# THE EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondents** |
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| **Mr K Kansal** | **v** | **(1) Tullett Prebon PLC**<br>**(2) Tullett Prebon (Europe) Limited**<br>**(3) Neil Campbell**<br>**(4) William Arnold**<br>**(5) Dan Nolan**<br>**(6) Paul Dunkley**<br>**(7) Andrew Polydor**<br>**(8) Jonathan Chico**<br>**(9) Tullett Prebon Group Limited** |

**Heard at**: London Central

**On**: 30 and 31 July 2018
4 and 5 October 2018 (in Chambers)

**Before:** Employment Judge Glennie
Mr D Buckley
Ms R Dacey

**Representation:**
**Claimant:** Mr A Allen (Counsel)
**Respondent:** Ms J Russell (Counsel)

# JUDGMENT

**The judgment of the Tribunal is as follows:**

1. The claim against the First and second Respondents are dismissed.

2. The total amount of compensation payable by the Respondents to the Claimant is £487,777.34.

3. The parties have permission to apply to the Tribunal in relation to any issues as to grossing up of the award, or as to the arithmetic involved in the calculation of the award.

4. The First and Second Respondents are removed from the proceedings.

# REASONS

1. These reasons relate to the Tribunal's judgment on remedy, which itself follows the judgment on liability, and the further judgment on liability on remission of parts of the judgment by the Employment Appeal Tribunal. The Tribunal is unanimous in the reasons that follow.

2. The parties had gone some way towards agreeing the issues arising on liability and had prepared similar, if not identical lists. There remained a dispute about the role of the Claimant's resignation in the remedy issues. At the liability stage, the Tribunal had declined to make a finding as to whether the Claimant was constructively dismissed, on the grounds that there was no complaint of unfair dismissal (that complaint had been made initially, but dismissed on withdrawal) and therefore no need to determine that question.

3. Ms Russell argued that this meant that the Claimant's resignation could not be included as a remedy issue. She based this on two grounds. The first was that the point was res judicata. The second, in the alternative, was that there was no liability finding to which losses flowing from the resignation could be attached.

4. Mr Allen submitted (and Ms Russell agreed) that the basic test was to ask: what losses flow naturally and directly from the acts of discrimination? Mr Allen further argued that there was no need for the Tribunal to decide whether the Claimant had been constructively dismissed, and no bar on the Tribunal awarding compensation for losses arising from his resignation in the absence of such a finding. The question was whether the Claimant's resignation was an event which naturally and directly arose from the discrimination, in which case the Claimant could be compensated for the consequences of his resignation.

5. The Tribunal agreed with Mr Allen on this point. If the Claimant's resignation flowed naturally and directly from the discrimination, then so did any loss suffered as a result of the resignation. The Tribunal reminded itself, however, that it should take care to assess the consequences of the acts of discrimination, not those of the whole situation affecting the Claimant, which involved non-discriminatory events as well as discriminatory ones.

6. Given the number and nature of the issues, the Tribunal has structured its reasons by reference to the issues themselves, rather than setting out as a whole the further evidence heard on remedy. Further evidence was given by the Claimant and by Mr Paul Dunkley on behalf of the Respondents. There was a fresh bundle of documents for the remedy hearing, and page numbers that follow in these reasons refer to that bundle.

7. Given its decision on the disputed issue, the Tribunal has attached as an annex to these reasons the Claimant's version of the list of issues, and will refer to the issues as set out in that document.

**Issue 1: The correct institutional respondent**

8. The parties made submissions about this aspect, but there was not a great deal of evidence on which the Tribunal could reach conclusions.

9. Ms Russell submitted that the Ninth Respondent was the correct corporate respondent as it was "the employing entity". The Tribunal took this to mean that the company employed all concerned, i.e. the Claimant and each of the individual respondents, which meant that Mr Allen's point that the entity vicariously liable for the acts of the Third, Sixth and Eighth respondents should be retained in the proceedings. Mr Allen also submitted that the various companies were so intertwined that the Ninth Respondent should be retained.

10. The Tribunal concluded that the Ninth Respondent was the correct corporate Respondent and that the First and Second Respondents should be removed from the proceedings pursuant to rule 34 of the Rules of Procedure.

11. The Tribunal's two liability judgments will therefore require amendment.

**Issue 2: Injury to feelings**

12. It was common ground between the parties that the Tribunal should make two separate awards for injury to feelings: one on account of the findings of direct discrimination, harassment and victimisation under the Equality Act, and the other on account of public interest disclosure (PID) detriment under the Employment Rights Act. It was necessary to avoid duplication where particular elements had been found to amount to both acts of victimisation and PID detriments.

13. In his witness statement for the remedy hearing, the Claimant stated that it was "humiliating and devastating" to be excluded from private equity deals (the Tribunal in fact found that the Claimant's exclusion from one deal was an act of discrimination) when he was Head of Private Equity. He said that being told that he could not work from home was "a source of great consternation" that made him feel "alone, isolated and on edge". He stated that the acts of discrimination were much more hurtful than the acts of harassment.

14. In relation to victimisation and PID detriments, the Claimant referred to the uncertainty of the situation and a feeling "like I was underwater". He said that the report to the FCA meant that the Respondents were deliberately trying to ruin him, and he referred to the stressful nature of the lengthy Tribunal proceedings. In this connection, the Tribunal reminded itself of its findings in the reasons for the main liability judgment, and in particular to

paragraph 233. It was understandable that, faced with allegations of this nature, the Claimant would have felt that he was facing possible professional ruin, and that the Respondents were trying to achieve this.

15. Referring to the revised **Vento** guidelines, Ms Russell submitted that the award in respect of direct discrimination, harassment and victimisation should be in the middle of the middle band (£8,600 to £25,700) while Mr Allen argued for the middle of the upper band (£25,700 to £42,900).

16. The Tribunal concluded that this was a serious case, involving different forms of prohibited conduct over a period. This culminated in acts of victimisation that caused the Claimant to feel, with justification, that his professional status was at risk.

17. The Tribunal reminded itself that the purpose of an award for injury to feelings is to compensate the Claimant, not to punish the Respondent. In the present case, the Claimant's evidence showed the extent of the injury to his feelings that the conduct concerned had caused.

18. The Tribunal accepted Mr Allen's submission that the correct band was the upper band, and that the award should be around the middle of the range within that band. The Tribunal assessed this element at £35,000.

19. As regards the separate element for PID detriment, Mr Allen argued for the top of the middle band (£8,600 to £25,700) while Ms Russell argued for the middle to the top of the lower band (£900 to £8,600).

20. The Tribunal found that, of the 4 successful complaints of PID detriment, only one (dismissing the whistleblowing complaints as frivolous and vexatious) was additional to the findings under victimisation. The effects of the 3 that were part of the victimisation complaint have already been included in the award under the Equality Act. We considered that this separate element had a substantial effect on the Claimant's feelings, as he had a serious complaint that was dismissed out of hand. It was, however, a single event.

21. The Tribunal concluded that the lower **Vento** band was appropriate for this additional element, and that the appropriate award was £5,000.

**Issue 3: Aggravated damages**

22. Mr Allen argued for an award of aggravated damages on two grounds. The first was that the Respondents had acted in a high-handed, malicious, insulting or oppressive way, as identified by the Employment Appeal Tribunal in **Commissioner of Police v Shaw UKEAT/0125/11**. The second relied on conduct subsequent to the ending of the Claimant's employment, as identified by the EAT in **Zaiwalla & Co v Walia UKEAT/451/00.** Mr Allen contended that there had been a failure to apologise to the Claimant and that the way in which the trial had been conducted was oppressive, in that the Respondents had alleged that the

Claimant was the worst perpetrator of the alleged harassment, when they must have known that this was not the case.

23. Ms Russell argued that an award of aggravated damages was not appropriate, but also reminded the Tribunal that if an award were to be made, it should be compensatory and not punitive: **Commissioner of Police v Shaw** at paragraph 60.

24. The Tribunal concluded that there had been conduct of the sort identified in **Commissioner of Police v Shaw** in two respects, namely:

    24.1 Mr Chico's dismissal of the whistleblowing complaint as frivolous and vexatious. The Tribunal refers to paragraphs 274 to 281 of its original reasons. We found that the complaints were not frivolous or vexatious, and that Mr Chico approached them with the intention of dismissing them. We also found that, without any basis for doing so, Mr Chico queried the Claimant's competence; and, without believing that there was any reason to question his mental capacity, purported to do so.

    24.2 The report to the FCA. Here the Tribunal referred in particular to paragraphs 232 and 233 of its original reasons. The Claimant was told that the Respondents would inform the FCA of his dismissal in the event that no appeal was received, or an appeal was raised and rejected. They in fact informed the FCA immediately. The letter did not contain a purely factual account, but included references to blackmail, bad faith, and the Claimant lacking integrity, competence and capability.

25. The Tribunal found that the Respondents had acted in a seriously malicious and vindictive way in these respects, and that an award of aggravated damages was merited.

26. The Tribunal did not consider that an award should be made in respect of the Respondents' subsequent conduct. It was true that there had been no apology and that the trial had involved the contention that the Claimant was "the worst perpetrator". This, however, was all in the context of hotly contested litigation, in which the Claimant achieved substantial, but not complete, success. The Tribunal considered that it was a matter of judgment as to how such a trial should be conducted on behalf of a respondent, and that it should be quick to find aggravating factors when a particular approach has been taken, without success. An apology could not realistically be expected in advance of the judgment in such a case, and might be regarded as somewhat hollow if offered subsequently.

27. The Tribunal concluded that aggravating elements had, nonetheless, added significantly to the injury to feelings suffered by the Claimant. We have already referred to the particular impact on him of the report to the FCA. We found that an award of £10,000 for aggravated damages was appropriate.

**Issue 4: Financial loss during employment: sick pay**

28. This was agreed at £4,515.15.

**Issue 5: Financial loss during employment: Amundi deal**

29. In paragraphs 39 and 40 of his remedy witness statement, the Claimant stated that there were two elements to the loss that he had suffered as a result of being excluded from the Amundi deal. One was the loss of revenue from the deal, which would depend on its size and the probability of winning it: the other was the more subtle loss of "being out of the market", in other words, losing the opportunity of enhancing one's reputation by participating in a successful deal.

30. The Claimant estimated the chances of success in the deal, had he been involved, at 20%. Mr Dunkley estimated them at less than 1%. The Claimant estimated the value of the deal at Euros 150m: Mr Dunkley said in paragraph 7 of his witness statement that he had no idea where this figure could have come from.

31. The Tribunal noted that in the Claimant's schedule of loss, an additional reduction of 25% for "uncertainty" had been applied, suggesting that the Claimant in reality regarded the prospects of success as less than 20%. It was a fact that the Amundi deal had not in the event succeeded. Although there was no reason to think that the Claimant's participation in the deal would have made the chances of success any worse, the Tribunal concluded that there was no evidential basis on which to conclude that there was anything other than a theoretical possibility that it would have improved those chances. Nor was there any evidential basis on which to assess what the value of any deal might have been. We found that the Claimant had not established any quantifiable loss under this head.

**Issue 6: Post termination losses**

32. In this regard, the Claimant relied on:

    32.1 His resignation.

    32.2 The continuation of the disciplinary process after his resignation.

    32.3 The refusal to accept the end of his employment.

    32.4 Informing clients that he was absent sick.

    32.5 The report to the FCA.

33. The Tribunal has already discussed above the dispute about the issue of the Claimant's resignation, and its conclusion that losses flowing from it could be recovered if the resignation was an event that arose naturally and

directly from the acts of discrimination (and detriment, to the extent relevant). A number of questions arose, the first being whether the discrimination "caused" the Claimant to resign.

34. Mr Allen addressed this in terms of what would have happened if there had been no discrimination. He referred to paragraph 57 of the judgment of the Court of Appeal in **Abbey National PLC v Chagger [2010] ICR** 397, which contains the following passage:

"It is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss."

35. The Tribunal considered the letter of 4 February 2014 by which the Claimant's solicitors communicated that he considered that his employment contract had been repudiated, and that he considered himself to have been dismissed. This made extensive reference to the matters on which the Tribunal found in the Claimant's favour. It also contained some matters which were not the subject of findings of discrimination, such as Mr Campbell's comments about the Claimant and a colleague when they had been playing badminton, and the seeking of undertakings regarding confidential information. The Tribunal concluded, however, that given the extent of the discriminatory elements in the letter, there was no real prospect that the Claimant would have resigned had the discrimination not occurred.

36. What, then would have happened if the discrimination had not occurred and the Claimant had not resigned? The Claimant's case was that he would have remained with Tullett for a further 10 years (i.e. until around 2028). Ms Russell submitted that this was fanciful, and that the Tribunal should take account of the prospect that the Claimant might have resigned for other reasons or, more likely, have been dismissed either for misconduct or on grounds of redundancy.

37. In paragraph 20 of his witness statement Mr Dunkley referred to the Claimant's employment history of changing jobs around every 3 years, and the decrease in Tullett's private equity work in recent years. He suggested that it was entirely feasible that at some point the Claimant would have left Tullett of his own volition in any event. Ms Russell referred to the additional point that the downturn in work might have led to the Claimant being made redundant. Mr Allen argued that, given the contents of the letter of 4 February 2014, it was very unlikely that the Claimant would have resigned in any event.

38. The Tribunal agreed with Mr Allen on this point, at least so far as it applied to the period of 2-3 years or so following his resignation (the significance of which will be explained below). Although there is always the possibility that an employee may resign for their own reasons, there was no basis beyond this for finding that the Claimant was likely to have done so. Nor was there

any evidential basis for finding that the Claimant would have been made redundant during the same period, although again the Tribunal recognised that it could be said that there is always some possibility of that.

39. In paragraph 17 of his witness statement Mr Dunkley asserted that it was highly likely that the Claimant would have been dismissed for misconduct in relation to his removal / deletion / sending to his personal email address, of confidential information. He maintained this position when cross-examined by Mr Allen. Mr Dunkley agreed, however, that it was he who had purported to dismiss the Claimant after his resignation, and that it was true that Tullett had not asked anyone independent to look at the case and assess whether the Claimant would otherwise have been dismissed. He said that Mr Campbell had been given a final written warning as a result of the case, and that he himself had not been disciplined. He did not know whether Tullett had re-investigated the Claimant's whistleblowing complaint. He was not aware of Tullett having taken any action over the confidential information or data.

40. All of this led Mr Allen to submit that the Claimant would not have been dismissed. He argued that no one with "clean hands" had given evidence in support of the proposition that there would have been a dismissal in any event, and that the Respondents' attitude to the outcome of the claim, the Claimant's whistleblowing complaint (which included allegations of bribery), and the "missing data" suggested that it was unlikely that they would have taken disciplinary action against the Claimant, certainly not to the extent of dismissing him.

41. The Tribunal reminded itself of its findings about the data issue. In summary, the Claimant had moved some data from the shared server to his own computer. He had had a conversation with Mr Campbell and Mr Dunkley about forming a new company. In December 2013 he had, on his own evidence, given an evasive answer to Mr Campbell about the whereabouts of certain data. There was sufficient concern about the data for it to be raised at the grievance meeting on 5 December 2013 and for Tullett to have sought undertakings. On 20 January 2014 the Claimant's solicitors had criticised the request for undertakings, but had given some assurances.

42. The Tribunal also reminded itself that the question was not whether Tullett would have fairly dismissed the Claimant, but whether they would have dismissed him lawfully (i.e. without discriminating against him). It was difficult to disentangle what might have happened in this regard from the discriminatory reasons that Tullett had for their actions towards the Claimant. The Tribunal considered that there was a substantial chance that Tullett would have lawfully dismissed the Claimant in the absence of discrimination against him, but that it was more likely that they would not have done so. For example, the Claimant might have explained his activities regarding the data in a way which Tullett found acceptable, or which at least mitigated the sanction to something falling short of dismissal;

or Tullett might have decided that the Claimant was too valuable to dismiss at that point.

43. The Tribunal concluded that there was a one-third chance that the Claimant would have been lawfully dismissed in any event at about the time that Tullett purported to dismiss him, on 27 March 2014.

44. The Tribunal then addressed the question of the period for which loss was recoverable, including the issue as to mitigation of loss. We reminded ourselves that the duty to act reasonably in order to mitigate losses suffered as a result of a tort is not an onerous one, and that there may be a variety of different reasonable courses of action that an individual could take.

45. The Claimant's case was that he regarded his professional life as "on hold" until he received the liability judgment in October 2015. He said that this was primarily because, until that point, he could not approach the FCA for authorisation (required if he were to start his own business) or approval (required if he were to take up employment where it was necessary to be an approved person). As a secondary consideration, the Claimant stated that, in order to save costs, he had acted as a "paralegal" in relation to the litigation.

46. Linked to the first of these points was an issue as to whether the Claimant had acted unreasonably in not seeking an "analyst" type of role, which probably would not have required FCA approval and would have involved working at a considerably less senior role than he had held with Tullett. The Tribunal considered that it was not unreasonable for the Claimant to have failed to pursue such a role. This would have been a backwards or downwards step for him in career terms and would not have looked good on his CV. He did not know what the outcome of his case would be, and the Tribunal considered that it was reasonable for him to await that before re-assessing his career path. The Claimant was not to know that the Tribunal process would become extended, nor was he to blame for that.

47. The Tribunal therefore concluded that it was not unreasonable for the Claimant to regard his professional life as "on hold" pending receipt of the liability judgment. As a secondary consideration, he was able to mitigate the financial impact of not working by carrying out "paralegal" work on the litigation.

48. The Tribunal then considered whether the Claimant's decision to set up his own private equity business, rather than to seek employment with another concern of a similar level to that which he had with Tullett, created a "cut off" point for the post-termination losses.

49. The Tribunal concluded that this was the case. There was no reason to think that, once the liability judgment had been promulgated, the Claimant was unable to return to employment if he so chose. He made a conscious decision not to re-enter the labour market, but instead to set up and operate

his own business. This was an intervening event which brought to an end the causative effect of the discrimination against him, at least in financial terms.

50. As to the point at which this cut-off operated, the Tribunal accepted that it would take some time from the Claimant's re-authorisation by the FCA to get the business under way. His evidence, which the Tribunal accepted, was that the business was "up and running" by mid-May 2016. We found that the appropriate "cut off" point for the post termination losses was a short time after this, around early June 2016. By this point, the discrimination that the Claimant had suffered was no longer an effective cause of any financial loss he was sustaining as a result of no longer being in Tullett's employment.

51. This meant that post-termination losses were recoverable for the period from the Claimant's resignation on 4 February 2014 to early June 2016, which the Tribunal took as a period of 2.33 years for the purposes of calculation.

**Issue 7: What figures should be awarded for (i) the Claimant's lost earnings to date and (ii) his future losses?**

52. The elements of lost earnings claimed over the post-termination period were:

52.1 Salary: the Claimant's net figure of £81, 268.20 was not challenged.

52.2 Bonuses, as to which there was a substantial dispute.

52.3 The value of other benefits, as to which the Claimant's net annual figure was £917.04 and the Respondents' £823.39. Not surprisingly, given the need to conduct the hearing proportionately, this aspect was given no real specific attention by either party. In the absence of any reason to doubt the Claimant's valuation, the Tribunal proceeded on that basis.

53. The Tribunal therefore had to resolve the dispute about whether the Claimant would have received bonuses had his employment continued, and if so, of what amount.

54. The Claimant's case, as set out in his schedule of loss, was that if his employment had continued, he could have expected bonuses amounting to £83,561.04 (net) during the period to the end of May 2016, which is the relevant period given the Tribunal's findings above. Mr Dunkley's evidence was that, with the passage of time, the total amount of bonuses paid to members of the AI desk had fallen considerably. He relied on a table at page 704 which showed totals of over £700,000 in each of 2011, 2012 and 2013; £156,000 in 2014; £255,000 in 2015; and £243,000 in 2016.

55. When cross-examined, Mr Dunkley said that it was impossible to speculate as to what bonus the Claimant might have received had he remained in Tullett's employment. He pointed out that bonuses were discretionary, and that the Claimant might have received no or very small bonuses. For his part, the Claimant made the point that, had he been present, the likelihood was that the performance of the AI desk, as regards private equity, would have been better than in fact it was in his absence.

56. It is impossible for the Tribunal to be certain what bonuses might have been paid, or to adopt any scientific means of calculating this head of loss. We find, however, that had the Claimant's employment continued, he would have received some bonus payments. We therefore have to do the best we can to estimate what the amount of those payments would have been. Taking into account all the various factors mentioned above, we have concluded that a figure of £45,000 (a little over half the Claimant's estimate) is realistic.

57. Given these findings, the relevant figures (all net) are as follows:

    57.1 Salary: 81,268.20 x 2.33 = 189,354.91.

    57.2 Bonus: 45,000.00.

    57.3 Benefits: 917.04 x 2.33 = 2,136.70.

    57.4 Total of the above: 236,491.61.

    57.5 Reduce total by one third to reflect possibility of dismissal in any event: 157,661.07.

**Issue 8: To the extent that the Claimant's expenses fall within issue 6 above, what expenses has the Claimant incurred in setting up his own FCA regulated business?**

58. The Claimant's evidence was that the expenses that he incurred were those listed at pages 760-761, amounting in total to £11,815.06. When cross-examined about this aspect, the Claimant accepted that there were no dates shown for the items of expenditure, but said that they had all been incurred after promulgation of the liability judgment. He said that the figures were taken from a spreadsheet provided to his accountant, and that the various items shown as skype calls to clients were necessary since, although the business had a website, it was necessary to let people know that it existed.

59. There was no evidence to contradict the Claimant's figures, and they seemed to the Tribunal to be the sort of sums that might be incurred in setting up a new business. We found that the Claimant had proved this element in full, i.e. as to £11,815.06.

60. This should then be reduced by one-third to reflect the possibility that the Claimant would have been dismissed in any event, giving £7,876.70.

**Issue 9: To the extent that the Claimant's ability to purchase a mortgaged property in early 2014 falls within issue 6 above, what losses has the Claimant sustained?**

61. In paragraphs 44 to 54 of his witness statement, the Claimant presented this as the loss of an opportunity to buy a home to move into with his fiancée. He was particularly keen on the house, the price of which was £445,000. Essentially, he said that becoming unemployed meant that he could no longer obtain a mortgage, and so was unable to purchase the property he had in mind.

62. In her written submissions Ms Russell pointed out inconsistencies in the Claimant's account of this aspect. On 27 November 2013 at page 492 the Claimant told the seller's agent that he was a mortgage buyer but could pay 100% cash after completion of the sale of another property, and that he wanted the property as a home for his father. The Claimant's evidence when asked about this in cross-examination was that at the time he lived with his father, so it would be both a family home and a home for his father.

63. An HSBC "key facts" document at page 496 referred to a mortgage of £261,000 and described this as the Claimant's first property (his evidence being that he owned several other properties at the time). The Claimant's evidence was that he did not say this, and that the entry to this effect was a mistake. Furthermore, Land Registry entries at page 498 showed that the Claimant had purchased a different property for £435,000 on 27 February 2014. The Claimant said that this was a buy-to-let property, and that he had purchased it with the proceeds of sale of another (the Tribunal assumes, the property referred to above).

64. The Tribunal found the Claimant's evidence to be unreliable on this aspect. If he was so keen on the original property, why did he not use the proceeds of sale to buy that house (as he suggested he would) rather than to purchase another buy-to-let property? The Claimant's explanations for the discrepancies over whether the house would be a family home for himself and his fiancée, or a home for his father; and whether this was his first purchase, were unconvincing. The Tribunal did not accept the Claimant's account of the lost house purchase, and found that he had not proved any recoverable loss in this regard.

**Issue 10: Is the Claimant entitled to "stigma" damages? If so, what is the appropriate compensation?**

65. In **Abbey National PLC v Chagger [2010] ICR 397** the Court of Appeal held that an employer who discriminated against an employee by dismissing him could be held liable for the stigma that might attach to him as a result of taking legal action because of the discrimination. In paragraph 95 of its judgment, the Court said that in most cases stigma loss

need not be considered as a separate head of loss, but will be one of the factors that impacts on the question how long it will be before a job can be found.

66. In paragraph 97 the Court said that:

"Plainly it would be wrong for them [a Tribunal] to infer that the employee will in future suffer from widespread stigma simply from his assertion to that effect, or because he is suspicious that this might be the case."

Adding in paragraph 98:

"However, where, as in this case, there is very extensive evidence of attempted mitigation failing to result in a job, a tribunal is entitled to conclude that, whatever the reason, the employee is unlikely to obtain future employment in the industry."

And then in paragraph 99, when considering a modest lump sum on account of stigma:

"Even then, however, this should not be seen as an automatic payment; there should be some evidence from which the tribunal can infer that stigma is likely to be playing a part in the difficulties facing the employee who seeks fresh employment."

67. In the present case, the Claimant has not sought to re-enter employment in the relevant industry. If stigma were to have any effect on his losses, it would have to operate on potential clients of his business. The Tribunal considered it unlikely that it would do so: clients would not naturally be concerned about the Claimant's relationship with his former employers. The important point, however, given what was said by the Court of Appeal in **Chagger**, was that there was no evidence that this was the case. The Tribunal therefore found that no loss had been established under this head.

**Issue 11: Have the Respondents shown that the Claimant has not taken reasonable steps to mitigate his loss?**

68. This has been addressed under issue 6 above.

**Issue 12: Should there be an uplift or reduction to the overall compensation because of either party's failure to comply with the relevant ACAS Code of Practice relating to disciplinary and grievance procedures?**

69. The potential consequences of a failure to comply with the ACAS Code are set out in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in the following terms:

"(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –
(a) The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) The employer has failed to comply with that code, and
(c) That failure was unreasonable,
the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

"(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –
(a) The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) The employee has failed to comply with that Code in relation to that matter, and
(c) That failure was unreasonable,
the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

70. The Claimant contended for a 15% increase, while the Respondents contended for a 15% reduction.

71. Ms Russell submitted in her written argument that the Claimant unreasonably refused to engage with the grievance and disciplinary processes. It was true that the Claimant had not engaged with either after his resignation. The Tribunal did not, however, consider that his failure to do so was unreasonable in the circumstances. The Tribunal has found that instituting the disciplinary process after the end of the Claimant's employment was a detriment done on the grounds that he had made a protected disclosure, and that treating him as an employee in other respects after his resignation amounted to victimisation. It was understandable, and not unreasonable, that he did not engage with the processes that Tullett sought to follow.

72. Mr Allen relied on the following parts of the 2011 ACAS Code:

72.1 Paragraph 4: "….whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:…Employers and employees should act consistently. Employers should carry out any necessary investigations."

72.2 Paragraph 33: "Employees should be allowed to explain their grievance and how they think it should be resolved."

72.3 Paragraph 43: "The appeal should be dealt with impartially."

73. In paragraph 193 of its liability reasons the Tribunal concluded that at the grievance meeting on 7 January 2014, Mr Dunkley berated the Claimant to a degree that amounted to a detriment. This was a failure to follow paragraphs 4 and 33. Paragraph 200 of those reasons amounted to a finding that Mr Dunkley had not investigated the first grievance properly (a failure to follow paragraph 4). In paragraph 234.2 of the liability reasons the Tribunal found that Mr Chico dismissed the Claimant's whistleblowing concerns in a way that showed that he was not prepared to deal with them seriously (a failure to follow paragraph 4). In paragraph 239 the Tribunal concluded that Mr Dunkley had approached the second grievance with a closed mind (also a failure to follow paragraph 4). The Tribunal's conclusions about the appeal conducted by Mr Polydor amounted to finding that he had not carried out the necessary investigations.

74. The Tribunal concluded that these were failures to comply with the Code, and that these failures were unreasonable. We could not see any basis on which they could be regarded otherwise.

75. The Tribunal also considered that it was just and equitable to increase the award made to the Claimant. There was no real excuse for the failings, and they had added to Tullett's poor treatment of him.

76. The Tribunal considered that the increase should be more than nominal in order to reflect these considerations. It should not, however, be towards the maximum possible. There were not wholesale failures in relation to every aspect of the processes undertaken. The Claimant himself was open to criticism for making covert recordings, a practice which is unfair on those who are recorded without their knowledge and which gives an unfair advantage to the party who does know that this is being done.

77. In the circumstances, the Tribunal concluded that the appropriate increase was one of 10%.

**Issue 13: What interest is recoverable?**

78. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, as amended, include the following provisions about interest:

"2 Interest on awards.

(1) Where……an employment tribunal makes an award under the relevant legislation –
  (a) It may, subject to the following provisions of these Regulations, include interest on the sums awarded; and
  (b) It shall consider whether to do so, without the need for any application by a party in the proceedings.

6(1) Subject to the following paragraphs of this regulation –

(a) In the case of any award for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the date of calculation;

(b) In the case of all other sums of damages or compensation……interest shall be for the period beginning on the mid-point date and ending on the day of calculation.

(2) ……..

(3) Where the Tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may –

(a) Calculate interest, or as the case may be interest on the particular sum, for such different period, or

(b) Calculate interest for such different periods in respect of various sums in the award,

as it considers appropriate in the circumstances, having regard to the provisions of these Regulations."

79. The current prescribed rate of interest is 8% per annum.

80. The Tribunal first calculated the interest that would be applicable under regulation 6(1), as follows:

80.1 In relation to injury to feelings, there was not a single act of discrimination found against the Respondents, but a series of acts extending over a period that ran from around 1 July 2012 to around 27 March 2014. The Tribunal decided that it should take the mid-point in that period as the date of the act of discrimination for the purposes of regulation 6(1)(a). The Tribunal took this as around 1 May 2013.

80.2 The day of calculation was 5 October 2018.

80.3 The period was 5 years and 158 days, which would give interest of 43.346%.

80.4 (Including 10,000 aggravated damages, which the Tribunal equated to injury to feelings) 50,000 + 10% uplift = 55,000 x 43.346% = 23,840.30.

80.5 For the purposes of regulation 6(1)(b) the Tribunal again took 1 May 2013 as the date of the act of discrimination. The mid-point date between that date and the day of calculation was 17 January 2016.

80.6 The period was 2 years and 261 days, which would give interest of 21.72%.

80.7 Sick pay 4,515.15 + 10% uplift = 4,966.66

80.8 Post termination losses 157,661.07 + 10% uplift = 173,427.17.

80.9 Expenses setting up business 7,876.70 + 10% uplift = 8,664.37

80.10 Total of 76.7, 76.8 and 76.9 = 187,052.20 x 21.72% = 40,629.04.

81. The Tribunal did not consider that serious injustice would be caused if interest were to be awarded in accordance with the above; and no argument to that effect was advanced (although the parties did not, of course, know what the Tribunal's findings were going to be on the issues as to compensation).

82. To the extent that the amount of interest had increased by virtue of the extended nature of the proceedings, the Tribunal considered that it should be the tortfeasor, rather than the injured party, who should bear the burden of that.

**Issue 14: What adjustment to future losses should be made to reflect the discount rate of -0.75%?**

83. There are no future losses to consider.

**Issue 15: Are any other reductions to compensation appropriate?**

84. The Tribunal considered that its findings on the reason for the Claimant's resignation effectively excluded finding that he had contributed to that by his own conduct in relation to the data issue. That issue did not contribute to his resignation and so cannot be said to have contributed to the losses that he sustained as a result of his resignation.

85. The Tribunal has already made allowance for the prospect that the Claimant would have been dismissed in any event on the basis of the data issue. There was a risk of making a double deduction for the same factor if this were also seen as a matter of contributory fault.

86. The Tribunal considered that, given these considerations, it was not appropriate to make any further reduction on account of contributory fault on the Claimant's part.

**Final calculation of compensation**

87. The Tribunal's calculation of the full amount of compensation and interest is as follows.

| | |
|---|---|
| Injury to feelings (total) | 40,000.00 |
| Aggravated damages | 10,000.00 |

| | |
|---|---|
| ACAS uplift 10% on both of the above | 5,000.00 |
| Interest | 23,840.30 |
| Sick pay | 4,515.15 |
| ACAS uplift 10% | 451.51 |
| Post termination losses | 157,661.07 |
| ACAS uplift 10% | 15,766.10 |
| Expenses setting up business | 7,876.70 |
| ACAS uplift 10% | 787.67 |
| Interest | 40,629.04 |
| Total | 306,527.54 |

**Grossing up**

88. The Tribunal's understanding is that the awards for injury to feelings and aggravated damages are not subject to income tax. Beyond this, the first £30,000 of the award would be tax free, being a payment on termination of employment. This means that £221,527.54 would be taxable (306,527.54 – 85,000).

89. The amount of the taxable award is such that the Claimant's marginal tax rate would be 45%.

90. The sum of £221,527.54 should therefore be grossed up as follows: 221,527.54 divided by 0.55 = 402,777.34.

91. The total award after grossing up is therefore: 55,000 + 30,000 + 402,777.34 = 487,777.34.

92. The Tribunal did not have any detailed submissions from the parties on grossing up, and it may be that on consideration of these reasons, further submissions on that element may be necessary. If so, the Tribunal invites the parties to agree that these may be addressed on paper by the Employment Judge alone. (As the parties are aware, both of the lay members have now retired).

93. The parties also have permission to apply in a similar way as to any matters of arithmetic arising on the calculation of the award.

94. No submissions were made as to any apportionment of the award as between the various Respondents, and the Tribunal has not attempted to do this.

95. Finally, the parties are thanked for their patience while awaiting the judgment and reasons.

_____
Employment Judge Glennie

Dated: 31 January 2019

Judgment sent to the parties on:

4 February 2019

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For the Tribunal Office