

Neutral Citation Number: [2026] EAT 86

Case No: EA-2024-001169-JOJ

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 12 June 2026

**Before :**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between :**

**Nicola Griffiths**

**Appellant**

**- and -**

**Essex County Council**

**Respondent**

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**Rad Kohanzad** (Instructed through direct access) for the **Appellant**  
**Tom Gillie and Katy Sheridan** (co-authored skeleton argument) (Instructed by Essex County  
Council Legal Services) for the **Respondent**

Hearing date: 12 May 2026  
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**JUDGMENT**

## **SUMMARY**

### **Disability Discrimination, Unfair Dismissal**

The Employment Tribunal erred in law in its assessment of compensation in awarding no future loss of earnings and in its assessment of pension loss. The Employment Tribunal did not err in law in its assessment that the claimant's loss of earnings flowed from a single act of indirect disability discrimination.

## HIS HONOUR JUDGE JAMES TAYLER

### The issue

1. The issue in this appeal is how the Employment Tribunal should have assessed compensation, having found in favour of the claimant in respect of one complaint of indirect disability discrimination and a complaint of unfair constructive dismissal.

### The Employment Tribunal judgments

2. In a judgment sent to the parties on 26 January 2023, an Employment Tribunal, Employment Judge Jones, sitting with members, upheld one complaint of indirect disability discrimination and a complaint of unfair constructive dismissal. This appeal is against the remedy judgment of the same Employment Tribunal, sent to the parties on 31 July 2024. The remedy hearing took place on 29 April 2024. The Employment Tribunal made an award that broadly followed the format of an award for unfair dismissal, but that exceeded the statutory maximum:

2. Remedy

3. Basic Award: £7875.00

4. Compensatory Award:

Loss of earnings £40,631.47

Loss of Statutory Rights £ 500.00

Expenses £10,738.75

Loss of Pension £20,000.00

Injury to Feelings £25,000.00

Total: - £115,312.74

3. The Employment Tribunal added interest, pursuant to the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996**, and grossed up for the incidences of tax, making a total award of £153,906.54. The Employment Tribunal described that award as being the remedy for the claimant's "successful complaints of disability discrimination and constructive unfair dismissal".

### Outline facts

4. I take the outline facts from the judgment of the Employment Tribunal.
5. The claimant is a qualified social worker. The claimant started work for the respondent in 2004. On 15 January 2014, the claimant started working as a Child in Need Reviewing Officer, providing independent oversight for social work teams supporting children and families with complex needs.
6. In April 2018, Ahana Kalluri, a newly appointed Interim Service Manager in the “Mid” area, raised concerns about the claimant’s work.
7. On 3 July 2018, during a 1:1 supervision session, Kate Adams, the claimant’s line manager, told the claimant that complaints had been made against her by her colleagues in Mid and by a service manager. The claimant was not told what the allegations were, who had made the complaints, what period they related to, or whether they had been or were going to be investigated.
8. An investigation was undertaken from July to September 2018. The claimant was not significantly involved in the investigation. The claimant found the process extremely stressful.
9. On 7 September 2018, Ms Adams sent an investigation report to Nahida de Leon, Professional Standard and Audit Services Manager, and Ms Kalluri; copied to the claimant.
10. From July to November 2018, the claimant did not have her normal supervision meetings.
11. On 26 November 2018, Ms Adams held a supervision session with the claimant. The claimant and Ms Adams were both very upset and found it difficult to discuss what had happened. Ms Adams unsuccessfully sought to meet with the claimant again. The claimant was struggling with anxiety, depression and sleep issues.
12. At this stage, the claimant had a good working relationship with Ms de Leon. Ms de Leon contacted the claimant and fixed a meeting, that took place on 11 December 2018. The meeting was attended by the claimant, Ms de Leon, Ms Adams and Gillian Hobbs, a Team Leader. The claimant was visibly upset during the meeting and explained how she had been affected by the process. The Employment Tribunal quoted from the meeting summary prepared by Ms de Leon:

Nicola described how not being informed of the detail of the situation by Kate had had a profound effect on her mental health. That the way in which the situation was described to her by Kate was cryptic by referring only to “a service manager in mid, and complaints raised by mid team managers and families.” This left Nicola not knowing the extent of the problem, that potentially everyone was talking about her. The result of this was for Nicola to withdraw from her work, feel intimidated and that she was unable to proceed with any confidence in her working relationships. And that this anxiety and upset continued all the way through the enquiries Kate undertook, mainly fuelled by not knowing what was going on and with whom, fearful so as not to aggravate the situation. Nicola confirmed that she had been so upset and worried that she had sought legal advice.

Nahida explained that Kate’s intention was to support her and in fact she had felt strongly that this was an unjustly positioned approach from Ahana and the mid managers who had been named - that she had advocated strongly on Nicola’s behalf throughout the set of circumstances. Kate talked us through with Nicola and apologised for the impact of this approach but had not known how best to deal with the situation and had approached it the best way that she could. And that she would like to resolve this with Nicola going forwards if she can.

We also talked about the importance of specifics when describing situations, i.e. the names of the managers involved, instead of just saying mid managers – this eliminating the potential for questions/speculation.’

13. The claimant was provided with some details of the complaints that had led to the investigation.

14. The claimant submitted a grievance on 3 February 2019. The claimant alleged that spurious allegations had been made against her and that the investigation was poorly conducted. The claimant asserted that she had been bullied.

15. On 27 March 2019, the claimant attended a Quality Assurance/supervision meeting with Ms de Leon. Concerns were raised about the claimant’s written reports. The Employment Tribunal held that the meeting had a negative impact on the claimant’s mental health. The claimant called in sick on 1 April 2019. The claimant raised a complaint about the Quality Assurance meeting on 2 April 2019.

16. The claimant’s grievance was investigated by Anita Kemp, head of Strategy, Planning and Performance. On 25 June 2019, Ms Kemp produced a grievance report that set out her findings, but did not state whether the claimant’s grievances were upheld or not. The claimant was very upset by

the grievance outcome, and felt that her complaints had not properly been investigated or resolved.

17. The claimant submitted a grievance appeal on 3 July 2019. The appeal hearing took place before Chris Martin, Commissioning Director – Children, Mental Health, Learning Disabilities and Autism, on 4 October 2019.

18. The appeal outcome was provided on 22 January 2020. Mr Martin concluded that the claimant had not been bullied, the complaints made against her had not been malicious, but the respondent could have handled the whole matter better. Mr Martin upheld some of the claimant’s grievances wholly, some in part, and rejected others.

19. The claimant was dissatisfied with the outcome, particularly as she wanted disciplinary action taken against those who had made what she considered to be “malicious complaints against her without foundation which had caused her a long period of anxiety”.

20. The claimant resigned on 10 February 2020.

### **The relevant liability findings of the Employment Tribunal**

#### ***Indirect Discrimination***

21. The Employment Tribunal held that the respondent did not apply a provision, criterion or practice (“PCP”) of “of not providing the subject of a complaint with full details of the complaint at an early stage” but it did apply a PCP of “not permitting the subject of the complaint to participate in the investigation”.

22. The PCP of “not permitting the subject of the complaint to participate in the investigation” put disabled persons at a particular disadvantage when compared with non-disabled persons because it “would be likely to cause a deterioration in the mental health of a person disabled with a mental impairment. The PCP put the claimant at that disadvantage and was not a proportionate means of achieving a legitimate aim. Thus the claimant succeeded in one complaint of indirect disability discrimination. Other complaints of disability discrimination failed.

#### ***Constructive unfair dismissal***

23. The Employment Tribunal held that the respondent had breached the claimant's contract in a number of respects, which had been asserted by the claimant in the following terms:

- (a) 3 to 20 July 2018: Ms Adams failed to tell the Claimant the nature or maker of the complaints against her; ...
- (c) 31 July 2018: the Respondent failed to respond to the Claimant's account of events and concerns;
- (d) 7 September 2018: the Respondent's management failed to respond to the conclusions of the investigation report that the complaints were unfounded;
- (e) 3 July to 23 November 2018: failure to give her supervision;
- (f) 11 December 2018: Ms de Leon insisted that the Claimant attend a meeting when she was off sick and failed to provide her with a copy of the email from Ms Kalluri;
- (g) From 11 December 2018: refusal to permit the Claimant to transfer to another part of the council and requiring her to work with the individual who complained about her;
- (h) 27 March 2019: Ms De Leon attended the Claimant's supervision without consent and complained about the Claimant's reports;
- (i) 3 February 2019 to 25 June 2019: failure to deal adequately with the Claimant's grievance, including delay, failure to keep her informed, not providing a sufficiently comprehensive outcome, taking no sanctions against the complainant and/or failure to act on the recommendations about alternative work;
- (j) 10 January 2020: the outcome and recommendations of the Claimant's grievance appeal, that the Claimant should look for an alternative role in the council or be subject to independent supervision and work separately from her existing team. This was the last straw.

24. The Employment Tribunal held of the complaint of constructive dismissal that:

- i. It is this Tribunal's judgment that the Claimant came to the meeting on 10 February, prepared to resign if she did not hear from Mr Martin that he had decided to sanction certain managers and members of the team at Mid. If he had decided to sanction certain managers/caseholders, that may have restored the Claimant's trust in the Respondent. The Claimant came prepared with her laptop, keys and ID card, ready to resign if the appeal outcome did not put right all the wrongs she had experienced in the past two years. It is our judgment that the Claimant did not resign because she had found alternative employment. The Claimant went to a temporary job which required her to travel and to stay in hotels away from her family. This was therefore not a better job than her job with the Respondent. She did not resign because she had found new employment. As a householder with dependents, it was imperative that she take any employment offered and so it is our judgment that this was the reason why she started work quickly after she left the Respondent.

ii. It is our judgment that the final straw was not a final straw so as to terminate the Claimant's employment. However, **it is our judgment that there was a cumulative breach of the Claimant's contract, which was not remedied by the grievance appeal process and outcome.**

iii. The Respondent readily accepts that its handling of the initial complaint raised by Ms Kalluri was not transparent and left the Claimant thinking that her employment was in trouble. The Respondent then began an investigation into her practice which included increased observation of her work, an in depth/forensic investigation of her written work and feedback forms. The Claimant did not know of this until she received the Subject Access Request in June 2019, but it confirmed her suspicions when she did receive it, as she had felt unsupported in the way that the Respondent dealt with the complaints. It was not until November 2018 that she found out that there were two separate complaints, that Ms Kalluri had raised the first one and that the second had come from Ms Millar. It was not until December 2019 that she saw and had the opportunity to properly digest Ms Kalluri's complaint which she found upsetting.

iv. When Ms Adams completed her investigation of Ms Millar's complaints, there was no statement from Ms de Leon or the managers at Mid that this was they accepted the outcome and that she had been cleared.

v. It is our judgment that the Claimant resigned because she believed that she could not trust the Respondent and that it was an unsafe place to work and because it was likely that this could happen again, given that there had been no sanctions applied to those who had made unfounded complaints against her and refused to accept that they were so. Also, when she expressed how the whole process had affected her, there was no substantive response from her managers. When one complaint was found to be baseless, there was no acceptance of that outcome by those who had complained and no clear statement of confidence in her practice and in her approach from her line managers. Lastly, when she raised a grievance, the recommendations were not followed.

vi. This Tribunal considers that items (a), (c), (d), (e), (f), (g) (h) and (i) above were matters where the Respondent conducted itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant. **There was not a deliberate attempt to push the Claimant out but: by failing to give her details of the complaints against her, failing to give her supervision at the most difficult time, by insisting that she continue to work with someone who did not want to work with her and who had accused her of serious misconduct without justification; by failing to give any meaningful response to her putting in writing her painful experiences at the wrong end of the complaint process and by using the meeting on 27 March as an opportunity to hit back on her for what was likely to be minor errors in her work when what she clearly needed was support, encouragement and supervision; the Respondent seriously damaged the trust and confidence with the Claimant. Add to that the failure of the grievance investigation to even tell her whether her grievance was upheld or not and to instead, without evidence, repeat the negative descriptions of her practice and her personality, which she had not been aware of before July 2018.**

vii. **It is our judgment that the Claimant's decision to resign on 10 February was not in sole response to the decision on the grievance appeal or in relation to the redeployment but was in relation to it and all that had gone before.** When the Claimant arrived at that meeting, she no longer had any trust or confidence in the Respondent. She did not believe in the jobs that Mr Secker told her about and did not trust in any arrangements that he promised to make for her to return to work. The job offers did not suffice to make her feel safe at work, which she reasonably believed was an ongoing risk to her mental health, should she return.

viii. **It is our judgment that the Claimant's contract had been breached fundamentally by the Respondent's conduct as set out in items (a), (c), (d), (e), (f), (g) (h) and (i) above. This was a cumulative breach which caused the Claimant to decide to resign** before she arrived at the meeting on 10 February 2020, unless the outcome met her expectations. She did not hear anything in the grievance appeal outcome to persuade her to stay and so she informed the Respondent of her decision to resign. [emphasis added]

### **The Remedy Judgment**

25. The Employment Tribunal awarded the claimant her full loss of earnings, not limited to the unfair dismissal cap, as compensation for the one act of indirect disability discrimination in respect of which the complaint succeeded:

41. We drew the following conclusions from the evidence we heard today and had in mind the findings that we made in the liability hearing.

42. **The Tribunal was mindful that it can only award the Claimant compensation for the aspect of the claim where she succeeded in proving indirect disability discrimination in addition to her successful complaint of unfair dismissal. Unfortunately, this is not as straightforward as it seems as, the disability discrimination is knitted into the facts leading to the Claimant's dismissal. We spent some time discussing the relationship between the discrimination and the dismissal at the remedy hearing.**

43. The Tribunal's judgment was that the Respondent failed to provide the full details of a complaint to the Claimant from 17 May until 3 July. **The Respondent also applied a PCP or practice to the Claimant by conducting an investigation into her practice after it received Ms Kalluri's complaint in April 2018. The Claimant was not informed that she was being investigated and she was not invited to participate in it. The investigation began in April 2018 and ended in or around September 2018. She was not provided with the details of the complaint until November.**

44. **It was also our judgment as set out in paragraph 254(iii) on page 50, that the experience of having your practice investigated and managers and colleagues talking about you, while continuing with a stressful job; is highly likely to cause a deterioration in the mental health of a person already disabled with a mental impairment.** That person would be put to a substantial disadvantage.

45. The Claimant had been diagnosed with anxiety/depression since 2002. The Claimant's managers all confirmed that they knew of her ill-health, her having been off sick in late 2017 – beginning of 2018. In this Tribunal's judgment, the application of the PCP put the Claimant at a particular disadvantage. This is described in detail in paragraphs 254 iv, v and vi on page 51 of the judgment. This was also not a proportionate means of achieving a legitimate aim.

**46. It is also our judgment that the indirect discrimination had a significant detrimental impact on the Claimant. It lasted for a considerable period of time, and she never fully recovered from it. This was so even though she had not in fact been told that she was being investigated. Things that were said to her made her suspect that she was. It was that suspicion and the worry and anxiety caused by the fear that she was being talked about, that caused her some psychiatric damage.** Social workers spoke to her and told her that they were being asked about her. Others made supportive comments to her. Ms Adams attended a meeting that she was chairing. The Claimant was promised a letter from senior management stating that the Respondent had confidence in her practice and that there were no issues as far as management was concerned. The letter never materialised. Even after the investigation exonerated her, she was still under criticism as shown in the interviews that Ms Hobbs and Ms de Leon had with Ms Kemp, as part of the Claimant's grievance investigation.

**47. The investigation ended but that repercussions from it continued until the Claimant left the Respondent's employment. Certainly, her trust and confidence in her employer was never restored.** And as stated above, her managers continued to criticise her until the end.

48. At paragraph 3.2 v. on page 59 of the liability judgment, this Tribunal stated that it was our judgment that the Claimant resigned because she believed that she could not trust the Respondent and that it was an unsafe place to work and because – given that there had been no sanctions applied to those who had made unfounded complaints against her - it could happen again. When she expressed how the whole process had affected her, she was including the investigation that had occurred without her being provided with the full details of the complaint and with her not being allowed to participate in the investigation. **Since 3 July 2018, the Claimant identified the Respondent's practice of discussing her at team meetings and between senior managers, without telling her about any complaints; as matters that made her feel unsafe (see paragraph 32, liability judgment). The effect on the Claimant worsened over time.**

**49. It is this Tribunal's judgment that it is impossible to divide the effect of the successful complaint of indirect discrimination from the Claimant's decision to resign a couple of years later, on 10 February 2020. The Claimant's faith in the Respondent was never restored (see para 43 of the liability judgment).** The Claimant's response to the review of the Respondent's handling of complaints at the end of July 2018 gave the Respondent a clear picture of how being involved in the complaint process had affected her. **This was not just about the second complaint from Ms Millar or only about her grievance process. It was also about the effect of the first complaint from Ms Kalluri which resulted in her being investigated**

by her employer, without being told of it or being part of it. She described it as anxiety provoking, disappointing and not consistent. She described feeling powerless, having professional anxiety, and experiencing paranoia (para 50, liability judgment).

50. In addition, following Ms Kalluri's complaint, the Respondent observed the Claimant more closely and failed to supervise her between July and November 2018. By the time she had a supervision meeting with Ms Hobbs in November, the Claimant, was fearful for her job, which is demonstrated by the fact that she had taken legal advice. She reported that social workers were either avoiding or acting worried or expressing support for her (paras 62 and 65 of the liability judgment). Some social workers had been asked of their opinion on her. It is likely that this was part of the investigation that had been conducted on her after the complaint was officially returned to Ms Kalluri. The Respondent continued to investigate the Claimant's practice, without her input and this was the day-to-day effect on her, of doing so.

51. The Claimant was having sleep issues, struggling with depression and anxiety. She continued to work for as long as she could but even before the meeting on 11 December, Ms de Leon confirmed that she knew that the Claimant was emotionally fragile (paragraph 68).

52. The consequences of the Respondent applying the PCP to the Claimant of not permitting her to participate in the investigation into her practice after they received Ms Kalluri's complaint were serious, destructive to the employment relationship and damaging to the Claimant's mental health. After that, the Claimant worked in the South Quadrant, raised two grievances, unsuccessfully sought reassurance from managers that there were no issues with her practice and from February 2019, started taking Prozac.

53. In the circumstances, it is this Tribunal's judgment that there is a clear line from the successful complaint of indirect discrimination to the successful complaint of constructive dismissal. These points are picked up at paragraphs (e) and (f) on page 55 of the liability judgment. The Claimant was already struggling with anxiety, depression, and insomnia when she was invited to the meeting on 11 December. They came from the way in which the investigation was conducted into her practice from July 2018. The Claimant's mental health was affected by the indirect disability discrimination she suffered. It is our judgment that her mental health was affected by the Respondent's decision not to give her full details of the complaint at an early stage, which was not a PCP but which, nevertheless was detrimental to her; together with its decision to conduct an investigation into her practice, not tell her about it and not permit her to participate in it. The Claimant felt undermined by the investigation. She felt that she was being talked about by managers and social workers. She suffered from paranoia. She began taking Prozac. Her trust and confidence in the Respondent began to unravel. She struggled with anxiety and depression, which she had before, but which had been under control. [emphasis added]

### The cross-appeal

26. It is convenient to start with the cross appeal that challenges the decision of the Employment

Tribunal to award loss of earnings for the one complaint of indirect disability discrimination that succeeded. The respondent asserts that the compensation could only be awarded for the complaint of constructive unfair dismissal and so should have been subject to the cap in place at the time on compensation for unfair dismissal.

### **Complaints of discrimination in employment**

27. Section 39 **Equality Act 2010** (“**EQA**”) provides:

39 Employees and applicants ...

(2) An employer (A) must not discriminate against an employee of A's (B)— ...

(c) by dismissing B;

(d) by subjecting B to any other detriment. ...

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment— ...

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

28. A discrimination complaint can be brought in respect of a dismissal, which can include a constructive dismissal, or in respect of “any other detriment”. They are separate concepts.

29. The claimant could have relied on the conduct that resulted in the complaint of indirect disability discrimination as part of the conduct that resulted in her resignation and brought a complaint of discriminatory constructive dismissal, but she did not. The finding in the liability judgment was only one of constructive unfair dismissal. There was no application to reconsider that judgment and so the claimant could only seek compensation for the indirect disability discrimination as a detriment.

30. Section 124 **EQA** provides:

124 Remedies: general

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) 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. ...

(6) 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.

31. Section 119 **EQA** provides:

119 Remedies

(1) This section applies if the county court or the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

(2) The county court has power to grant any remedy which could be granted by the High Court—

(a) in proceedings in tort;

(b) on a claim for judicial review.

32. The correct approach to the assessment for unlawful discrimination was concisely and authoritatively stated by Lord Justice Elias in the context of a complaint of race discrimination in

**Chagger v Abbey National plc** [2009] EWCA Civ 1202, [2010] ICR 397:

11. The starting point, therefore, is that race **discrimination is treated as akin to a tort and compensation has to be assessed on tort principles**. In accordance with those principles, **the measure of damages is the loss flowing from the unlawful act**. The classic formulation of the underlying principle is by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 , 39, where he said:

“where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages **you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong** for which he is now getting his compensation or reparation.”

12. Furthermore, **the loss must flow “directly and naturally” from the tort. There is no requirement that the loss should be reasonably foreseeable**. This was confirmed by the Court of Appeal in *Essa v Laing Ltd* [2004] ICR 746 , para 37, where Pill LJ observed:

“I see no need to superimpose the requirement or prerequisite of reasonable foreseeability upon the statutory tort in order to achieve the balance of interests

which the law of tort requires. It is sufficient if the damage flows directly and naturally from the wrong. While there is force in the submission that, to prevent multiplicity of claims and frivolous claims, a control mechanism beyond that of causation is needed, reliance upon the good sense of employment tribunals in finding the facts and reaching conclusions on them is a sufficient control mechanism, in my view. As a mechanism for protecting a defendant against damages which, on policy grounds, may appear too remote, a further control by way of a reasonable foreseeability test is neither appropriate nor necessary in present circumstances.”

13. In the same case Clarke LJ recognised that damages might be limited by the possibility of a break in causation or the failure of the claimant to mitigate his loss, at para 53:

**“In all the circumstances I agree with Pill LJ that there is no need to add a further requirement of reasonable foreseeability and that the robust good sense of employment tribunals can be relied upon to ensure that compensation is awarded only where there really is a causal link between the act of discrimination and the injury alleged. No such compensation will of course be payable where there has been a break in the chain of causation or where the claimant has failed to take reasonable steps to mitigate his loss.”** [emphasis added]

33. The fact that an act might have been relied upon in a complaint of discriminatory constructive dismissal does not necessarily mean that it could not be brought as a detriment complaint, the damage resulting from which could include those flowing from loss of employment. In **McLeary v One Housing Group** UKEAT/0124/18/LA, His Honour Judge Auerbach noted:

**An individual who claims that one or more individual acts of discrimination during employment have driven them to resign, may argue, as a matter of ordinary principles of causation of loss, that the discrimination during employment therefore caused the loss of that job and the loss of earnings and so forth that may go with it.** Nevertheless, the presence or not of a discriminatory constructive dismissal claim may make a material difference in a case where that claim would be in time, but where a claim or claims which are dated from the last date of the impugned treatment during employment would be out of time. [emphasis added]

34. The chain of causation for an act of discrimination to loss sustained may be broken. But it will not generally be broken by a wrongful act of the discriminator; **Prison Service v Beart (No 2)** [2005] EWCA Civ 467, [2005] I.C.R. 1206.

35. In a claim of constructive dismissal it is necessary that the employee resigned in response, at least in part, in response to the fundamental breach, or breaches, of contract on the part of the

employer. In **Meikle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1,

Lord Justice Keene held:

33. It has been held by the Employment Appeal Tribunal in *Jones v F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The appeal tribunal there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the "effective cause" of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the *Western Excavating* case. **The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer.** [emphasis added]

36. There is no reason why, where there is more than one repudiatory breach of contract, that a resignation cannot amount an acceptance of more than one of the breaches. Thus there could be a non-discriminatory and discriminatory fundamental breaches of contract which are accepted by the employee resigning. The former could give rise to a unfair constructive dismissal and the latter to a discriminatory constructive dismissal or might be brought as a complaint of discriminatory detriment from which the loss of earnings is said to arise.

37. A separate question is that of what harm was caused by such discrimination as is established. There may be circumstances in which harm results both from discrimination and some other cause. In some cases it may be possible to divide the harm occasioned by the discrimination from that arising from other causes. In others the loss will be indivisible. In **BAE Systems (Operations) Ltd v Konczak** [2017] EWCA Civ 1188, [2018] I.C.R. 1 Lord Justice Underhill held:

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. [emphasis added]

### The grounds of cross-appeal

38. The grounds of cross-appeal assert that:

#### GROUND 1

The Employment Tribunal erred by:

- (i) Not applying, or misapplying, the test for causation under the Equality Act 2010 set out in *Essa v Laing* [2004] IRLR 313;
- (ii) Erroneously establishing legal causation without identifying a direct and natural cause, or the *causa proxima* amongst concurrent causes, contrary to the principles in *Essa* and in *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobras (The Kos)* [2012] 2 A.C. 164;

(iii) Establishing legal causation on the basis of a sine qua non or an indirect cause.

## GROUND 2

Alternatively, the Tribunal erred by perversely concluding that the single act of indirect discrimination in 2018 was a direct and natural cause of the Claimant's constructive dismissal 2 years later

## GROUND 3

The Tribunal erred by finding that the dismissal was discriminatory in circumstances where a discriminatory dismissal had not been foreshadowed by the parties in pleadings, nor set out in the List of Issues, nor argued in submissions before the Tribunal at the Liability Hearing, nor clearly identified in the Tribunal's Liability Judgment.

### **Analysis of the cross-appeal**

39. The grounds are overlapping and I will not analyse them in order. Initially, I was inclined to consider that there was force in Ground 3. The most obvious analysis would have been to treat the one act of indirect disability discrimination as forming part of the conduct that gave rise to a discriminatory constructive dismissal. This option was not open to the Employment Tribunal because a case of discriminatory constructive dismissal had not been advanced at the liability hearing. The claimant had not sought reconsideration of the liability judgment on the basis that a complaint of discriminatory constructive dismissal had been overlooked.

40. I was troubled that in reality the Employment Tribunal might have awarded damages for discriminatory constructive dismissal rather than as a loss flowing from the detriment that resulted from the PCP of "not permitting the subject of the complaint to participate in the investigation" being applied to the claimant that resulted in the successful indirect disability discrimination detriment.

41. I have concluded that was not what the Employment Tribunal did. The Employment Tribunal specifically stated that it "was mindful that it can only award the Claimant compensation for the aspect of the claim where she succeeded in proving indirect disability discrimination in addition to her successful complaint of unfair dismissal". The Employment Tribunal correctly noted that "this is not as straightforward as it seems". The Employment Tribunal was entitled to observe that "the

disability discrimination is knitted into the facts leading to the Claimant's dismissal". The Employment Tribunal was aware of the analytical problem it faced and "spent some time discussing the relationship between the discrimination and the dismissal at the remedy hearing". Rather than awarding compensation for a discriminatory constructive dismissal the Employment Tribunal did, what it was required to do, by assessing the loss that flowed from the indirect disability discrimination detriment. The Employment Tribunal found that the losses that resulted from the claimant's loss of her employment flowed from the indirect disability discrimination as well as from the unfair constructive dismissal. The question in the cross-appeal is whether that was a permissible option.

42. As His Honour Judge Auerbach noted in **McLeary** employees who have established that "acts of discrimination during employment have driven them to resign, may argue, as a matter of ordinary principles of causation of loss, that the discrimination during employment therefore caused the loss of that job and the loss of earnings". As I have explained in my analysis of the law above, I do not consider the fact that there has been an unfair constructive dismissal after the detriment precludes the possibility of the loss of earnings also being a loss that flows from the detriment. Indeed the contrary was not argued by the respondent.

43. The Employment Tribunal had to assess compensation that would put the claimant financially in the position that she would have been in had she not been subject to discrimination. The question for the Employment Tribunal was whether the claimant's loss of earning and other benefits flowed "directly and naturally" from the indirect disability discrimination detriment as required by **Essa v Laing**. Although appearing within a direction about injury to feelings, the Employment Tribunal noted that "issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct". The Employment Tribunal directed itself to **Essa v Laing**. In **Essa v Laing** Lord Justices Pill and Clark thought the issue was one that is to be left to the "good sense of employment tribunals".

44. On a fair reading of the judgment, it is clear that the Employment Tribunal did carefully

consider whether the losses flowed “directly and naturally” from the indirect disability discrimination. The Employment Tribunal noted that the indirect disability discrimination “lasted for a considerable period of time”, that the claimant “never fully recovered from it” and that “repercussions from it continued until the Claimant left the Respondent’s employment”. The Employment Tribunal found as fact that the claimant’s “trust and confidence in her employer was never restored” and that she felt “unsafe” to an extent that “worsened over time” with the claimant “feeling powerless, having professional anxiety, and experiencing paranoia”. The Employment Tribunal held that the application of the PCP was “serious, destructive to the employment relationship and damaging to the Claimant’s mental health”. It is in that context that the Employment Tribunal held that “there is a clear line from the successful complaint of indirect discrimination to the successful complaint of constructive dismissal”.

45. The Employment Tribunal properly applied the principle in **Essa v Laing** to the facts it found. It identified the direct and natural cause of the claimant’s losses. Causation was not established on a “sine qua non” basis; i.e. merely by finding that if the indirect discrimination had not occurred the sequence of events that resulted in the constructive dismissal of the claimant would not have unfolded. The Employment Tribunal found that the indirect disability discrimination it was an effective cause of the claimant’s resignation, the delay in resigning resulting from the grievance and appeal processes that had failed to resolve the problems. The Employment Tribunal accepted that the primary reason the claimant left her job was the fact that she had been excluded from the investigation of the complaints against her and had lost confidence in the respondent as a result.

46. The decision of the Employment Tribunal was one that was open to it and the respondent cannot surmount the high hurdle of establishing that the decision was perverse.

47. The cross appeal is dismissed.

### **The appeal**

48. The grounds of appeal that were permitted to proceed challenge the refusal to award future

loss of earnings and the approach of the Employment Tribunal to pension loss.

### **The findings of the Employment Tribunal**

49. The Employment Tribunal found that the claimant had done all that she could reasonably have been expected to have done to mitigate her loss from the date of her resignation on 11 February 2020 to the remedy hearing on 29 April 2024. During that period the claimant had worked as a locum and on fixed term contracts in London and elsewhere. The claimant would have earned £180,012.45 for the respondent and had been able to earn £139,380.98, giving a net loss of earnings of £40,631.47.

50. The Employment Tribunal held that the claimant had only “recently regained her mental health”. The Employment Tribunal considered what employment the claimant might find in the future:

78. At the hearing she told us of **her latest interview, for the post of Army Welfare Officer which would be based on an RAF base, which is within 1.5 hours of travelling for her. The Claimant is considering whether to accept this job.** All that remains to be done from the Army’s perspective, is for the security checks to be done. The Claimant got the offer in March 2024. **The concerns for her are the travelling as it would be about approximately 3 hours per day, in total, which could be difficult.** Coming to London would require her to travel over an hour each way. She was also concerned whether, having been away from an office environment for so long, she would be able to be in an office every day. She was worried that she might let them down, which shows that her confidence in her abilities is not quite yet restored.

79. She has also begun to consider the possibility of becoming self-employed as an independent social worker. In order to do that the Claimant would have to undergo specialist training. The Claimant is presently looking for a suitable course and needs to decide when she would be able to do this. It is a position that would take time to build to a decent income, as it would depend on recommendation and personal referral. The Claimant also told us that with her level of experience [she] could work as a LADO (local authority designated officer) or train social workers at university such as Anglia Ruskin.

51. The Employment Tribunal did not award any future loss, stating that:

84. **It is likely that if the Claimant decides not to accept the Military Welfare Officer post, she is likely to find another job soon. She also has the option of becoming an independent social worker, which she is likely to be successful at,** given the wealth of experience she has doing many different jobs within social work.

85. **The Tribunal does not agree with the Claimant that it is likely to take her 8**

**more months to find suitable employment. The Claimant has an offer of a job on the table at present, which she says would entail a reasonable journey into Surrey.** Although she has legitimate concerns about the practicalities of being in an office environment again, after a break of 4 years, the Claimant does have a suitable job offer. **If she declines to accept it, then there is likely to be another permanent job that she can take up or project work that she can do.**

**86. In the circumstances, the Tribunal makes no order for future loss.** The Claimant was dismissed over 4 years ago. She is no longer on medication and has told the Tribunal that she is much better. We believe that now that the publicity over the case has passed and she is much better, **she should find suitable, permanent employment quite soon.** [emphasis added]

52. The claimant provided an expert report in respect of her asserted pension loss, calculated in accordance with the complex method for defined benefit schemes in the **Employment Tribunals Principles for Compensating Pension Loss, Fourth Edition (Third Revision) 2021**. The Employment Tribunal rejected this approach, essentially because of its analysis that the claimant would soon find suitable permanent employment. The Employment Tribunal held:

100. The Tribunal understand that had she not been dismissed, it is highly likely that the Claimant would have remained in employment with the Respondent, barring redundancies, reorganisations and personal issues such as her health or that of significant members of her family. **However, the Claimant is unlikely to remain unemployed for long. She has many transferable skills** that are sought after within the social work and children safeguarding fields. She told us that she can apply for the position of a LADO, that her skills could be used to teach social work students and that she could work for the military in the job she was offered in March, or other local authorities or other national bodies such as CAFCASS.

101. **The Claimant is highly likely to earn again and to earn a pension or to continue to put money into her NEST pension during the 6.5 years to retirement.** The Claimant's evidence was that she did not have a difficult time finding work and that the fact that she did not work apart from CAFCASS for the last two years must have been fallout from the publication of the liability judgment. That is an indication that she is confident that now she is well and able, she will have no problems getting another job.

102. **It is therefore our judgment that the calculation produced by the forensic accountant is not appropriate for us to use to calculate the Claimant's pension loss.** The Claimant has lost the total of the Respondent's contributions towards her pension for the past two years since her dismissal. We see on Appendix C3 that **the Respondent's contribution per year towards the Claimant's pension was approximately £5,700 - £6,000 per annum. It is therefore our judgment that the Claimant has lost approximately £20,000 in pension contributions and we award her that sum to reflect her pension loss.**

## **The appeal**

53. The claimant was permitted to advance two grounds of appeal challenging the assessment of future loss and pension loss, which include challenges on **Meek** grounds that the decision is insufficiently reasoned to enable the claimant to understand why no future loss was awarded and why pension loss was assessed in the sum of £20,000. The grounds challenge a failure on the part of the Employment Tribunal to grapple with potential ongoing loss that the claimant was likely to suffer.

## **The Law**

54. As set out above, section 124 **EQA** requires compensation to be assessed on tortious principles. The assessment requires a robust and realistic assessment of what is likely to happen. The process necessarily involves a degree of speculation. Awards should properly compensate but not provide a windfall. Schedules of loss that, almost as a matter of course, paint the bleakest possible future and maximise losses do not assist the Employment Tribunal and are to be treated with a degree of scepticism. But whether there are likely to long lasting financial consequences arising from discrimination the complexity of the arithmetic involved in calculating the loss cannot be avoided.

55. There are a limited number of cases where an employee will suffer full career loss of earnings.

56. There are many cases in which fair assessment of compensation can be assessed by fixing a nominal date upon which the employee will find a job with equivalent salary and other benefits up to which compensation can be calculated. It may be appropriate to assess a percentage chance that new work will be obtained.

57. There are also cases in which the employee taking reasonable steps to find new employment will only be able to partially mitigate future loss. In such cases there will be a partial ongoing loss of earnings to be assessed up to the nominal date when a job providing total mitigation will be obtained, or to retirement.

58. The Employment Tribunal appears to have accepted that this was a case in which the claimant would soon find a new role that would partially mitigate her loss.

59. The Employment Tribunal erred in assessing that no future loss should be awarded because the claimant would either take the Military Welfare Officer post or some other “suitable” job. The Military Welfare Officer paid considerably less than the claimant’s salary with the respondent and so would result in significant ongoing loss of earnings for which no compensation was awarded. The Employment Tribunal did not assess what salary the claimant could earn from any of the other types of suitable employment that it considered she could obtain.

60. The Employment Tribunal also failed to assess what pension would be provided in such employment and whether there would be ongoing pension loss.

61. The Employment Tribunal did not refer to the Employment Tribunals Principles for Compensating Pension Loss. While I doubt that there are many Employment Tribunal’s that relish the prospect of assessing loss on the complex calculation method, sometimes it cannot be avoided if proper compensation is to be awarded. On the face of it this case does not seem to fit into the simple calculation methodology.

62. The appeal is allowed and the matter shall be remitted to the Employment Tribunal. I have concluded, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, that the remission should be to the same Employment Tribunal. The Employment Tribunal made numerous detailed findings of fact that have not been successfully challenged on appeal. The Employment Tribunal will be better placed than a newly constituted Employment Tribunal to assess future loss and pension loss. Remission to a newly constituted Employment Tribunal would be likely to be more costly and so proportionality is in favour of remission to the same Employment Tribunal.