |
| iv. | Travel expenses for therapy sessions: | **£130.90** |
| v. | New mortgage set up fee: | **£2,030.00** |
| vi. | Increased interest rate on new mortgage: | **£1,174.80** |
| | TOTAL: | **£4,146.03**; |

3.4. The Claimant shall give credit for sums received by her or which she ought reasonably to generate by way of mitigation of her losses as follows:

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|---|---|---|
| i. | Job Seeker's Allowance: | **£330** |
| ii. | Employment Support Allowance: | **£2,926** |
| iii. | Earnings in April 2022: | **£240**, |
| iv. | Personal Independence Payments received in the period January 2022 to January 2023: | **£3,541.20** |
| v. | Income from self-employment since February 2023: | **£2,667.94** |
| vi. | Future mitigation: | **£20,125.00** |
| | TOTAL: | **£29,830.14**; |

3.5. Interest shall be awarded in respect of the Claimant's losses up to and including 28 March 2024, excluding pension losses. Interest shall be awarded at the rate of eight per cent per annum for a period of 813 days, namely from the mid-point between 16 October 2019 and 28 March 2024.

3.6. There is no chance that the Claimant would have voluntarily left her employment with the Respondent prior to 5 April 2025 had she not been constructively dismissed;

3.7. There is a fifty per cent chance that the Claimant would have developed post natal depression in 2021 even had she not been discriminated against or constructively dismissed, but any post natal depression would not have led to the Claimant being absent from work beyond 19 November 2021, namely her child's first birthday;

3.8. There is no chance that the Respondent would have terminated the Claimant's employment on grounds of long term incapacity or otherwise;

3.9. The award to the Claimant shall be grossed up to reflect any liability to tax;

3.10. There shall be no adjustment to the compensatory award pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

# REASONS

1. We delivered an oral judgment on liability on 3 January 2024 and, in response to a subsequent request from the Respondent, written reasons were provided to the parties on 14 February 2024. We were unable to deal with remedy on 3 January 2024. For reasons we do not know, Mr Bidnell-Edwards did not attend the hearing. In any event, once we had delivered our judgment and reasons there was relatively limited time remaining to deal with remedy. Furthermore, the Claimant was distressed and expressed her preference to reflect on the decision before remedy was determined. We therefore made case management orders in discussion with the Claimant and the representative who attended on behalf of the Respondent. Notwithstanding the orders were effectively agreed, they were not complied with by the Respondent in so far as it did not prepare a remedy hearing bundle for the resumed hearing on 23 February 2024 and its remedy witness statements were served very late, possibly even on the morning of the hearing. Nevertheless, we were able to make some progress on 23 February 2024 by dealing with the Respondent's application dated 22 February 2024 for reconsideration of our judgment on liability and, when that application was refused, by proceeding to hear evidence from the first of the Respondent's two remedy witnesses, Ms Harper. The remedy hearing resumed part-heard on 19 March 2024 and we made further case management orders with a view to ensuring that the hearing was effective.

2. In our judgment on liability we upheld the Claimant's complaints that she had been discriminated against: (a) as a result of the Respondent's failure to carry out a risk assessment in relation to her during her pregnancy; (b) by reason of its failure to deal with, or deal appropriately with, the issues raised in her email of 16 October 2020; and (c) by constructively dismissing her. We also determined that the Claimant had been unfairly dismissed.

3. As set out below, we shall make a basic award in respect of the Claimant's unfair dismissal, but otherwise make no separate compensatory award for unfair dismissal given that the compensation to be awarded in respect of discrimination covers any losses that might otherwise be addressed by way of an unfair dismissal compensatory award.

4. The Claimant gave evidence on remedy. She additionally submitted witness statements from her husband, Gary Hinds and mother, Janice Hinds, both of which statements we have read. On behalf of the Respondent, we heard evidence from Ms Harper and Mr Kalley, both of whom suggest that the Claimant was looking for an opportunity to leave

her role as Programme Manager and indeed that she planned to resign her employment with the Respondent. We return to this below.

5. By the time of the hearing on 19 March 2024, there was a remedy hearing bundle comprising 317 numbered pages, though we also had access to and were referred to the original liability hearing bundle. Within the remedy hearing bundle there is a Schedule of Loss dated 24 January 2024 and Respondent's Counter Schedule, seemingly undated.

**Basic Award for Unfair Dismissal**

6. The Claimant has calculated the amount of the basic award incorrectly, as she has applied an out of date upper limit in terms of her weekly pay. As at 6 September 2021, the date the Claimant resigned her employment, the maximum amount of a week's pay for the purposes of calculating the basic award, was £544 (gross). The Claimant earned comfortably in excess of that amount each week. She was continuously employed for 12 years and was 34 years of age when her employment ended. Accordingly, the basic award is £6,528 (12 years x £544).

**Compensation for Discrimination**

7. Mr Bidnell-Edwards submits that this is effectively a case of constructive unfair dismissal and that we should approach remedy on that basis. This overlooks that we upheld that the Claimant was discriminated against by being constructively dismissed. Whilst compensation for financial losses is calculated in essentially the same way as for unfair dismissal, and there should obviously be no double-recovery, there is no upper limit on the amount of compensation for discrimination. The Claimant is additionally entitled to an award in respect of injury to feelings, which would not be the case if she had only succeeded in her complaint of unfair dismissal.

8. We approach compensation on the basis that we must first determine the amount of the Claimant's losses before going on to determine, if relevant, whether the Claimant failed to mitigate her losses and then, in order, whether there should be any reduction in compensation to reflect the chance that the Claimant would have left the Respondent's employment in any event and any increase or reduction in compensation to reflect any breach of any applicable ACAS Code of Practice.

Injury to feelings

9. In Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, CA, the Court of Appeal gave specific guidance on how Tribunals should approach the issue of quantum for injury to feelings. Since Vento, further account must be taken of the guidance provided in Simmons v Castle 2012 EWCA Civ 1039 and Da'Bell v National Society for Prevention of Cruelty to Children 2010 IRLR 19, EAT, which required adjustments to be made to awards for injury to feelings to reflect the impact of inflation and a general increase in the level of awards for pain and suffering etc. These and other pertinent decisions are reflected in Presidential Guidance issued

jointly by the Presidents of the Employment Tribunals in September 2017; the Guidance has been the subject of a number of addendums.

10. The Claimant puts the injury to her feelings at £45,600 in her Schedule of Loss. The figure is unchanged from her original Schedule of Loss submitted on 6 September 2022, which was presented on the strength of her various complaints, the majority of which were either not upheld or not upheld as acts of discrimination. Having regard to the 26 March 2021 addendum to the Presidential Guidance which applies to claims presented between 6 April 2021 and 5 April 2022, the Claimant places her treatment at the very top of the higher Vento band which concerns the most serious cases.

11. The Respondent contends that the award for injury to feelings should sit in the lower Vento band.

12. As regards the Respondent's response to the Claimant's email of 16 October 2020, Mr Bidnell-Edwards submits that the injury to feelings was effectively experienced over four days and was overtaken by events, namely the discovery during a routine hospital appointment on or around 20 October 2020 that the Claimant's baby had stopped growing, and which resulted in her commencing her maternity leave earlier than planned. We do not agree that this unwelcome development somehow drew a line under the previous events or, as Mr Bidnell-Edwards put it to the Claimant, that the 16 October 2020 email "had become old news". On 20 October 2020 the Claimant was advised that her unborn child had not grown since her last scan two weeks earlier. Over those two weeks the Claimant had experienced significant work related stress and two panic attacks, leading to her 16 October 2020 request for support. When the Claimant discussed the matter with the hospital consultant on 20 October 2020, she was informed that the pressures and stresses she was experiencing at work could be a factor in the baby's lack of growth. The issues in her email of 16 October 2020 remained unaddressed by the Respondent. We accept the Claimant's evidence that her decision to commence her maternity leave earlier than planned was not just because the baby had stopped growing but because she believed the Respondent to have been unresponsive and unsupportive notwithstanding the difficulties she was then experiencing. We find that what she learned on 20 October 2020 served to crystalise in her mind that she and her unborn child were potentially at risk if she remained at work.

13. The Claimant's email of 16 October 2020 was an obvious cry for help from a dedicated, long-serving employee in the final weeks of her pregnancy. As we said in our judgment on liability, the email plainly called for urgent action on the part of the Respondent as well as an immediate response. Even if the Respondent was not then aware that the Claimant's baby had stopped growing, it inexcusably failed to engage with, or address her urgent concerns which directly touched upon her health, safety and wellbeing, as well as that of her unborn child. It is trite that an expectant mother's paramount concern will be for her unborn child. The Law expects

employers to take action to address risks to their pregnant workers. The Respondent failed in its obligations to the Claimant in this regard and, in so doing, it discriminated against her. Whilst the Respondent is not to be punished in respect of its failings and the award for injury to feelings is not to be inflated to reflect feelings of indignation at the Respondent's conduct, the Claimant is entitled to be compensated in respect of the injured feelings that have resulted from her treatment, including her knowledge that the Respondent's failings at that time were the result of discrimination.

14. The events immediately leading up to the Claimant's maternity leave represented a distressing, indeed traumatic, start to her leave. We are satisfied that they cast a shadow over the birth and her maternity leave, even if other factors, including her grandmother's death during her maternity leave and her misplaced perception that the Respondent had discriminated against her in other ways, also impacted her.

15. Mr Bidnell-Edwards' submits that the award for injury to feelings should be £5,000, "if that". We do not share the Respondent's view that this is a less serious case. Although the Claimant readily accepted during cross examination that the Respondent's failure to undertake a risk assessment ahead of and following her return from maternity leave, had weighed less heavily upon her than the Respondent's failure to deal, or deal appropriately with her email of 16 October 2020, in our judgement, the Respondent's discriminatory treatment of the Claimant, including her constructive dismissal, has caused a significant, lasting injury to her feelings, indeed we consider that it has contributed in some measure to the ongoing psychological issues she has experienced since 2021 even if specific compensation for personal injuries has not been sought by her. The immediate impact upon the Claimant in October 2020 was feelings of worthlessness and hopelessness; during her maternity leave and beyond it has contributed to highly distressing thoughts by the Claimant that perhaps she should end her life.

16. Equally significantly, the Respondent's discriminatory treatment of the Claimant has resulted in the loss of secure, long-term employment which contributed to the Claimant's family's financial security and from which the Claimant derived a real sense of purpose, self-worth and achievement. With the loss of her employment and career, the Claimant has experienced isolation and a keenly felt loss of purpose, worth and direction.

17. Whilst this is not a case such as Miles v Gilbank and anor 2006 ICR 1297, CA in which an award was made at the top of the upper Vento band following a targeted, deliberate, repeated and consciously inflicted campaign involving a callous disregard for the life of an unborn child, nevertheless the discrimination in this case was significant, involving as it did a failure to have proper regard for the Claimant's health, safety and wellbeing, as well as that of her unborn child, and a failure to undertake an appropriate risk assessment. It has had a pronounced effect upon the Claimant regardless of the other conduct about which complaint was made

but which was either not upheld or was found by the Tribunal to involve non-discriminatory breaches of contract. No remedy lies by way of an award of injury to feelings in respect of those other matters. We have remained resolutely focused upon the acts of discrimination and their impact upon the Claimant. In that regard, she felt compelled to commence her maternity leave earlier than planned in order to safeguard her unborn child. We regard this as a serious case that sits more obviously within the upper half of the middle Vento band. We award the Claimant the sum of £20,000 as compensation for injury to feelings. Pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, she is entitled to statutory interest at the rate of eight per cent per annum on that sum from 16 October 2020 to 28 March 2024, the latter being the date upon which the Tribunal calculated the interest.

Compensation other than in respect of injury to feelings

18. The parties agree that the Claimant should be awarded the sum of £500 in respect of the loss of her statutory employment rights.

19. According to her Schedule of Loss, the Claimant's gross annual salary at the date of her constructive dismissal was £48,960 (or £32,927 net). It is unclear whether this is inclusive of any discretionary bonus award she might have received, if indeed she was eligible for consideration for such an award. She additionally received an annual car allowance of £7,200. She values the annual employer pension contribution at £2,937.60. All three amounts are agreed by the Respondent.

20. Although we are unable to finally determine the amount of the Claimant's financial losses, in our judgment these should be calculated on the basis that the Claimant will fully mitigate her losses by 5 April 2025. The reason we are unable to calculate what those losses are is that there is no information currently available to us as to what the Claimant would have earned had she continued in the Respondent's employment in her role as Programme Manager. That information is potentially available insofar as the Programme Manager role effectively still exists; the Claimant's former colleague, Clare Orton was appointed to the role or an effectively identical role following the Claimant's departure from the business. We do not know whether Ms Orton was appointed to the role at the same level of remuneration as the Claimant. This will need to be disclosed by the Respondent together with details of Ms Orton's annual pay reviews and any bonus payments whilst in role. Even if it transpires that Ms Orton was appointed to the Programme Manager role on a lower salary than the Claimant, we will need to be provided with details of Ms Orton's remuneration to date in the role, including her annual pay reviews and any bonus awards, in order to come to a view as to the Claimant's likely remuneration had she remained with the Respondent so that we might finally determine what financial losses have been caused by her constructive dismissal.

21. The Claimant left education in 2003 with modest or possibly even below average grades. However, this was over 20 years ago. We do not think

this will have any material bearing upon the Claimant's future career prospects or ability to mitigate her losses, which will instead in our judgement be informed by the skills and experience she has acquired over the course of the sixteen or so years that she worked within the security sector. In this regard, the Claimant's progression from being a Store Detective to a Regional Account Manager at the Respondent with responsibilities in relation to the Respondent's relationship with Sainsbury's, and thereafter to a Programme Manager with a broad remit in respect of a variety of strategic projects, speaks to her abilities and would so speak to a prospective employer.

22. Notwithstanding her modest educational attainments, the Claimant is evidently an intelligent individual. She has proved to be a formidable advocate in her own cause in these proceedings as well as an able communicator. For example, she was able to respond to the Respondent's application for reconsideration of the Tribunal's judgment on liability within less than 24 hours of the application being made. In so doing, she was able to identify all relevant legal principles, including those laid down by the Court of Appeal in Ladd v Marshall [1954] 3 All ER 745, CA and to apply those principles to the facts of the case, setting out in a structured and focused way why she believed the application for reconsideration should not be granted. When the application was refused by the Tribunal, essentially for the reasons put forward by the Claimant, she was then able to proceed to deal with remedy. She brought the same focus to bear when cross examined, in her own cross examination of Ms Harper and Mr Kalley, and to her closing submissions on remedy. In short, notwithstanding her evident and significant distress at times during the proceedings, the Claimant is an articulate and impressive individual. She will undoubtedly be an asset to any future employer.

23. We recognise, of course, that the Claimant has experienced a lengthy period of depression and that she is still on medication to treat her depression. It is apparent from her remedy witness statement and her evidence at Tribunal that the Claimant experienced a significant and highly distressing mental health crisis in late 2021, early 2022. However, that crisis has passed, even if the Claimant may have some residual vulnerability. In or around January 2023 the Claimant stopped receiving Personal Independence Payments. We conclude that this marked a turning point for the Claimant. We do not expect her to recover her health overnight, indeed it is possible that she will have to live with ongoing mental health issues for the foreseeable future. However, in our judgement, it would be reasonable for the Claimant to now begin to identify and implement a plan to resume her career or, if she does not wish to return to working in the security sector, to accept that the Respondent should not be liable to compensate her for any decision she might make in that regard. In our judgment on liability we referred to the Claimant's 'can-do' attitude to her work and that in February 2020 she was described by Ms Harper as extremely dedicated and always striving to deliver the best possible customer service to her client, that she was someone who took full accountability and ownership for the relationship. The events of the

last three to four years may have knocked the Claimant off course, but as Ms Harper did in February 2020, we observe that the Claimant is someone with tremendous potential. We are confident that these proceedings will go some significant way to laying to rest the issues in the case and enable the Claimant to move forward.

24. That is not to detract from the Claimant's unchallenged evidence that she made poor life decisions whilst unwell, that had a profound impact on her family, because in her mind she had become worthless and burdensome. Nor do we lose sight of the fact that the Claimant has a young child of pre-school age; whereas she had an established record with the Respondent (and its predecessors) she will inevitably face the difficulties, challenges and biases that often confront working mothers with young children who are seeking to re-enter the workplace or seeking to secure career progression, including stereotypical assumptions around her commitment and willingness or ability to put in the required hours and effort. Some of these potential barriers will abate over the next year once the Claimant's child reach's school age, most likely at the start of the January 2025 school term.

25. In our judgement it would be reasonable for the Claimant to secure a comparable position to the one she held with the Respondent within the next 12 months, namely by the end of the 2025 Spring school term on or around 4 April 2025.

26. That is not to say that we consider the Claimant will be unable to work or generate an income until that date. In February 2023 the Claimant began working as a cleaner in a business started by her husband after he was made redundant in January 2023. The Claimant felt she could not continue in the role as a result of her mental health and these proceedings. Nevertheless, over the period of six months from April to October 2023 the Claimant was able to generate a modest income from self-employment as a home carer charging £12.50 per hour for her services. Assuming there is no appeal by the Respondent, this judgment on remedy marks the conclusion of these proceedings. We consider that the Claimant ought reasonably to start working again whilst she implements a plan for the longer term. In our judgment she could take on work as a self-employed, or indeed employed, cleaner and/or carer on a full time basis, namely working for 35 hours per week at a rate of £12.50 per hour, or £437.50 gross per week. She has shown that she does not regard such work as beneath her notwithstanding her previous career; it reflects her intrinsic work ethic. Carers and cleaners are in reasonably high demand across the country. We consider that it would be reasonable to expect the Claimant to secure the level of income just referred to by no later than 20 May 2024. This will further mitigate her claimed losses over the period 20 May 2024 to 4 April 2025. We calculate that she can earn £20,125 (gross) over that period.

27. We have given consideration to whether the Claimant would or might have secured further career progression had she remained with the

Respondent. She contends that she would have been a strong candidate for the Head of Operations role on the Sainsbury's contract that became vacant in July 2022 when Ms Harper was promoted into Mr Kalley's former role after he in turn secured promotion within the business. The Claimant states that the Head of Operations role attracted a basic salary of £60,000. The Claimant's evidence in this regard in paragraphs 76 and 77 of her witness statement was unchallenged. As we shall return to, the Respondent asserts that the Claimant would have left its employment in any event on 6 September 2021 regardless of its treatment of her. If it does not believe that the Claimant would have secured the Head of Operations role had she remained in its employment, this is not something that has been addressed by Ms Harper or Mr Kalley in their respective remedy witness statements and it was not addressed by Mr Bidnell-Edwards in his submissions notwithstanding the Respondent was on notice by reason of the Schedule of Loss and the Claimant's remedy witness statement that she was contending she would have been appointed to the role.

28. As we noted in our judgment on liability, in her February 2020 'MiReview', the Claimant had said that she wanted to continue to grow within her current role. We accepted her evidence that she saw any career growth and progression at that time as being within her existing role and that she was not seeking a move away from the Sainsbury's contract or her role as a RAM.

29. Whilst it is often said that you 'make your own luck', nevertheless we note that at the point she left the Respondent's employment, the Claimant had been in the Programme Manager role for approximately 15 months. Looking at her history of employment, the Claimant was promoted to RAM in April 2015, meaning that she was in that role for five years before she transferred to the Programme Manager role, essentially a sideways move. Whilst it is particularly unsatisfactory that the Respondent has failed to address this issue with evidence or indeed by cross examining the Claimant on the matter, we are not persuaded that the Claimant would, or might have, secured further promotion over the last three years had she remained with the Respondent. Her evidence on this point largely consists of an assertion on her part. We were not provided with the job description or person specification for the Head of Operations role, nor do we have any information as to the skills, experience or other attributes of the successful candidate, or indeed any other candidates, to be able to come to even a rudimentary view as to the Claimant's chances of securing the role, assuming that she might even have applied for it given any documented requirements and responsibilities. On this issue, given the dearth of evidence available to us, we cannot reasonably conclude that the Claimant might have been promoted as she claims. In the circumstances, we shall award compensation on the basis of the Claimant's past and likely future earnings in the Programme Manager role. Had she not continued in the Programme Manager role because of the difficulties with Mr Aston, we conclude that she would have moved sideways again and that her total level of remuneration would have remained unchanged.

Out of pocket expenses and other costs incurred by the Claimant

30. The Claimant has sought five specific amounts in respect of out of pocket expenses and other costs incurred by her following the loss of her employment with the Respondent. They are not addressed by the Respondent in its Counter Schedule and the Claimant was not questioned about them by Mr Bidnell-Edwards nor did he make any submissions in respect of them.

31. The Claimant paid £15.49 in respect of two months' subscription to LiveCareer to assist her in creating a CV in connection with her initial job search following her resignation from the Respondent. In our judgement it was entirely reasonable for her to incur these modest expenses to support her in her job search, not least given how long she had been out of the jobs market.

32. The Claimant claims the sum of £294.84 in respect of unpaid travel expenses for three round trips to Northampton for job interviews. Again, the expenses were reasonably incurred by the Claimant as part of her unsuccessful efforts to mitigate her losses by finding another job.

33. As noted already, the Claimant underwent a course of therapy between 15th July 2021 and 18th May 2022 focused upon her employment. Of course, the events with which she was concerned comprised a mixture of discriminatory acts, non-discriminatory breaches of contract (not all of which were repudiatory) and entirely innocuous acts. Tribunals can reduce an award where there are a number of concurrent causes for the loss or harm in question, albeit Mr Bidnell-Edwards did not make any submissions in that regard, specifically whether it might be possible to separate out the costs by reference to the Respondent's culpable and non-culpable conduct. We consider the causes to be essentially indivisible and in such circumstances that the Claimant should be entitled to claim the full amount of the travel costs associated with the therapy, namely £130.90.

34. As a result of leaving the Respondent's employment and being without a job, the Claimant and her husband's mortgage renewal in December 2021 was refused and a new mortgage deal had to be brokered at a cost of £2,030.00. The mortgage interest rate rose from 1.64% to 2.99%, necessitating a six year extension to the mortgage term. Had they been able to renew their mortgage with their existing provider, they would have fixed for a two year period at a rate of 1.29%. The Respondent has not challenged the Claimant's calculation that this has resulted in otherwise avoidable additional interest charges of £1,174.80. These losses were caused by the discriminatory constructive dismissal and the Claimant is entitled to be compensated accordingly.

Mitigation

35. The sums received by the Claimant by way of Job Seeker's Allowance (£330) and Employment Support Allowance (£2,926) are to be set off against her financial losses, since they will not be the subject of a

recoupment order. The Personal Independence Payments received by her in the period January 2022 to January 2023, totalling £3,541.20 should also be offset against the Claimant's claimed financial losses since the Payments were not already being made to the Claimant when she resigned her employment. In the circumstances they have provided a new source of income for the Claimant and fall into account. The Claimant accepts that she should give credit for earnings totalling £2,907.94 (gross) received by her since she left the Respondent's employment.

36. In opening we observed that having determined the amount of a claimant's losses, the Tribunal goes on to consider, if relevant, whether the claimant failed to mitigate their losses. We have dealt above with the potential for the Claimant to mitigate her future losses. As regards her losses to date, the Respondent has the burden of establishing that she has unreasonably failed to mitigate these losses. Although the Claimant was briefly questioned regarding her decision to become a kidney donor in 2022, the Respondent does not assert any failure to mitigate on her part. In any event, putting aside that she did make efforts to secure another position after she resigned her employment, she has been significantly impacted by mental health issues since leaving the Respondent's employment. The DWP accepted that she was unfit for all work between January 2022 and January 2023. As we shall return to in a moment, we shall need to consider whether these health issues would or might have manifested in any event and led the Claimant to stop working for the Respondent regardless of its treatment of her.

Interest

37. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 give Tribunals the power to award interest on awards made in discrimination cases. Interest is awarded for the period beginning on the 'mid-point date' and ending on the day of calculation — Reg 6(1)(b). The 'mid-point date' is the date halfway through the period beginning on the date of the act of unlawful discrimination (in this case, 16 October 2020) and ending on the day of calculation (in this case 28 March 2024) — see Regulation 4(2). Accordingly, interest will be awarded for a period of 813 days at the statutory rate of eight per cent per annum. No award of interest can be made in relation to losses which will arise after the day of calculation, such as future loss of earnings — Regulation 5. The EAT confirmed in Ministry of Defence v Cannock and ors 1994 ICR 918, EAT that this means that no interest will be awarded on pension losses.

Polkey

38. Pursuant to s.123(1) of the Employment Rights Act 1996, where a Tribunal upholds a complaint of unfair dismissal, it may award such compensation as it considers just and equitable in the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal. In accordance with the well established principles in Polkey v A E Dayton Services Limited [1988] AC344, the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect

the likelihood that the employee's employment would still have terminated in any event. The burden of proving that an employee would have been dismissed in any event, rests with the employer. The principles in Polkey are equally applicable to awards of compensation for discrimination: see for example O'Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615, CA and Abbey National plc and anor v Chagger 2010 ICR 397, CA. Tribunals are required to actively consider whether a Polkey reduction is appropriate. In Software 2000 Limited v Andrews & Ors. [2007] UK EAT 0533_06, the EAT reviewed the authorities at that time in relation to Polkey and confirmed that Tribunals must have regard to all relevant evidence, including any evidence from the employee; the fact that a degree of speculation is involved is not a reason not to have regard to the available evidence, unless the evidence is so inherently unreliable that no sensible prediction can be made. It is not an 'all or nothing' exercise, though we are mindful that having discriminated against the Claimant the Respondent now has an obvious interest in asserting that it was inevitable or likely that she would have left its employment in any event.

39. Applying Polkey principles in practice requires an evidence based approach drawing upon common sense and the Tribunal's experience.

40. The Respondent's primary contention is that the Claimant would always have resigned her employment and accordingly that she should not be awarded any compensation for her claimed financial losses. Alternatively, it contends that the Claimant's mental health issues would likely have manifested in the same way they have over the last two years or so, with the result that she would have been dismissed from the Respondent's employment by reason of long term incapacity.

41. The Respondent's primary contention is addressed in Ms Harper and Mr Kalley's respective remedy witness statements. They suggest that the demands of the Programme Manager role would not have been something that the Claimant would have wanted to commit to long term. Oddly, they each suggest that the role would not have been suitable for any individual who was unable to commit to the role on a full time basis; the Claimant was working full time when she went on maternity leave, returned to work on a full time basis and never suggested that she might want to work flexibly. We find particularly perplexing Ms Harper's observation that the role could be mentally challenging and that it requires a significant level of focus and commitment, the inference being that the Claimant was perhaps not equipped to meet such demands. It will be evident from our observations above that we consider the Claimant to have all these attributes and to have been entirely capable of meeting the challenges of the role. It is particularly difficult for us to square Ms Harper's evidence with what she wrote in the Claimant's February 2020 MiReview, including that the Claimant always rose to the challenge.

42. The Claimant's evidence and her cross examination of Ms Harper and Mr Kalley, as well as her submissions, were all on point on this issue, namely that having left education with modest or below average qualifications, she

had spent the bulk of her career with the Respondent and its predecessor organisations and was committed both to her career and to the organisation. In this regard her history of continuous, stable employment reflects that of her mother, husband and three siblings. The Claimant commenced keeping in touch days within approximately 12 weeks of the birth of her child and she returned to work at the end of her ordinary maternity leave, electing not to take additional maternity leave. As between herself and her husband, the Claimant was the principal earner, so that they were reliant upon the Claimant's income to maintain their standard of living. In our judgement, there is no chance that the Claimant would have left the Respondent's employment but for how it treated her. The Claimant's career achievements, given her relatively modest personal and educational background, are testament to her ability, resilience and work ethic. We accept her evidence that she has encountered and successfully navigated numerous challenging situations during her career, including difficult colleagues, demanding clients and complex projects. Her February 2020 MiReview speaks to her potential and her determination to provide outstanding customer service and to succeed even in the face of the particular challenges she encountered on the Sainsbury's account. Matters of chance are to be assessed on the assumption that the employer would not have treated the claimant as it did but instead acted as a reasonable employer. It seems to have been recognised within the Respondent that Mr Aston could be difficult and unreasonable. Ms Harper and Mr Kalley's evidence rather assumes that the Respondent would have been a passive bystander in the event of further difficulties when, instead, acting as a reasonable, non-discriminating employer it would, as a minimum, have supported and mentored the Claimant through the issues she was encountering and indeed, have escalated the matter within Sainsbury's had Mr Aston's alleged behaviours persisted. The Respondent has tens of thousands of staff; we are certain that had any issues proved incapable of resolution the Claimant would have been redeployed into another role within the business. The Claimant was a dedicated employee with "tremendous potential" whom the Respondent had singled out for the Programme Manager role. That speaks to how well regarded she was prior to the events in question, and why, all other things being equal, the Respondent would have sought to retain her within its business.

43. The Respondent may have failed to discharge its duties and responsibilities to the Claimant as a pregnant woman, specifically insofar as it failed to assess the risks to her during her pregnancy and following her return from maternity leave, but that is no reason for us to proceed on the basis that it would equally have failed to discharge its responsibilities to her in the face of any bullying or other unreasonable behaviour on the part of Mr Aston. The Claimant is an independent career-minded individual. We are certain that she intended to and, all other things being equal, would have continued in the Respondent's employment but for what happened. We reject Ms Harper and Mr Kalley's evidence that the Claimant had been looking for an opportunity to leave her existing role and employment and find particularly unattractive the suggestion in paragraph

7 of Ms Harper's witness statement, that the way the Claimant outlined her grievance and then pursued her Tribunal claim evidences that the Claimant wished to leave her role, was not committed to it and had been planning to resign for some time. Mr Kalley's assertion that the Claimant was "angry" that she had not been made redundant earlier is equally misconceived. Shortly after the Claimant returned from maternity leave, a long standing colleague expressed surprise that the Claimant was still with the business. She understood from his comments that her role might be at risk. She felt uneasy and accordingly raised the issue, we find because she wanted reassurance in the matter. Subsequently, in her grievance of 3 September 2021, the Claimant observed that a severance package would have been kinder than the treatment she believed she had been subjected to. It is fanciful for the Respondent to suggest that these comments evidence some desire on the Claimant's part to be made redundant, let alone that she was angry or resentful at having not been made redundant. As the Claimant observes, it rather begs the question why she emailed Mr Kalley in the terms she did on 27 July 2021 (page 561 of the liability hearing bundle), seeking his support, or why she took a relatively short period of maternity leave and embarked upon keeping in touch days just 12 weeks or so after the birth if her aim was to be made redundant or she was angry at having not been made redundant.

44. Ms Harper and Mr Kalley's evidence on the issue of whether the Claimant might have resigned her employment in any event and the unappealing suggestion in the course of cross examination that the Claimant's child would have been an obstacle in terms of her ability to hold down the Programme Manager role has served to add a measure of insult to the injury that has already been caused to the Claimant by the Respondent's treatment of her.

45. We turn then to the question of whether the Claimant would or might have left the Respondent's employment in any event by reason of ill health. Mr Bidnell-Edwards' observation that there is no medical report that addresses the potentially complex medical issues around the Claimant's pregnancy and mental health, including post natal depression, overlooks that the Respondent has the primary burden of establishing the relevant chance that the Claimant's employment would have ended in any event. It has not adduced any medical evidence in this regard. We recognise that it might equally be said that neither has the Claimant sought to adduce medical evidence in support of her claim to an award for injury to feelings at the top of the higher Vento band. We are not qualified to bring any medical perspective to bear. Instead, we have regard to the limited contemporaneous materials in the liability hearing bundle. These evidence that the Claimant began to experience mental health issues whilst pregnant because of the pressures of work she was under, including as a result of the difficulties she was encountering on the Sainsbury's account particularly in her dealings with Mr Aston. In her email of 16 October 2020 she wrote that she had experienced two panic attacks that week. She referred to them as having taken her completely by surprise and went on to say that she was struggling to sleep. We accept

the Claimant's evidence at Tribunal that she has no history of mental health issues prior to 2020. The fact that the Claimant described the two panic attacks in October 2020 as having taken her by surprise indicates to us both that it was not something she had experienced before and that her symptoms had developed and escalated within a relatively short period of time.

46. There is a contemporaneous record as to how the Claimant was feeling by 19 October 2020 when the issues in her 16 October email had not begun to be addressed. She emailed Mr Kalley and Ms Young as follows:

> "I don't know what to say… disappointed and worthless is probably how I feel right now… I have logged on for work today thinking you would be coming up with a plan to support my health and wellbeing but in light of the revised time / date I am in absolute floods of tears right now asking myself why I have even got up and put the effort into working today… I cannot spend another day crying with anxiety. I hope you know that I am truly conflicted with this decision but I cannot keep back the tears."

47. During her maternity leave the Claimant experienced a significant deterioration in her mental wellbeing. As we have noted already, she experienced suicidal ideation.

48. Within little more than of a week of returning to work following her maternity leave, the Claimant wrote in an email to Mr Kalley,

> "I have had an extremely difficult return to work, I have tried to mask this by not talking about my struggles and just trying to crack on, but this weekend I have had a little bit of a mental health crisis and feel completely overwhelmed with emotions that I just cannot bear the thought of applying myself in work. The thought of reading an email or answering the phones is causing me to panic and I am not fully sure why."

She went on to say that she had no history of taking sick leave and that she felt tremendous shame for having to take sick leave.

49. We note that in her email to Mr Kalley of 20 June 2021, the Claimant attributed her difficulties not just to how she had been treated, but to the circumstances surrounding the death of her grandmother. During cross examination, the Claimant was not challenged in terms of her evidence as to how she had felt at the point she had returned to work or during the initial days following her return. In her email she referred to the fact that her maternity leave had effectively been triggered as a result of health complications and anxiety, which she attributed to work. She also said that she was over thinking the events prior to her maternity leave and these were causing her to panic. It reinforces what we have already said regarding the lasting impact of the events in mid-October 2020.

50. The Claimant was initially certified with depression on 20 June 2021, though was subsequently certified with post natal depression on 27 July 2021 and again on 2 September 2021. She resigned her employment a

few days later. The Claimant had commenced therapy on 15 July 2021 and she continued with the therapy until 18 May 2022. Again, her unchallenged evidence was that most, if not all, of her discussions with her therapist were about her employment and that how she perceived she had been treated since the announcement of her pregnancy had fuelled constant negative thoughts of worthlessness.

51. In January 2022, the Claimant was assessed by the DWP as unfit for work. Nevertheless, she continued to take positive steps to develop income generating opportunities, including setting up a company that she thought might provide support to new and expectant mothers who were experiencing work place discrimination; it has not in fact generated any income. In her remedy witness statement, the Claimant describes a variety of initiatives she has undertaken to rebuild her confidence and in order to establish a network of contacts through which she might identify and secure some way forward. For over a year now she has not been in receipt of any form of state support, reinforcing our sense that she is on the road to recovery.

52. Doing the best that we can on the information available to us, in particular in the absence of any expert medical evidence as to how the Claimant's health issues would or might have developed but for how she was treated, and on the assumption that the Respondent, acting as a reasonably concerned, non-discriminating employer, would have supported her through her illness and recovery, and having further regard to the documented position as at 16 and 19 October 2020, we conclude that there was a fifty per cent chance that the Claimant would have developed post natal depression regardless of how she was treated by the Respondent. Furthermore, that had she developed post natal depression this would have led to the Claimant being absent from work for a period not exceeding five months from 20 June 2021, namely up to her child's first birthday. We take judicial notice of the fact that post natal depression typically affects parents during the first year of their child's life, even if in some cases the depression is of longer duration. The Claimant had no history of mental health issues and the Respondent has not pointed to any other circumstances of hers that might indicate an increased propensity or chance of experiencing a longer term depressive illness.

53. At the point at which she resigned her employment, the Claimant had been absent from work for eleven weeks. We believe she was eventually paid in full for that absence and that it was also eventually accepted by the Respondent that she was entitled to full pay for 16 weeks and thereafter to half pay for a further 16 weeks' sickness absence. In which case, there is a fifty per cent chance that the Claimant would have transitioned to half pay from 11 October 2021 until 19 November 2021, namely a period of four weeks and four days. Accordingly, the Claimant's loss of earnings for that period should be reduced by 25% to reflect this chance.

54. On the basis we consider that the Claimant would otherwise have made a full recovery from any post natal depression, we discount entirely the

possibility that she would have left the Respondent's employment by reason of ill health / long term incapacity. Acting as a reasonable, non-discriminating employer and having regard to its size and administrative resources, as well as to the Claimant's length and record of employment, we do not consider that the Respondent would have terminated the Claimant's employment if she had been absent from work for up to five months (of which there was in any event only a fifty per cent chance).

S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992

55. The Claimant's contention that the award of compensation should be increased by 25% to reflect the Respondent's alleged contravention of the ACAS Code of Practice on disciplinary and grievance procedures cannot be maintained in view of the findings and conclusions in or judgment on liability in respect of Issues 4.11(b) and (c).

56. In conclusion, we shall make case management orders to enable the award of compensation to be finalised without further delay. If the parties are able to agree the amount of the compensation award we are content to issue a final judgment on remedy by consent.

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Employment Judge Tynan

Date: 24 April 2024……

Sent to the parties on: 2 May 2024.....

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For the Tribunal Office.

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