THE EMPLOYMENT TRIBUNALS

Claimant **Mr J Banerjee**

Respondent **Royal Bank of Canada**

HELD AT: **London Central**

ON: **4 to 7 December 2018**
Chambers 10 December 2018

Employment Judge: **Mr J Tayler**

Appearances

For Claimant: **Mr P Nicholls, Queen's Counsel**
Ms C D'Souza, Counsel

For Respondent: **Mr D Craig, Queen's Counsel**

JUDGMENT

1. The Claimant's losses are to be calculated on the basis of gross total annual salary (including bonus) of £280,000 per annum to 19 April 2021.

2. The Claimant is not entitled to recover in respect of health-insurance premiums that he has not replaced to date. Health insurance premiums can be recovered for future loss.

3. There shall be a reconsideration of the ACAS uplift. Once the parties have calculated the sums to which the Claimant is entitled, the parties will have an opportunity to put forward any further submissions on the question of whether the percentage uplift should be reduced, and if so to what extent, having regard to the total compensation to be paid to the Claimant.

REASONS

Issues

1. The parties agreed a List of Issues on 29 August 2018. I have decided those issues necessary to determine the key points of principle on remedy and taking account of the manner in which the parties put their cases by the close of proceedings.

Evidence

2. The Claimant gave evidence on his own behalf.

3. The Claimant called:

   3.1 Simon Birch, Portfolio Manager at Highbridge Capital

   3.2 As an expert witness; Andrew Nicolll, Employment Consultant

4. The Respondents called :

   4.1 Edward Stubbenhagen, Director of Compensation, Advisory for Capital Markets, Technology Operations and Functions

   4.2 As an expert witness; Timothy Mark Carrington

The Law

Assessment of Loss

5. Pursuant to section 123 of the Employment Rights Act 1996 ("ERA"), the Tribunal should award a sum of compensation to the Claimant that is:

> "…just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

6. The Claimant is entitled to be put in the position in which he would have been if the wrong had not been committed.

7. I accept the Respondent's submission that the assessment of loss is not an exact science; in assessing damages there must be "elements of estimate and to some extent of conjecture": per Lord Morris in **Mallet v McMonagle** [1970] AC 166 who stated at 173:

> "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past the court decides upon a balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or

> would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

8. While predicting what would have been can never be an exact science it is founded on an analysis of the evidence. The evidence of the Claimant is important but is not to be accepted without further enquiry: **Ministry of Defence v Cannock** [1994] ICR918 at 951B. I accept that there is always a risk that a Claimant may have an overly rosy view of what the future held absent the unlawful actions of the employer. Evidence of what has happened to others in similar circumstances may be significant: **Cannock** at 951C. As Morrison J put it ""The chances must be assessed sensibly having regard to what happens in real life…"

9. The burden of proving loss lies on the Claimant: **Newton Tool Co v Tewson** [1972] ICR 501. The burden of establishing any unreasonable failure to mitigate loss lies on the Respondent: **Wilding v British Telecom** [2002] ICR 1079. There is a difference between acting reasonably and not acting unreasonably: **Cooper Contracting v Lindsay** [2016] ICR D3.

10. The word "attributable" in s.123 ERA implies that there has to be a direct and natural link between the losses claimed and the conduct of the employer in dismissing. The phrase *"just and equitable"* requires the Tribunal to look at the conclusions it draws from its quantification of losses and what is attributable to the conduct of the employer, and then determine whether, in all the circumstances, it is reasonable to award: **Simrad Ltd v Scott** [1997] IRLR 147.

11. Morison J stated in **Ministry of Defence v Cannock** (at 950H):

> "We suggest that tribunals do not simply make calculations under various different heads, and then add them up and award the total sum. A sense of due proportion involves looking at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed."

12. If there is a realistic chance that the Claimant would have been dismissed fairly or resigned, this must be factored into the calculation of loss: **Polkey v Dayton** [1988] ICR 142, **Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290; **Cherry Tree Day Nursery v Fanstone** UKEAT/0273/07/DM.

13. Elias LJ observed in **Wardle** at paragraph 65 that it is unlikely that an employee would voluntarily leave a job otherwise than for similarly paid employment as employees rarely voluntarily leave a job for lower pay. They are even less likely to resign without any job to go to, although this does happen.

14. In **Software 2000 v Andrews** [2007] ICR 825, it was held at paragraph 54:-

> *"The following principles emerge from these cases. (1) In assessing compensation the task of the tribunal is to assess the loss flowing from*

> *the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and Judgement for the tribunal.*

15. In analysing the counter factual one is considering what the position would have been had the employer appreciated their obligations and acted lawfully: see (in the context of unlawful imprisonment) **Parker v The Chief Constable of Essex Police** [2018] EWCA 2788 (Civ) and the analysis of **R (Lumba) v Secretary of State for the Home Department** [2011] UKSC 12.

16. Future loss of earnings should normally be assessed up to the point when the Tribunal estimates that the employee will obtain a job at an equivalent salary: **Wardle** Per Elias J at para 51:

> "…in my view the usual approach, assessing loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases – and they are likely to be the vast majority – where it is at least possible to conclude that the employee will in time find such a job."

17. In **Griffin v Plymouth Hospital NHS Trust** [2015] ICR 347 Underhill LJ explained the assessment at paragraph 9:

> "At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the Claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the Claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of probabilities"

18. The compensatory award is intended to compensate the employee for loss which flows from the unlawful dismissal and is not a penal award against the employer: **Morgans v Alpha Plus Security** Ltd [2005] ICR 525

19. However, if the evidence established that the employee genuinely has been robbed of his career in the sense that there is no real prospect of a Claimant obtaining another job, particularly where stigmatised by the actions of the employer, full career loss damages may be appropriate: **Chagger v Abbey National** [2010] ICR 397 (CA).

Expert Evidence

20. Expert evidence may be of assistance in assessing loss. However, its use should be limited to where it really is necessary. I have found assistance in considering the appropriate role and extent of expert evidence by considering the provisions of Rule 35 CPR. Rule 35.1 provides: "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings." Rule 35 states that the expert's duty is to the court and Rule 35.2 provides "This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid." Rule 35.10 requires an expert report to comply with Practice Direction 35. Paragraph 2 of the Practice Direction provides:

> "2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
>
> 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
>
> 2.3 Experts should consider all material facts, including those which might detract from their opinions."

21. In **Kennedy v Cordia (Services) LLP** [2016] 1 WLR 613it was held at para. 50:

> "The skilled witness must demonstrate that he or she has the relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence".

Health Insurance

22. I accept Mr Craig's submission that where health insurance has not been replaced the cost cannot be recovered as past loss: although it can be recovered as future loss: **Knapton v ECC Card Clothing Ltd** [2006] ICR 1084.

ACAS Uplift

23. In assessing an appropriate figure for the ACAS uplift the Employment Tribunal may after assessing the blameworthiness of the Respondent's conduct have regard to the overall figure for compensation to ensure that the sum awarded is not excessive, having regard to the types of sum awarded for matters such as injury to feeling: **Wardle v Credit Agricole** at paragraphs 27-9.

Res Judicata and Reconsideration

24. The principle of res judicata generally prevents issues that have been finally determined from being re-opened: **Thoday v Thoday** [1964] P 181.

25. The Employment Tribunal has power to reconsider its decisions pursuant to rule 70 of the Employment Tribunal Rules 2013 which provides:

> "A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any Judgement where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again."

26. The provision was considered by Lord justice Elias in **Ministry of Justice v Burton and another** [2016] ICR 1128 where he held:

> "21 An Employment Tribunal has a power to review a decision where it is necessary in the interests of justice: see rule 70 of the Employment Tribunals Rules of Procedure 2013. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J pointed out in Newcastle upon Tyne City Council v Marsden [2010] ICR743, para 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray & Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review. In my Judgement, these principles are particularly relevant here."

27. However, reconsideration is not limited only to "exceptional circumstances": **Newcastle Upon Tyne City Council v Marsden** [2010] ICR 743, at para. 16.

Findings of fact and analysis of likelihood of events

28. After completing a degree in economics at Sussex University, aged 21 or 22, the Claimant joined Chemical Bank (now JP Morgan) in June 1990 as a graduate trainee in the Capital Markets Division. He became a Vice President by age 24.

29. In 1995 the Claimant joined NatWest Markets as a senior trader. However, the job did not work out as he expected and, in the summer of 1995, he left to join Citibank as a Senior Trader in the European Currency Trading Group. Subsequently, he became head of Spot EM Trading.

30. In 1998, the Claimant left Citibank to join Barclays to run the London non-G7 FX Trading Team. This was the first time he worked with Mr Birch. He states he was extremely successful during this period. In the Claimant's witness statement for the liability hearing he stated that this was when he first earned more than £1 million a year. The implication was that he regularly earnt more than £1 million a year thereafter. That was not the case. However, the Claimant was also paid approximately £1 million in his last full year at Barclays.

31. In 2002 the Claimant left Barclays to set up a hedge fund, Magi Capital, together with former colleagues. The venture was not economically viable and was closed.

32. In March 2004 the Claimant was hired by Simon Birch (who had by then left Barclays) and Chris Allington (with whom he had worked Chemical Bank) to join Merrill Lynch in the Emerging Markets Division. He eventually lead the FX Proprietary Trading Group. The group was disbanded, resulting in his redundancy in around January 2006. That was the last time that Mr Birch worked with the Claimant.

33. The Claimant was at his most successful while at Barclays and Merrill Lynch.

34. In the spring of 2006 the Claimant was recruited again by NatWest Markets as a Senior Trader in their Propriety Trading Group. The group was closed and the Claimant was made redundant.

35. In January 2007 the Claimant joined Credit Suisse to run a Cross-Product EM Group. The Claimant moved to Zürich in about April 2008. I was provided with figures for the Claimant's earnings form this period. The figures for the period during which the Claimant worked at Credit Suisse are a little difficult to follow because he started this new employment and subsequently moved to Zürich.

36. For the 2007 bonus year. there appears to have been no discretionary bonus but a sign-on bonus of $250,000.

37. In 2008, after the move to Zürich, the Claimant was awarded total compensation of $1,060,00. In Stirling his total for the year was a little over £570,000.

38. In early 2009 the Claimant decided to leave Credit Suisse. He stated that he made his entire budget within the first five weeks of the year and was uncertain how any profit he made thereafter would be treated for bonus purposes. His bonus for 2009 is difficult to follow. The Claimant in his supplementary witness statement suggested that he earnt CHF 1,293,498. However, that took into account a cash retention award from 2008 of CHF 609,741 which was not paid until February 2009. The Claimant does not appear to have been paid a discretionary bonus in 2009. The Claimant did receive CHF 535,000 as a result of a settlement agreement. I conclude that the payment included an element to buy out the bonus to which he would have been entitled to.

39. In June 2009 the Claimant set up and worked for a family company, Wedderburn AG.

40. In August 2010, the Claimant joined Standard Chartered working in Dubai as a Senior Propriety Trader. In 2010 Claimant did not receive a discretionary bonus from Standard Chartered. His annualised total pay was approximately £175,000.

41. In April 2011 at the Claimant moved to Standard Chartered in London. He was awarded no discretionary bonus. His total pay was approximately £195,000.

42. The Claimant was approach while working with Standard Chartered to join Jefferies. At about that time the Claimant was also approached by Simon Birch to work as an EM trader at Morgan Stanley, but said that he was not able to do so as he had already agreed to join Jefferies.

43. The Claimant joined Jefferies on 16 April 2012. The Claimant was not awarded a bonus for 2012. His total pay was £125,128. The Claimant suggested in his witness statement that the relatively low income was because of losses made by others, but accepted in cross examination he had not, himself, made that much money.

44. In 2013 Claimant was paid a discretionary bonus of £100,833, and had a total remuneration package of £300,833.

45. The Claimant and was not paid a bonus by Jefferies in 2014. His total remuneration was about £200,000.

46. The venture for which the Claimant was engaged at Jefferies was not successful and towards the end of 2014, or early 2015, the Claimant started considering alternative options. He attended interviews with BNP, where Mr Birch now worked. In his oral evidence the Claimant's stated that the interviews were towards the end of 2014. His evidence was that he was made a verbal offer of employment at the end of 2014 that he did not at that stage accept, but had no reason to believe would be withdrawn.

47. Subsequently, the Claimant states that another more formal offer was made in early 2015, by which stage he had already agreed to join the Respondent. The main reason the Claimant chose to join the Respondent was because he considered that the Respondent had a clear regulatory record. The Claimant's contention in his witness statement that he did not join BNP because he had already shaken hands to join the Respondent is misleading in that on his evidence, which I accept, there had been an earlier offer that he had not taken up because he wished to join a bank with a clear regulatory record, rather than because he had agreed on a move to the Respondent.

48. The period that the Claimant worked for Standard Chartered and then Jefferies was a low point in his career. He accepts that he made a poor decision in joining Jefferies. I consider that his earnings for this period are less than he might have earned had he been working at another bank and do not represent his true market value.

49. The Claimant eventually left Jefferies on 1 June 2015 and commenced employment with the Respondent on 15 June 2015 as Director, Emerging Markets FX Trader. In his statement the Claimant states that he was looking for a stable employer where his experience and skills would be appreciated and where he could earn a good living for a long period of time. He placed considerable emphasis on the fact that the Respondent had a clean regulatory record when he joined. I accept that the Claimant was particularly concerned about the regulatory problems that were facing many major banks and wished to work out the remainder of his career at a bank where regulatory issues were unlikely to be a problem. The key question is how long that career was likely to last.

50. The Claimant only worked for the Respondent for part of the 2015 bonus year; which ended in October 2015, the bonus being paid in December 2015.

51. Mr Stubbenhagen set out the bonuses paid to traders at a similar level to the Claimant in FX together with the independent benchmarking undertaken by an external contractor for remuneration purposes, as follows:

Individual	Actual TDC	Median	High quartile	Top decile
1	£625,000	£375,830	£596,670	£827,870
2	£555,000	£375,830	£596,670	£827,870
3	£325,000	£255,720	£353,590	£773,080
Claimant	£330,000[1]	£390,000	£499,350	£696,140

52. The Claimant was paid fixed remuneration of £200,000. Mr Stubbenhagen estimated the Claimant's bonus as £130,000 assuming that the Claimant would have achieved revenue at the same average monthly rate as he had achieved over the part of the year he was employed. This gave a figure of £330,000 for total remuneration. I accept that is the best way of estimating bonus; although I accept that the Claimant's revenue was patchy; tending to result from an occasional very successful large trade with occasional significant losses. The Claimant was a little below median earnings for benchmarking purposes. Taking into account the fact that there is likely to be a comparatively slow start in a trading role the Claimant's likely market value for future years on a change of employer would be likely to be in the region of median earnings. The median earnings for his role was slightly higher than for two of his colleagues; and significantly higher than one. I consider that median earnings for the highest earning of the Claimant's colleagues provides a good starting point for assessment of the Claimant's likely earnings in a good year with the Respondent or, indeed, if he moved to another bank, the Claimant having re-established himself in a more mainstream trading role.

53. The Claimant's employment terminated on 18 November 2016.

54. After his dismissal the Claimant spoke with James Ludlam (a senior Emerging Markets Trader) who told him that it was unlikely that he would be able to obtain a trading job because of his dismissal and before any litigation was resolved. The Claimant had a further conversation with Mr Ludlam after his appeal who again stated that it would not be possible to advance the Claimant as a candidate for a trading role until the litigation was over. The expert witnesses agreed that there was no realistic chance of the Claimant obtaining a trading role before the litigation was completed. I accept that evidence. It was not challenged by the Respondent.

55. Mr Stubbenhagen in his first and second witness statement considered the bonus that the Claimant would have been likely to have been paid had he still been in the Respondent's employment in December 2016. He sets out the

initial recommendations and actual bonuses paid to the other FX traders as follows:

56.

Individual	Initial recommendation	Actual year-end bonus	% Reduction
1	£450,000	£235,000	48%
2	£550,000	£260,000	53%
3	£350,000	£175,000	50%
		Average	**50%**

57. Mr Stubbenhagen notes that overall there was a 50% reduction in bonus as against that originally recommended. The Claimant was originally recommended for a bonus of £250,000; reducing that by 50% would suggest a bonus of £125,000.

58. However, Mr Stubbenhagen makes it clear that bonuses are calculated by application of a compression ratio applied to revenue generated. The original bonus recommendations would have been equivalent to a compression ratio of 11%. The bonuses eventually awarded were based on a compression ratio of 7%. Applying this compression ratio to the proposed bonus for the Claimant would have given a bonus in the region of £160,000.

59. Mr Stubbenhagen states in his second witness statement that he made an error in calculation of the Claimant's likely bonuses for 2016 because he failed to take into account the fact that two of those awarded bonuses had a reduction because they had been found guilty of misconduct by using offensive language in email communications. Once that was taken into account there was a smaller percentage reduction form the original recommendation (46.3%) or, on the more appropriate method of calculation, a higher compression ratio. One would assume that would have led Mr Stubbenhagen to conclude that he had slightly underestimated the bonus that the Claimant would have been paid for 2016. Surprisingly, his second witness statement is relied upon to support the contention that the Claimant would have received a lower bonus. Mr Stubbenhagen achieves this result by either applying a percentage reduction leading to a bonus of £135,000 (this approach would have led to a bonus of £125,000 before the correction but was not his preferred approach to calculating bonus in his first statement). Alternatively, he applied a slightly higher compression ratio, but assumed that the Claimant would not have added any further revenues up to the end of the bonus year (as opposed to his previous approach of averaging across the year): giving a bonus of £92,500. Mr Stubbenhagen does accept that if he annualised likely revenue this would give a likely bonus for the Claimant of about £190,000. Overall, I conclude that the best approach is to assume that the Claimant would have been in a similar position to his two colleagues who had a reduction their bonus because of their misconduct and that therefore the figure of £160,000 is the appropriate figure for the bonus that the Claimant would have been awarded for 2016. That was the figure originally put forward by the Respondent and was accepted by the Claimant. I accept that it is the sum that he would have been paid. This would give total remuneration for the Claimant of £360,000 in 2018.

60. In the previous year the Claimant had the highest benchmark median earnings. The above figure would broadly fit with the benchmark median earnings for the comparators for 2016:

Individual	Actual TDC	Median	High quartile	Top decile
1	£460,000	£362,670	£640,190	£836,980
2	£460,000	£362,670	£640,190	£836,980
3	£350,000	£269,780	£490,000	£678,400

61. In early 2017 the Claimant states he spoke to James Ludlam who said he was engaged in an active search for a senior emerging markets trader for Namura, but although the Claimant would have been his choice for the role. he could not be put forward because of the litigation. In fact the litigation had not yet started but the Claimant had been dismissed for cause and the litigation was contemplated. The Claimant states he spoke again with Mr Birch in early 2017. Mr Birch told him that his hiring managers were focused on risk minimisation and so his whistleblowing would be likely to render him unsuccessful in any application. This fits with my finding that there was no realistic prospect of the Claimant obtaining a trading role while the litigation was ongoing.

62. Mr Birch states that he would have liked to have been in a position to engage the Claimant in 2016 or 17. If had been able to recruit the Claimant he states that the likely fixed remuneration would have been £300,000 with a guaranteed bonus in the region of £300,000 and the possibility total bonus in the region of £600,000; being a maximum level of two times annual salary. I note that Mr Birch has not worked with the Claimant since 2006 when his career was at its height. He is a friend who has a generous view of the Claimant's abilities. However, before any appointment to BNP the Claimant would have had to be interviewed by other members of the team. I consider that had the Claimant moved to BMP there is no realistic prospect that there would have been any substantial increase in the Claimant's remuneration over that that he earned with the Respondent. I consider that the total remuneration that the Claimant would have been paid had he remained at the Respondent and received his 2016 bonus, of £360,000, is the best reflection of his market value and likely starting salary (including and guaranteed or variable bonus) if moving banks at that time, taking into account that fact that if he had moved he might have been paid rather less or rather more.

63. The Claimant provided his first schedule of loss on 16 June 2017. He contended that he would have remained employed by the Respondent as a trader to the end of his career at 68 with fixed income of £200,000 and annual bonus of £400,000.

64. In July 2017 Claimant sent out a first batch of emails to a number of banks seeking roles as a trader. The emails were in a generic form that made it extremely unlikely that they would result in an offer of employment. the Claimant had not identified the relevant manager of the appropriate

department. He did explain why he would be a good fit for any specific roles. In circumstances in which most appointments involve a degree of word-of-mouth and the use of head hunters the applications had no reasonable prospect of resulting in the Claimant obtaining a role. However, for the reasons set out above, I accept that there was no realistic prospect of the Claimant obtaining a trading roles while the litigation was ongoing.

65. Mr Birch left BNP on 20 October 2017 and thereafter would not have been available to champion the Claimant.

66. Mr Birch stated BNP increasingly operate an Anglo-Saxon model in which if employees do not achieve the revenues expected of them they are dismissed.

67. On 30 November 2017 the Claimant served his second schedule of loss in which he approached the calculation in a similar manner to his first schedule.

68. The Claimant served his third schedule of loss on 22 March 2018. He again adopted a similar approach to loss.

69. The liability hearing took place between 23 April and 10 May 2018.

70. In June 2018 the Claimant sent out a further generic email, which again was unlikely to secure him a trading job.

71. On 6 July 2018, the Claimant served his fourth schedule of loss, again adopting similar approach.

72. The Claimant included an exchange of emails in July 2018 in which he sought to obtain practice as a teacher, referring to his wish to undertake Teach First. It is notable that he put a great deal more effort into the exchanges about seeking teaching experience than he did in his attempts to find trading roles. I conclude that the Claimant has been considering the possibility of a move into teaching, when his career in banking comes to an end, for a considerable period of time.

73. On 28 August 2018 the Claimant applied to BNP and others, now naming specific contacts. This has not resulted in any contacts from the banks. However, it is common ground, and I find, that that the Claimant has no realistic prospect of obtaining a trading role while still engaged in litigation.

74. On 1 November 2018 a recruiter, Mr Armon-Jones sent an email to the Claimant. He suggests that there is a current shortage of experienced traders in emerging markets and that he has been able to place experienced people with total packages between £650,000 and £980,000, with one trader on a total package of £2 million. It does not appear that he has been shown Claimant's historical earnings. While I accept that the market for emerging markets traders is brighter than suggested by the Respondent's witnesses, I do not accept that the Claimant's market value is at this level, based on the trajectory of his career and historic earnings together with the benchmarking evidence – form all of which I assessed his market value as of the end of 2016 as set out above.

75. On 26 November 2018, the Claimant served his final schedule. He changed his position contending, in the alternative, that if he had obtained a bonus of “only” £160,000 from the Respondent for 2018 he would have been likely to leave them and move to a competitor bank where he would have been likely to receive annual bonuses in the region of £450,000, or above, as he had previously claimed he would have earned had he remained with the Respondent.

76. The fundamental issues on remedy in this case are the determination of what the Claimant's likely career and earnings would have been had he not been unfairly dismissed for making protected disclosures and what the future is likely to hold should he take proper steps to mitigate his loss. That involves an overall consideration of the evidence to determine a trajectory that would provide an appropriate level of compensation, accepting that this is not a fact finding analysis as conducted when determining historic facts, but is an assessment that is designed to allow for the fact that there might have been alternative scenarios involving the periods of loss ending earlier or later; and/or higher or lower earnings.

77. In carrying out the analysis I obtained very little real assistance from the expert evidence. When I conducted a telephone Preliminary Hearing for Case Management on 2 November 2018 I expressed my considerable reservations as to whether expert evidence would be of assistance in this case, Mr Craig and Ms D'Souza told me that they agreed that expert evidence was necessary and persuaded me that I should permit it. I do not criticise them for the fact that they did not specifically direct me to CPR 35, and the requirement upon judges to limit expert evidence to that strictly necessary. I assume that they took that for granted. However, I do, on reflection, regret the fact I was not more robust and require more convincing that expert evidence was necessary.

78. The evidence of Mr Nicoll was fundamentally undermined by his acceptance in cross-examination that the approach he adopted was to base the majority of his conclusions on information that had been given to him by the Claimant, or individuals he had been introduced to by the Claimant, accepting at face value anything he was told unless he regarded it to be nonsense, absurd or ridiculous; in which case he would express his deep scepticism, but leave it in the report as material for the Claimant to “argue” the case, because it might be accepted by the judge. Most of Mr Nicholl’s report amounted no more than him repeating what he had been told by the Claimant, and those the Claimant had introduced to him; accepting it all with no serious analysis. This led him to conclude that that the Claimant would have worked as a trader to 68 or 70, when the objective evidence shows that would be extraordinarily unusual. Mr Nicoll demonstrated no real expertise in banking.

79. Mr Carrington's evidence was somewhat more impressive. His specific expertise is about computerised or “algorithmic” trading and the effect that it has had on FX trading in the major currencies, from which he infers it is likely to reduce the requirement for EM FX traders in the future. However, his evidence was severely undermined by the fact that he did not set out the alternative views, although he accepted that his view about the likely speed of a move to algorithmic treatment in EM FX trading was not universally held. Despite stating that he had read CPR 35 he did not comply with his duty to

explain the competing views and explain why he analysed the matter as he did. His evidence that algorithmic trading has become increasingly important in major currency FX trading added little to the objective evidence that a number of the main traders in major currency FX now only use algorithmic trading. It did not need expert evidence to establish that there are more challenges for algorithmic trading in EM markets, because of the lesser prevalence of fully electronic trading, limited opening hours for markets in certain EM Currencies and a tendency for greater volatility caused by unexpected political events: or to establish that, despite these challenges, it is likely in the next few years algorithmic trading will become increasingly important in EM FX trading. The usefulness of Mr Carrington evidence as to salaries in the FX market was reduced by the fact that he retired in September 2015.

80. Taking a step back and looking at the evidence as a whole; I conclude that the Claimant's losses should be calculated on the basis that he would have continued as a trader until April 2021 (when he will be 53) and that he would have earned the market fixed salary that I concluded he merited as of December 2016: i.e. fixed annual remuneration of £200,000. While I concluded that the market value for bonus purposes was £160,000 at the end of 2016, that represents what I consider would be the sort of sum that might be guaranteed on a move of banks. Total earnings of £360,000 would represent a good year for the Claimant on a historical basis. The Claimant's history suggests that bonuses varied with there being a significant number of years when he has not earned any bonus. I apply a discount of 50% to average out likely bonus over the period of loss giving an annual figure of £80,000 and therefore total annual remuneration during the loss period of £280,000 per annum. I conclude that the Claimant's losses should end on 19 April 2021, his 53rd birthday.

81. I adopt this calculation to take into account the full range of possibilities; in particular that his career as a trader might have been longer or shorter and that he might have earned more or less; and to take into account the possibilities of his leaving the Respondent in the various circumstances identified as possibilities by the Respondent, of moving as a trader to an equivalent bank and the small chance of him leaving the Respondent and not finding equivalent employment lasting up to April 2021.

82. The Respondent does not allege that there has been any failure by the Claimant to mitigate his loss to the date of the remedy hearing, save that it is contended he should have taken up the opportunity of a move to Namura that was raised by Mr Ludlam in early 2017. The Claimant suggested in his witness statement that he was precluded from taking up the opportunity because he was engaged in litigation with the Respondent at the time. In fact, the litigation had not yet started. The Respondent contends that the Claimant should have given up his proposed litigation and taken up the opportunity with Nomura. I accept the Claimant evidence, on cross-examination, that the opportunity could not be taken up because he had been dismissed for cause and litigation was in contemplation. I do not consider it was unreasonable of the Claimant not to be prepared to give up the proposed litigation to establish that he had been dismissed for making a public interest disclosure. I do not consider that whistle blowers should be required to keep silent and not litigate in order to mitigate their losses.

83. I next consider the period for which the Claimant would have been likely to remain as an EM FX trader. I accept that it is unusual for traders to continue in that role into their 50s. In the experts' joint statement it is stated that Mr Nicoll was content to agree with Mr Carrington that the majority of traders do not continue in the occupation into their 60s and most have withdrawn by their mid-50s. The sentence is a little unclear, but I take it that Mr Nicolle accepts that most traders have left trading by their mid-50s. The Respondent's evidence shows that in the whole of the Respondent's UK FICC business the average age of the 193 employees is 38, with the oldest employee in the entire business being 63. The average age of traders is 35. The oldest traders are both 51. There 69 traders. Mr Stubbenhagen's evidence as to the age at which traders generally retire is consistent with the evidence of Mr Carrington. It was also consistent with the evidence set out in paragraph 22 of the Respondent's closing estimating the age at which various employees referred to by the Claimant had left the Respondent. However, I am prepared to accept that the Claimant would have continued trading longer than is the norm. He was unusually committed to the role of being a trader. He obtained great job satisfaction from trading. Although he at one stage referred to having lost his pleasure in making money, I do not consider that reflects his general approach, which was one in which he was very committed to trading as long as he reasonably could. I consider he planned to see out his time in banking as a trader.

84. The difference between the parties reduced considerably during the hearing. In closing the Claimant's case was that the Claimant would been likely to have continued as a trader for at least five year; when he would have been 53, as opposed working as a trader to 68, as had been the claim in the Claimant's first four schedules. This was a much more realistic way of putting the case and I accept it is broadly accurate.

85. I accept that there are changing in working patterns that mean that traders may work against this longer than they have done previously. I have sought to avoid falling into an ageist stereotypes by assuming people cannot trade into their 60s or beyond. However, the evidence shows that very few do. That may be, in part, because of the early starts and considerable stresses in the role. Many traders choose either to retire from banking or to change jobs before they are 50.

86. I fix on the date of loss of the loss ending in April 2021, taking into account the possibility that the Claimant might have ceased trading earlier or he might have continued rather later because of his deep commitment to trading. I think there is a real possibility he might have continued trading beyond that age; but I offset that possibility against the various possibilities that might have resulted him leaving the Respondent earlier; and the small possibility that he would have done so and not have obtained a similar role in an equivalent bank.

87. The Claimant might have been dismissed for timekeeping or resigned after receiving a further warning for timekeeping. The Respondent accepted in closing submissions that the Claimant would have received a first warning had been treated fairly and not dismissed because of making protected disclosures. It should be remembered that Mr Adamson gave evidence on behalf of the

Claimant. Despite the terms of his email of 27 July 2016 in which he suggested that there was a breakdown of trust, Mr Adamson's evidence was that he did not believe the Claimant should be dismissed, but disciplined. He stated he was going along with the approach of senior management who had turned against the Claimant . In any event, even if Mr Adamson had really felt there was a breakdown in trust, had the matter been dealt with fairly, and HR had been permitted to go along with their initial recommendation for a disciplinary process, the Respondent's position is that there would have been a first warning. Mr Adamson would have had to accept that. I consider that the likelihood is that the Claimant's timekeeping would have improved once he realised his career in trading was at risk and would not have been likely to result in dismissal before April 2021. An improvement in timekeeping would have resolved the Claimant's difficulties with Mr Adamson.

88. There is also a possibility that the tendency for the Claimant to fall out with colleagues might have resulted in him leaving earlier by dismissal or resignation. However, in circumstances in which the Claimant's disclosures would have been taken seriously, as the Respondent suggested it was going to do, it is likely that the Claimant would have felt much less isolated in the workplace and I do not consider that there is a substantial likelihood that he would have been dismissed, or resigned, as a result of interpersonal relationships before April 2021.

89. I consider that it is unlikely that there would have a been a reorganisation, because of a move a computer trading, before April 2021 that would have resulted in the Claimant's redundancy.

90. I do not accept the Claimant's evidence that he would have left the Respondent if he received a bonus of "only" £160,000. Such a bonus would have resulted in overall remuneration that represented a good year for him and the Claimant was keen to remain at a bank that he considered had low regulatory risk.

91. Even if the Claimant had left the Respondent before April 2021, I consider it is most unlikely that he would have done so without obtaining a job at a competitor. Mr Birch provide support for the contention that the Claimant was well thought of and that that there would have been possibilities to work at banks such as BNP. If the Claimant had moved to another bank I consider that his earnings would have likely to have remained at the same level that he would have achieved with the Respondent; i.e. fixed annual salary of £200,000 and average bonus of £80,000. This takes account of the small possibility of much higher earning that Mr Ludlam suggest are available and allows for the possibility that bonus might have been higher in some years and lower in others. While I accept that there has been some decrease in earnings for his colleagues at the Respondent I consider had the Claimant's earnings fallen substantially below overall remuneration of £280,00 he would have been likely to obtain an opportunity with an alternative bank where he could earn such sums.

92. I consider that the loss should end in April 2021. I consider that taking proper steps to mitigate his loss the Claimant should be able to put himself back into the position he would have been had he remained with the Respondent, or moved to a competitor bank in a trading role before 2021. That is when I have

concluded he would have ceased trading. That would have put him at very top of the age range when people stop trading. It was the basis upon which the Claimant's final submissions were made. After ceasing trading I consider it is most likely that the Claimant would have retried from baking. He would have had a few good years of salary before retiring. Trading was his real calling and I do not consider it is likely that he would have wanted to move into sales.

93. Traders commonly move into new careers once their trading days are over. I consider the likelihood was that the Claimant would have retired from banking when he ceased trading and would have looked for a new challenge; the most likely being as a teacher. The enthusiasm that is shown in his email exchanges seeking to obtain teaching experience contrast with the lackadaisical approach he took in his email enquiries about banking roles.

94. If the Claimant takes proper steps to mitigate his loss by April 2014 he should be able to be in a similar teaching role to that he would have been in had he retired from banking on ceasing to be a trader in April 2021.

95. Alternatively, there is some possibility that the Claimant would have sought a sales role after ceasing to work as a trader. Application for such roles would have been unrealistic whilst the litigation was ongoing. However, once the litigation has ceased the Claimant should be able to find a sales role by April 2021 , which would mean that he would not sustain additional losses. However, I consider it is unlikely he will take that path.

96. I accept the Respondent's contention that the Claimant is not able to claim compensation in respect of health-insurance that he has not replaced, but is entitled to such sums in respect of future loss.

97. In respect of the ACAS uplift, I consider that this is a matter where reconsideration is appropriate. I appreciate that reconsideration will be rare where a party has failed to put forward an argument that was available, but overlooked. However, I consider that, in seeking to deal with matters in an effective manner, both the Claimant's and Respondent's Counsel at the liability hearing considered that it would be an effective use of tribunal time to determine the level of the ACAS uplift at the same time as liability as it turns on the extent of the Respondent's default in failing to apply a proper disciplinary process. It was considered to be a matter, like contribution, that while being a remedy issue is commonly determined at the same time as liability. The Counsel then instructed by the Claimant and Respondent, and I, focussed on the extent of the default. There was a genuine common mistake in overlooking the fact that there is a potential further step after that initial assessment has been conducted, in assessing the total value of the uplift to ensure it does not result in an excessive windfall for the Claimant.

98. It was agreed with Counsel that once the above points of principle had been determined the parties would seek to agree the calculation of the sums due to the Claimant, taking into account matters such as grossing up. Once those calculations have been made, I will reconsider the issue of the ACAS uplift on the basis of any further submissions about whether it is appropriate for a smaller percentage to be applied, and if so, what percentage.

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Employment Judge Tayler

1 February 2019

Judgment and Reasons sent to the parties on 1 February 2019