EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Ms A Agarwal (C1) **Mr R Meshram (C3)**	**AND**	**Tata Consultancy Services Ltd and Others**

HELD AT: **London Central** **ON:** **21 & 22 January 2020 & 23 January 2020 (In Chambers)**

BEFORE: Employment Judge Brown

Ms T Breslin
Mr S Soskin

Representation:

For Claimants: **Both appeared in person**
For Respondent: **Mr A Smith, Counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. **There was no likelihood that Ms Agarwal would have been dismissed or resigned had the First Respondent not victimised her, or subjected her to harassment or discrimination, or had not unfairly dismissed her.**

2. **It was 40% likely that Mr Meshram would have been dismissed fairly through redundancy in any event, even if the Respondents had not victimised him or subjected him to protected disclosure detriment, or dismissed him unfairly.**

3. **The First Respondent breached the ACAS Code of Practice in relation to Ms Agarwal's grievance. A 25% uplift should be applied to the £10,000 portion of Ms Agarwal's injury to feelings award for sex discrimination and harassment referable to those breaches.**

4. **The First Respondent shall pay Ms Agarwal a grand total of £91,056.03 in compensation for sex harassment, sex discrimination and victimisation from 31 August 2017 comprised as follows:**

    a. **Past economic loss: £54,960.52, including interest and a figure for grossing up grossing up.**

    b. **Pre-dismissal injury to feelings and interest: £22,756.77 (including aggravated damages and ACAS uplift).**

    c. **Post-dismissal injury to feelings and interest: £13,338.74.**

5. **The First Respondent shall also pay Ms Agarwal £1,016 for loss of statutory rights in her unfair dismissal claim.**

6. **The Respondents shall pay Mr Meshram a grand total of £69,903.15 in compensation for victimisation and protected disclosure detriment, from 31 August 2017 to 3 June 2019, comprised of:**

    a. **£40,628.19 for past economic loss, including interest and a figure for grossing up;**

    b. **£15,936.22 for pre-dismissal injury to feelings; and**

    c. **£13,338.74 for post-dismissal injury to feelings.**

7. **The First Respondent shall also pay Mr Meshram £636.60 for unfair dismissal.**

REASONS

Preliminary

8. This was a remedy hearing in the joined cases of Ms Agarwal and Mr Meshram against the Respondents. Ms Agarwal had succeeded in complaints of sex harassment, sex discrimination, victimisation and unfair dismissal against the First Respondent. Mr Meshram had succeeded in complaints of victimisation against all three Respondents and in his complaints of protected disclosure detriment and unfair dismissal against the First Respondent.

9. The Employment Tribunal established the issues to be determined in this remedy hearing at the outset of the hearing. They were:

1. For how long would the Claimants have been employed by the First Respondent had the Respondents not subjected them to the unlawful treatment?
(Would the Claimants have been made redundant in any event?
Would their employment have terminated because the Claimants had lost trust and confidence in the First Respondent for reasons predating and unconnected with the unlawful conduct upheld by the Tribunal?
Would their employment have ended because both Claimants believed and continue to believe that they were subjected to discrimination which has not been upheld by the Tribunal?
Would their employment have ended because, for example, Mr Krishnaswami and the marketing team had already had significant conflict with the Claimants before they raised complaints of discrimination?
Would the Claimants have been made redundant in any event, because there were no roles into which the Claimants could have been bumped and/or because Ms Agarwal was unlikely to have secured a Business Development Manager role, or any other role, in a fair redundancy process?
What is the likelihood that Mr Meshram would have obtained any alternative role in a fair redundancy process? Was there a real and substantial chance that he would have benefited from the lost opportunity to apply for, either, the Head of Ireland role, or for the Client Partner for AVIVA role? If so, what was the chance that he would have been appointed to either of those roles?)

2. When, if at all, did the Claimants, or will the Claimants, obtain alternative employment to reduce or extinguish the loss flowing from their dismissals?

3. Could Mr Meshram's actions in his new employment break the chain of causation of loss flowing from his dismissal by the First Respondent?

4. Would the Claimants have been promoted had they remained in employment with the First Respondent? If they would have been, when would that have occurred and what would have been the effect on their earnings?

5. Have the Claimants' dismissal impacted on their future likely employment prospects?

6. To what bonuses and salary increments would the Claimants have been entitled had they remained in employment with the First Respondent?

7. What is the appropriate compensation for injury to feelings? For aggravated damages? For exemplary damages?

8. What pension loss have the Claimants suffered?

9. ACAS uplift. Is Mr Meshram entitled to claim any ACAS uplift? To what element of Ms Agarwal's claim would an ACAS uplift be applicable? What, if any, ACAS uplift should be applied to Ms Agarwal's remedy?

10. What is the appropriate interest and grossing up?

11. What should be awarded for the Claimants' ancillary expenses claims, including claims for mobile phone, internet and mortgage payments?

10. The Respondents agreed that the Second and Third Respondents were jointly and severally liable, with the First Respondent, for a remedy in respect of the acts of discrimination / victimisation found against them.

11. There was a large bundle of documents and a Claimants' mitigation bundle.

12. The Tribunal heard evidence from: Ms Agarwal; Mr Meshram; Vishal Gandhi, the First Respondent's Head of Staffing and Sourcing for UK and Ireland; and Saloni Shah, the First Respondent's Head of Compensation and Benefits for UK and Ireland. All parties made submissions. The Tribunal reserved its judgement.

13. At the start of the hearing, the Respondents produced the case of *Abegaze v Shrewsbury College of Arts and Technology* UKEAT/0368/12/JQJ and referred the Tribunal, in particular, to paragraph 21. In that paragraph, HHJ McMullen said that the Claimant had misled his new employer as to his qualifications and that, as a matter of causation, it was the Claimant who caused loss after that date; it was not attributable to the Respondent employer's earlier tort.

14. In the light of *Abegaze,* Mr Meshram agreed that it might be possible for his actions, in his new employment, to break the chain of causation of loss flowing from his dismissal by the First Respondent. It was agreed, therefore, that, at this Hearing, the Tribunal should only consider remedy in respect of Mr Meshram from the date of his dismissal until he started new employment at a new employer, DXC Technology Ltd, on 3 June 2019. Mr Meshram had been dismissed from that employment on 5 June 2019. Mr Meshram had brought new claims arising out of the termination of that employment, which were not being considered in these proceedings, of victimisation against the First Respondent and against DXC Ltd. This Tribunal was not in a position to make any findings about the true facts of his dismissal by DXC Ltd.

15. It was agreed that, once the outcome of Mr Meshram's claim against DXC Ltd and his new claim against the First Respondent are known, then the question of Mr Meshram's losses after 3 June 2019 can be addressed, either by this Tribunal, or by the Tribunal which has heard those other claims, as appropriate.

Findings

Issue 1. For how long would the Claimants have been employed by the First Respondent had the Respondents not acted unlawfully?

Ms Agarwal

16. The Tribunal noted that Ms Agarwal had been employed by the First Respondent for almost 13 years. She had spent her whole career at First Respondent. She had previously complained of maternity discrimination. She also believed that she had been discriminated against because of sex in 2010 by previous managers. Nevertheless, she had continued to work for the First Respondent and had attained performance bands B, B and A in the three years after she had returned from maternity leave. She had also been promoted in 2014 - after she believed that she had been discriminated against because of sex. The Tribunal considered that this showed that Ms Agarwal was committed to working for the First Respondent, even when she believed that she had been treated unfairly and discriminated against.

17. Furthermore, in this case, when Ms Agarwal raise grievances in 2017, she was harassed and/or discriminated against by Ms Bhogal, Mr Buckley and Ms Hide. Mr Buckley did not investigate her grievance, other than holding a meeting with her and then sending a humiliating and threatening outcome letter. In the Tribunal's industrial/workplace experience, even if a grievance is not upheld, employees are much more likely to accept the outcome if the employee feels that they have been listened to and that the grievance has been properly investigated. In this case, the opposite happened to Ms Agarwal. She was humiliated and threatened and her grievances were not properly investigated. Insofar as that led to any erosion of trust and confidence between employer and employee, the Tribunal found that Ms Agarwal's feelings were caused by the First Respondent's discrimination and harassment towards her.

18. The Tribunal did not find that there would have been any appreciable damage to the relationship of trust and confidence if Ms Agarwal's grievances had been properly investigated and rejected on non-discriminatory grounds.

19. Even after the outcome of her grievances, there was no suggestion that Ms Agarwal had started to look for work outside the First Respondent.

20. Furthermore, the First Respondent offered Ms Agarwal the chance to move to a different job working with Vodafone in May 2018, indicating that the First Respondent was happy for Ms Agarwal to continue to work for it, albeit in another role.

21. On 7 November 2017, Mr Krishnaswami had told Mr Venkatraman of his frustrations with Mr Meshram and had said "Given the attitude and refusal to change I suggest we release him from the unit as per process…", paragraph [110], Tribunal's liability judgment. However, Mr Krishnaswami did not evince such a clear intention to move Ms Agarwal out of the Unit before she submitted her grievances.

22. Moreover, the Tribunal found, in its liability judgement, that the 2018 restructuring of the Unit was designed to move all 3 associates out of the Unit. However, the Tribunal found that that restructuring which led to the Claimants being put at risk of redundancy was an act of victimisation. Given that there was no redundancy exercise in respect of other Units, pursuant to the change to revenue-generating Units, the Tribunal concluded that there would not have been redundancy exercise had the First Respondent not victimised the Claimants by seeking to remove them from the Unit.

23. On all those facts, the Tribunal concluded that, had the discrimination and victimisation not occurred, it was 100% likely that Ms Agarwal would have continued to work for the First Respondent.

Mr Meshram

24. Mr Meshram had been employed for 23 years and therefore had a long and loyal service to the First Respondent.

25. On the Tribunal's findings of fact in the liability judgment, before Mr Meshram submitted any grievance, Mr Krishnaswami already wanted to remove him from the Unit. In the light of the unpleasant email exchanges between Mr Krishnaswami and Mr Meshram regarding his handover to Mamta Panya's marketing team, and Mr Krishnaswami's significant frustrations with Mr Meshram, the Tribunal concluded that, even in the absence of his later grievance, Mr Krishnaswami would not have wanted to continue to work with Mr Meshram. Mr Meshram would, therefore, have had to find another role within the First Respondent's organisation.

26. The Tribunal considered that this change was likely to have happened at around the same time as the redundancy exercise was, in fact, undertaken in 2018. There were no facts from which the Tribunal could conclude that Mr Meshram's removal from the Unit would have happened significantly before or after that date.

27. Between May and August 2018, there were two roles, the Head of Ireland role and the Aviva Client Partner role, for which Mr Meshram contended he would have been suitable.

28. Mr Meshram did not have the right to be slotted into either role.

29. Mr Meshram rejected nearly all the alternative roles suggested to him during the redundancy exercise which did take place, on the grounds that they would represent a demotion, or loss of status.

30. He did not apply for the Head of Ireland role, which had been advertised on Lead. In the Tribunal's liability judgement, the Tribunal recorded, at paragraph [644], that Mr Meshram knew that he was not seen as a desirable candidate for the Head of Ireland role and, therefore, did not apply.

31. The Tribunal considered that it did not follow that, in the absence of victimisation, Mr Meshram would have failed to apply for the Head of Ireland role. He would have been at risk of redundancy, but not in circumstances where he was being victimised and believed that he was being victimised.

32. Mr Meshram told the Tribunal that he would, in fact, have been interested in the job, partly because it was the Head of a geography and, therefore, would have some strategic functions.

33. The Tribunal accepted Mr Gandhi's evidence that the base salary for the Head of Ireland post was €140,000 (about £120,000), which was lower than Mr Meshram's salary of £135,000. The First Respondent's Ireland office generates an annualised revenue of €10-€20 million. Mr Meshram's Profit & Loss responsibility in 2018 was much higher than this. The Head of Ireland role had responsibility for managing two employees, whereas Mr Meshram had 6 to 8 people reporting to him in 2018.

34. Mr Meshram had declined to consider roles which he perceived would reduce his status in the organisation. On some measures, the Head of Ireland role would have represented a lower status, because of lower salary, reduced management responsibilities and lower Profit & Loss responsibility.

35. The Tribunal therefore considered that there was some possibility that, even absent victimisation, Mr Meshram would not have applied for the Head of Ireland role.

36. The Tribunal accepted Mr Gandhi's evidence that there were 7 applicants for the Head of Ireland role; 3 at C4 grade and 4 at C5. One C4 and one C5 applicant were interviewed and the Ireland role was initially offered to the C5 applicant.

37. No SP1 grade employee applied for the role. This may have meant that the First Respondent would have favoured any SP1 candidate for this role, as they would have brought greater managerial and strategic experience than applicants at lower grades in the organisation. Nevertheless, the Tribunal took into account that Mr Krishnaswami and Mr Venkatraman would not necessarily have given Mr Meshram wholly positive references, given their frustrations with him, even before November 2017.

38. The Tribunal accepted Mr Gandhi's evidence that the person appointed to the Aviva Client Partner role had 19 years insurance experience and had worked in the relevant insurance unit for 10 years, meaning that they had become an expert in the insurance sector. Mr Meshram had not been involved in the insurance sector for at least 10 years, and so would not have had any recent relevant knowledge or experience. The Tribunal concluded that it was very unlikely that Mr Meshram would have been appointed to the Aviva role. It did not consider that there was any real or substantial chance that Mr Meshram would have been appointed to that role.

39. The Tribunal concluded that it was more likely than not that Mr Meshram would have applied to the Head of Ireland role, in order to continue his long career at the First Respondent and avoid redundancy. It was not certain that he would have done, given the comparative reduction in status and seniority that it represented. Furthermore, the Tribunal concluded that Mr Meshram would have been seen as a desirable candidate, given that he was an SP1 grade, compared to the other candidates. However, again, it was not certain that he would have been appointed to the role, especially given his previous unhappy relationship with Mr Krishnaswami and Mr Venkatraman.

40. In the absence of victimisation and unfairness, taking all those matters into account, the Tribunal concluded that it was 60% likely that Mr Meshram would have, both, applied for the Head of Ireland role and been appointed to that role, thus avoiding redundancy and continuing in employment with the First Respondent.

41. The Respondents contended that Mr Meshram's employment would have ended in any event, arising out of his own disaffection and his strained relationship with Messrs Krishnaswami, Mr Venkatraman and others. The Respondents relied on Mr Meshram conceding, in evidence, that his time at the First Respondent was "coming to an end". However, the concession was inconsistent with the rest of Mr Meshram's evidence. Mr Meshram told the Tribunal that he would have stayed with the First Respondent and wanted to be promoted further. There was no evidence that Mr Meshram had looked for alternative employment outside the First Respondent, at any time. Tribunal concluded that Mr Meshram's concession did not alter the Tribunal's conclusion that it was 60% likely that Mr Meshram would have stayed in employment, in the Head of Ireland role. His line manager would no longer have been Mr Krishnaswami and so an immediate source of friction would have been removed.

42. On the other hand, it was 40% likely that Mr Meshram would have been made redundant, fairly, in any event.

2. When did, or will, the Claimants obtain alternative employment extinguishing or reducing their losses?

43. The Respondents did not contend that the Claimants had failed to mitigate their loss by failing to make insufficient efforts to find alternative work.

Mr Meshram

44. The Respondents did not contend that Mr Meshram had found alternative work extinguishing his loss before 3 June 2019. It was agreed that Mr Meshram started work on a self employed consultancy basis for Epiphany Srl from July 2019. The Tribunal is only considering remedy for Mr Meshram until 3 June 2019. Consideration of remedy for losses incurred after that date are deferred until after the outcome of Mr Meshram's other proceedings.

Ms Agarwal

45. Ms Agarwal had made 255 job applications between 1 September 2018 and 19 January 2020. In October 2019, she was offered and accepted a job at Introhive, a sales intelligence and data quality management company. Ms Agarwal accepted the terms of an offer letter dated 4 November 2009. The offer of employment summarised the important terms of her contract. It said, "Your basic gross salary will be £85,000.00 per year with a £45,000.00 OTE (On Target Earnings) bonus...".

46. The offer letter also said that Ms Agarwal would be granted a stock option for 10,000 shares and that she would be provided with health insurance, travel insurance, life assurance, critical illness benefit, a pension of 5% employer contributions and car allowance of £5,000 a year.

47. Ms Agarwal told the Tribunal that, in fact, she had not received any car allowance and that she had been required to sign a different contract, which she had not been given a copy of and was unable to produce Tribunal**,** which omitted the £45,000 On Target Earnings bonus.

48. Ms Agarwal also told the Tribunal that she feared that she would not be employed by Introhive for long. She said that 9 employees had been made redundant in the last week, that the General Manager had resigned and that the Head of Alliances had left the office and not returned. She said that she had also been told that her team would undergo restructuring imminently. Ms Agarwal felt that, as the most recent recruit to the team, she was vulnerable to dismissal.

49. The Tribunal was very concerned to be told that, when Ms Agarwal disclosed her Introhive offer letter to the Respondents, she had altered it to delete the £45,000 OTE bonus term. Ms Agarwal told the Tribunal that she had "redacted" this, but would have produced the unredacted document to the Respondents before the Remedy Hearing. However, the document she disclosed to the Respondents contained other redactions, which appeared as blocked out text. By contrast, OTE bonus term had simply been deleted; there was no indication on the page that it had ever been present. The Tribunal concluded that Ms Agarwal had misled the Respondents by altering the document. It did not accept that the alteration was redaction and it therefore approached Ms Agarwal's evidence about the terms of her contract with considerable caution.

50. The Tribunal decided that the best evidence about the terms of the Ms Agarwal's employment with Introhive was in the signed employment offer as unredacted and unaltered.

51. That being the case, the Tribunal decided that Ms Agarwal's new contract was more favourable than her contract with the First Respondent. Her start date in that new work was 4 November 2019.

52. The Tribunal was required to assess compensation at the date of the remedy hearing. At that date, there was no basis for it to conclude that Ms

Agarwal's employment with Introhive would cease at any particular point in future, although it might. Ms Agarwal had certainly not been served with notice of termination by the date of the Remedy hearing. The Tribunal concluded that it should proceed on the basis that Ms Agarwal had obtained employment on more favourable terms and that that employment was continuing.

3. Promotion Prospects

53. Ms Agarwal contended that she would have been promoted from grade C3A to C3B in January 2019 and further promoted in the coming years.

54. By the time of her redundancy on 31 August 2018, Ms Agarwal had been in grade C3A for 4 years, since 2014. She therefore met the First Respondent's base criteria for promotion, of being in grade for more than 4 years. However, the Employment Tribunal accepted Ms Shah's evidence that, even where an employee met the base eligibility criteria for promotion, promotion must be proposed by the line manager, in the first instance, and then approved by the Business Unit and Performance Management Team within the Corporate Department. Factors such as individual performance, leadership potential and project management capabilities are considered before deciding that an employee should progress from grade C3A to C3B.

55. Ms Shah told the Tribunal, and the Tribunal accepted, that, in the past two years, of the 180 employees at grade C3A in the UK who met the criteria of being in grade for more than 4 years, only 25 of them were promoted to C3B; that is, 13.88% of those eligible. Furthermore, Ms Shah told the Tribunal that the percentage of TCS employees promoted from C3A to C3B was even smaller for employees on local contracts. In the financial year ending in 2018, 11 out of 349 employees on local contracts were promoted from C3A to C3B; that is, 3.15%.

56. The Tribunal concluded, on the basis of the statistics, which it accepted, that there was not a real and substantial chance that Ms Agarwal, an employee employed on a local contract, would have been promoted to Grade C3B in 2019. She would therefore have continued to be paid the same salary, save that she would have attracted an increment in April 2019. She would also have received a bonus based on her previous year's performance grade.

57. Ms Shah told the Tribunal that, had Ms Agarwal been promoted to grade C3B, she would have received an increase in salary of 3.5%. Ms Shah said that this would have been the same increase as Ms Agarwal would have received had she simply had a salary increment in April 2019.

58. Ms Agarwal's gross annual basic pay on dismissal was £58,780. From April 2019, therefore, pursuant to a 3.5% annual increment, Ms Agarwal would have received a salary of £60,840 per annum.

59. Ms Agarwal would also have received a bonus on the basis of her performance grade in 2018. Ms Agarwal received a performance grade of B. The Tribunal accepted the Respondents' evidence that, in the financial year

2018/19 all employees with performance band B received a bonus. The average bonus received by them 75% of their individual maximum bonus opportunity. Ms Agarwal's maximum bonus opportunity was £2,000. The Tribunal concluded that Ms Agarwal would have received 75% of £2,000 - £1,500 in bonus in 2018/19.

60. The Tribunal concluded that any further promotions and pay increases were too speculative in Ms Agarwal's case to be taken into account.

Mr Meshram

61. Mr Meshram was at grade SP1 when he was made redundant in August 2018. Mr Meshram contended that he was overdue a promotion to Vice President grade, on the basis that his last promotion had been 9 years previously, in 2010.

62. The formal grade for a Vice President in the First Respondent's grade hierarchy is SP2. The Tribunal accepted Ms Shah's evidence that SP2 is a very senior grade, occupied by a small number of employees. There are 4 SP2 employees out of a total workforce of 19,000 in the UK. Furthermore, in the past 3 years, only 1.5% of SP1s globally were promoted to SP2. In the UK, only one employee has been promoted SP2 in the past 5 years.

63. Ms Shah told the Tribunal, and the Tribunal accepted, that employees who are promoted to SP2 are consistently very high performance performers with performance bands of at least A and B. Ms Shah told the Tribunal that employees who had received a performance band of C in recent years would not be considered to be suitable for promotion to SP2. Given the rarity and seniority of the SP2 grade, the Tribunal had little difficulty in accepting that employees who had recently received a C grade would not be promoted.

64. Excluding the band D, which he had been awarded in 2018, Mr Meshram's most recent performance bands had been B, B and C. The Tribunal concluded that Mr Meshram's performance was not "very high". There was nothing to indicate that he would have been promoted, other than long tenure of his SP1 grade. That could just as easily indicate that he had stagnated in the role. Given Mr Meshram's unexceptional performance and the rarity with which UK employees were promoted to SP2, the Tribunal concluded that there was no real or substantial chance that Mr Meshram would have been promoted to SP2 before June 2019.

65. Mr Meshram's gross annual pay on dismissal was £135,640.

66. The Tribunal decided that the performance band D which Mr Meshram was awarded in 2018 was an act of victimisation. Nevertheless, the Tribunal read Mr Krishnaswami's detailed assessment of Mr Meshram's performance against his goals, giving rise to the "D" performance band. While some of the assessments involved victimisation, Mr Krishnaswami had many criticisms of Mr Meshram's performance which did not appear to be acts of victimisation. The Tribunal decided that, on any view, Mr Krishnaswami's assessment of Mr

Meshram's performance was not good. It accepted the First Respondent's contention that the likely non-discriminatory performance band would have been "C". The Tribunal therefore decided that Mr Meshram would have been given a salary increment of 1.9% based on that grade, as set out in the Respondents' Counter Schedule of Loss. Mr Meshram would therefore have received a £2,577.16 gross, or £1,546.30 net increment in April 2018.

67. Mr Meshram also claimed a net payment of £24,738 in respect of a bonus of £41,230 gross which he asserted would have been paid to him had he not received a "D" grade. It was not in dispute that £41,230 was the maximum potential bonus for SP1 employees in 2017/18. The Tribunal accepted the First Respondent's evidence that the average percentage bonus, of the maximum bonus, awarded to ATU UK employees at SP1, who were awarded performance band C, was 54%. 54% of £41,230 is £20,779.92 gross.

68. Mr Meshram claimed a further bonus payment of £27,000 net (£45,000 gross) in the financial year 2018-2019. The Tribunal accepted the First Respondent's assertion that UK ATU employees attaining grade C in 2018-2019 received an average of 43.5% of their maximum potential bonus. That equated to £18,391.80 gross in Mr Meshram's case. The Tribunal accepted the First Respondent's contention that Mr Meshram's likely performance grade in 2018/19, would have been C. In the previous four years, his performance grades had been C, B, B, C (as adjusted by the ET to avoid victimisation). The Tribunal assumed that Mr Meshram's performance would have continued at about the same level.

Injury to Feelings

69. The Tribunal is guided by the principles set out in *Prison Service v Johnson* [1997] IRLR 162 with regard to assessing injury to feeling awards. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the Claimant, (without punishing the Respondent) only for proven, unlawful discrimination for which the Respondent is liable. Awards that are too low would diminish respect for the policy underlying anti-discrimination legislation. However, excessive awards could also have the same effect. Awards need to command public respect. Society has condemned discrimination because of a protected characteristic and awards must ensure that it is seen to be wrong.

70. Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power.

71. It is helpful to consider the band into which the injury falls, *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102. In *Vento* the Court of Appeal said that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of race or sex. The middle band should be use for serious cases which do not merit an award in the highest band and the lower

band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

72. *Joint Presidential Guidance on Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury following Da Vinci Construction (UK) Limited* [2017] EWCA Civ 879 was issued on 4 September 2017. It reviewed the effect of recent case law and inflation on the Vento Bands and said that, when awards are made by Tribunals, the Vento bands should have the appropriate inflation index applied to them, followed by a 10% uplift on account of *Simmons v Castle* [2012] EWCA Civ 1039 *Simmons v Castle* [2012] EWCA Civ 1288.

73. The *Joint Presidential Guidance* concluded as follows,"…as at 4 September 2017, that produces a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,000 (cases that did not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000. … the Employment Tribunal retains its discretion as to which band applies and where in the band the appropriate award should fall."

74. Further uprated for inflation, the middle band is now £8,800 - £26,300.

75. In *St Andrews Catholic School v Blundell* UKEAT/0330/09 the Employment Appeal Tribunal upheld an appeal against an Employment Tribunal's injury to feelings award of £22,000 and substituted an injury to feelings award of ITF £14,000, plus aggravated damages. In that case, the Claimant was a teacher who was victimised by the head teacher for having brought a sex discrimination claim against the school by: (a) demanding details of the Claimant's complaint about her handling of a complaint about her behaviour by certain teacher governors, (b) assessing the Claimant very negatively following a classroom observation, telling her that everything she had seen was inadequate, that she had grave concerns and her future was under review; and (c) dismissing her. The conduct was not of long duration, its culmination occurring within about four months, but this was a serious case and the claimant suffered a stress related illness and panic attack.

76. In *Da'Bell v NSPCC* [2010] IRLR 19, which was heard at the end of 2009, the EAT adjusted the *Vento* bands for injury to feelings to allow for inflation. From then the lower band was £500 to £6,000, the middle band was £6,000 to £18,000 and the upper band was £18,000 to £30,000.

77. The award of £14,000 in *St Andrews Catholic School v Blundell* UKEAT/0330/09 was therefore towards the upper end of the middle band in *Vento.*

Aggravated Damages

78. Aggravated damages are available for an act of discrimination (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162, [1997] ICR 275, EAT).

79. The award must still be compensatory and not punitive in nature, *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291, EAT. In that case, a whistleblowing case, compensation was assessed on the same basis as awards in discrimination cases).

80. The EAT said that the circumstances attracting an award of aggravated damages fall into three categories:

> (a) The manner in which the wrong was committed. The basic concept here is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase "high-handed, malicious, insulting or oppressive" is often referred to – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. An award can be made in the case of any exceptional or contumelious conduct which has the effect of seriously increasing the claimant's distress.
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> (b) Motive. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a).
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> (c) Subsequent conduct.

81. In *HM Land Registry v McGlue UKEAT/0435/11*, [2013] EqLR 701, EAT, the EAT said that aggravated damages 'have a proper place and role to fill', but that a tribunal should also 'be aware and be cautious not to award under the heading "injury to feelings" damages for the self-same conduct as it then compensates under the heading of "aggravated damages"'. Such damages are not intended to be punitive in nature.

Exemplary Damages

82. In *Rookes v Barnard and others* 1964 AC1129, HL the House of Lords said, ".. cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff … where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity …".

83. Exemplary damages may, in principle, be awarded for acts of discrimination, *Hackney BC v Sivanadan* [2011] ICR 1374 at paragraph 31.

84. However, the EAT in *Ministry of Defence v Fletcher* [2010] IRLR 25 gave the following guidance on exemplary damages:

a. Exemplary damages may be awarded where there has been oppressive, arbitrary or unconstitutional action by the servants of the government.
b. Certain “ordinary” employment functions performed under statute by an official of a public body of sufficient seniority may, subject to certain conditions, be capable of supporting an award of exemplary damages. The wrongdoing must, however, be conscious and contumelious.
c. Exemplary damages are reserved for the very worst cases of oppressive use of power by public authorities. Such damages are punitive, not compensatory, and intended to deter. Overlap and double recovery is to be avoided.

Personal Injury

85. In *HM Prison Service v Salmon* [2001] IRLR 425, EAT, the EAT said that in principle, injury to feelings and psychiatric injury are distinct. In practice, however, the two types of injury are not always easily separable, giving rise to a risk of double recovery. In a given case, it may be impossible to say with any certainty or precision when the distress and humiliation that may be inflicted on the victim of discrimination becomes a recognised psychiatric illness such as depression. Injury to feelings can cover a very wide range. At the lower end are comparatively minor instances of upset or distress, typically caused by one-off acts or episodes of discrimination. At the upper end, the victim is likely to be suffering from serious and prolonged feelings of humiliation, low self-esteem and depression; and in these cases it may be fairly arbitrary whether the symptoms are put before the tribunal as a psychiatric illness, supported by a formal diagnosis and/or expert evidence. There is nothing wrong in principle in a tribunal treating "stress and depression" as part of the injury to be compensated for under the heading "injury to feelings", provided it clearly identifies the main elements in the victim's condition which the award is intended to reflect (including any psychiatric injury) and the findings in relation to them.

Ms Agarwal

86. The relevant acts of the First Respondent for which Ms Agarwal can claim an injury to feelings award are:

a. sex harassment or sex discrimination by Ms Bhogal and Mr Buckley’s treatment of her collective grievances,
b. sex discrimination by Ms Hide’s failure objectively to investigate her grievance, and
c. victimisation by putting her at risk of redundancy.

87. The Tribunal has decided that, if the First Respondent had not victimised Ms Agarwal, she would not have been dismissed. She is entitled to recover injury to feelings on the basis that the victimisation led to the end of her career at the First Respondent.

88. The Tribunal accepted Ms Agarwal's evidence that she felt confused, humiliated and belittled by Ms Bhogal and Mr Buckley's treatment of her. Ms Agarwal told the Tribunal that, because of the First Respondent's actions, her self-confidence was damaged, she was tearful and stressed and suffered from insomnia for long periods. She also told the Tribunal that this has had a deleterious impact on her family life and that she has felt guilty about being distracted from her 5 year old son because of her preoccupation with thoughts of how she has been treated at work and with the resulting litigation.

89. It was clear from Fit Notes produced by Ms Agarwal that her GP signed her off work because of "stress at work" from 3 – 17 January 2018 and referred he for counselling at the same time. This was just after Ms Bhogal and Mr Buckley's conduct towards her. She was also signed off work for stress related reasons on 8 – 22 August 2018.

90. Ms Agarwal told the Tribunal and the Tribunal accepted that she had been prescribed medication for insomnia, anxiety and depression by her GP for about 2 years. Ms Agarwal produced evidence of prescriptions for medication to treat depression and insomnia from April 2018 and throughout 2019, Claimants' Bundle pp 232 - 240.

91. Ms Agarwal was provided with a weekly Mood Management Course by "Uplift", an NHS mental health service for 7 weeks in October – December 2018, page 237.

92. She produced a report from "Uplift", an NHS mental health service, dated 24 May 2019. The report said that, on standard self-report measures of depression and anxiety, Ms Agarwal's scores were in the severe range. As a result, the Uplift service provided Ms Agarwal with a 4-6 week course of one-to-one cognitive behavioural therapy, as well as a sleep workshop and a self-confidence and assertiveness workshop, Claimants' Bundle pp233, 234, 241 - 248.

93. The report noted that Ms Agarwal felt that she was in an abyss of negative thinking and that friends had said that she had become a different person. She had difficulty sleeping felt very scared.

94. After her dismissal by the First Respondent, Ms Agarwal was able to look for work. She started looking for alternative work in September 2018 and eventually started work in November 2019, over a year later. In the interim, she suffered additional anxiety because of her financial losses and the impact this had on her family.

95. The Tribunal decided that the First Respondent's actions were serious and that they continued over a period of about 9 months. Ms Bhogal and Mr Buckley's conduct was demeaning and humiliating and, from the medical evidence, were the initial trigger for the Claimant's depression and anxiety. Ms Agarwal suffered the loss of a career at the First Respondent which she treasured. The Tribunal accepted her evidence that she had worked very hard

to be recruited by the First Respondent and felt that she had been loyal and dedicated to it.

96. The Tribunal found that the effect of the First Respondent's actions on Ms Agarwal was profound and long-lasting. It accepted that she had lost confidence, ruminated on the First Respondent's treatment of her, was distracted from family life, was tearful and unable to sleep, to the extent that friends noticed a dramatic change in her personality.

97. From the medical evidence, Ms Agarwal has also suffered from depression and anxiety since April 2018 and has been treated with medication as well as numerous talking and behavioural therapies.

98. On the other hand, Ms Agarwal has been able to look for work and has been in work since November 2019, so her injury to feelings was not so severe as to prevent her from being able to further pursue her career.

99. The Tribunal considered that the First Respondent's treatment of Ms Agarwal and the resulting injury to feelings was similar to the case of *St Andrews Catholic School v Blundell* UKEAT/0330/09. In that case, the EAT awarded compensation in the upper part of middle band of *Vento.* The middle band is now £8,800 - £26,300.

100. However, there were some features of this case which were more serious. In particular, Ms Agrawal has suffered from a depressive illness for over 18 months, requiring a number of different medical interventions. While she has been able to look for work and to work, this has been a prolonged period of illness. The period of discriminatory treatment was also longer – lasting from November 2017 to June 2018.

101. The Tribunal decided that the appropriate award was very close to the top of the middle band. It awarded Ms Agarwal £24,000 for injury to feelings.

102. However, the Tribunal decided that an award of aggravated damages was also warranted in Ms Agarwal's case.

103. In its liability judgment, the Tribunal found that Ms Bhogal's letter, responding to Ms Agarwal's formal grievance, was critical and threatening towards Ms Agarwal. The Tribunal found that the contents of the letter were extraordinary, particular where Ms Agarwal, a junior employee, had raised legitimate concerns about a very senior employee's unacceptable behaviour, which included shouting and banging a table at her. Ms Bhogal also made threats about Ms Agarwal's future in the Company face-to-face.

104. The Tribunal further found that Mr Buckley's grievance outcome letter to Ms Agarwal was patronising and humiliating of her. It was also unduly critical and hostile towards her. His lengthy paragraph about potential change in her Unit was an implicit threat to Ms Agarwal's continued employment.

105. The Tribunal concluded, from both Ms Bhogal and Mr Buckley's letters, that the First Respondent put excessive pressure on Ms Agarwal not to pursue a complaint. Mr Buckley did not investigate Ms Agarwal's grievance, other than holding a meeting with her and sending her a humiliating and threatening outcome letter.

106. The Tribunal decided that Ms Bhogal and Mr Buckley's rejection of Ms Agarwal's grievance was done in an exceptionally upsetting way. Their treatment of her was, indeed, high-handed, malicious, insulting and oppressive. They were Human Resources professionals who ought to have handled Ms Agarwal's grievance in a dispassionate and respectful way. They did the opposite, threatening her and humiliating her as they did. The Tribunal had no hesitation in finding that their conduct seriously increased Ms Agarwal's distress.

107. The Tribunal was mindful that it had already compensated Ms Agarwal for some of the upset caused by Ms Bhogal and Mr Buckley's actions. It awarded an additional £5,000 for aggravated damages.

108. The total award to Ms Agarwal for injury to feelings and aggravated damages was £29,000.

ACAS Uplift

109. Ms Agarwal also sought an ACAS Uplift in respect of the First Respondent's failure to follow the ACAS Code on Disciplinary and Grievance procedures under *s207A TULR(C)A 1992*.

110. The First Respondent's failure could only relate to its handling of Ms Agarwal's grievance. The Foreward to the ACAS CoP 1 makes clear that it does not apply to redundancy dismissals.

111. Ms Agarwal contended that Ms Bhogal's discouragement of her grievance, including her failure to take action on Ms Agrawal's formal grievance, and Ms Hide's failure to be objective were breaches of the ACAS CoP1 on Grievances.

112. The relevant provisions of the ACAS Cop1 were

a. [33] Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.
b. [43] The appeal should be dealt with impartially …. .

113. Tribunal decided that the First Respondent had unreasonably breached the Code of Practice in these regards and that the breaches were serious. The First Respondent is a large employer, with a large Human Resources department. There was no acceptable reason for the breaches. It was just and equitable to apply a 25% uplift to the relevant portion of the damages award for injury to feelings which related to the First Respondent's unlawful acts in relation to Ms Agarwal's grievances.

114. Not all the acts in relation to the grievance also amounted to breaches of the Code. Mr Buckley's actions, for example, did not appear to come within the Code of Practice. The Tribunal considered that £10,000 of the injury to feelings award was referable to the particular breaches of the Code.

115. 25% of £10,000 = £2,500.

116. Ms Agarwal's award for injury to feelings, including ACAS uplift and aggravated damages, was £31,500.

Mr Meshram

117. The Tribunal found that the First and Second Respondent victimised Mr Meshram by Mr Krishnaswami presenting unauthentic communications from team members December 2017 – February 2018 and by awarding Mr Meshram a D Performance rating. It found that the First and Third Respondents victimised Mr Meshram by Mr Venkatraman's hostile email threatening disciplinary action against the Claimant, which HR then considered.

118. It also held that the First Respondent victimised Mr Meshram when it commenced the change management process, put him at risk of redundancy, failed to offer him the roles of Client Partner for AVIVA and Country Head for Ireland and terminated his employment.

119. In addition, the Tribunal decided that the First Respondent subjected Mr Meshram to protected disclosure detriment when it queried, or failed to approve Mr Meshram's expenses in July 2018. Putting Mr Meshram at risk of redundancy was also an act of protected disclosure detriment by the First Respondent.

120. Where there are concurrent discriminators the usual award will simply be that each such respondent is jointly and severally liable, *LB Hackney v Sivanandan* [2011] IRLR 740, [2011] ICR 1374 EAT, upheld by the Court of Appeal, [2013] EWCA Civ 22, *[2013] EqLR 249*. In such cases, the EAT (Underhill P presiding) held that the Employment Tribunal's discretion to apportion liability to the claimant between each of the respondents exists only where the injury caused by different acts of discrimination is 'divisible' and the tribunal can—and, indeed, should—apportion to each discriminator responsibility for only that part of the damage done by them. Even then, the EAT said that such 'split' awards should only be made where such an order is sought by one of the parties and if the proper legal basis for the discretion is clearly demonstrated in the particular case.

121. The parties did not ask that the Tribunal apportion liability for injury to feelings between the Respondents, so the Tribunal has made one award. The Respondents are able to apportion liability to pay the award as between themselves.

122. The Respondents subjected Mr Meshram to several acts of victimisation and protected disclosure detriment over a period of 8 months. Some acts were

hostile – those relating to the investigation of expenses included the threat of disciplinary proceedings.

123. The "D" performance rating also potentially had a deleterious effect on Mr Meshram's future career at the Respondent Company, as well as outside the Company. It would affect his bonus payment and increment.

124. Mr Meshram had been employed by the First Respondent for 23 years. He lost a long and valued employment when he was dismissed. He was without work for the whole period until 3 June 2019, despite strenuous efforts to find alternative work. The Tribunal accepted Mr Meshram's evidence that he was concerned that he would never rebuild his career.

125. Mr Meshram is the sole earner in his family. The loss of his income resulted in him having to survive on savings, which have now been exhausted. The Tribunal accepted Mr Meshram's evidence that this has had a significant impact on both him and his family. Mr Meshram's wife submitted a statement to the Tribunal about her own distress and anxiety arising out of Mr Meshram's treatment by the Respondents. While Mr Meshram cannot recover damages on behalf of his wife for her injured feelings, the Tribunal accepted that Mr Meshram's own distress would have been increased by the impact of the Respondents' conduct on his family.

126. Mr Meshram told the Tribunal, and the Tribunal accepted, that due to his loss of earnings, Mr Meshram has been unable to continue to support his widowed mother in India, or visit her on a regular basis, which has been a source of great distress for him.

127. The Tribunal concluded that the Respondents' unlawful towards Mr Meshram were insidious, in that they included threats of disciplinary action, repeated questioning of his expenses and the secret gathering of evidence against him, from his former colleagues. Ultimately, Mr Meshram lost his job and, with it, his long career with the First Respondent. He has lost his financial security.

128. Mr Meshram has been able to look for work. He has, very commendably, undertaken voluntary work and commenced a study course at the Said Business School, at Oxford University. He might have been made redundant in any event. He secured alternative employment, for the purposes of this Remedy Hearing, by 3 June 2019.

129. Taking all matters into consideration, including that Mr Meshram might have been made redundant in any event, the Tribunal considered that Mr Meshram's case came within the middle band of *Vento,* like Ms Agarwal's and *St Andrews Catholic School v Blundell* UKEAT/0330/09. Because of the number of unlawful acts against Mr Meshram and the insidious nature of them, the injury to feelings award should be at the very top of the middle band.

130. The Tribunal awarded £26,000 for injury to feelings to Mr Meshram. It did not make any separate award for aggravated damages in Mr Meshram's case;

the £26,000 award adequately and fully reflected Mr Meshram's injury to feelings.

131. There was no ACAS Uplift on this award because Mr Meshram did not bring a grievance and the ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy dismissals.

Exemplary Damages

132. The Tribunal did not award the Claimants exemplary damages. The Respondents were not public authorities. There was no calculation by the Respondents that they would make a profit for themselves by their acts which could exceed the compensation payable to the Claimants.

Unfair Dismissal

133. The Tribunal has awarded compensation for loss of earnings to the Claimants for their discrimination claims. There cannot be double recovery by awarding overlapping compensation in their unfair dismissal claims.

134. The Claimants would have been entitled to be paid basic awards in their unfair dismissal claims. They received statutory redundancy payments, however, so their basis awards are reduced to nil.

135. The Claimants can recover a sum for loss of their statutory rights. The Tribunal awarded the Claimants 2 weeks' pay (subject to the statutory cap) for loss of statutory rights. This is because an employee must now work for 2 years to acquire the right to bring an unfair dismissal claim.

136. The maximum weekly wage at the date of their dismissal was £508 – *s227 ERA 1996.*

137. The Tribunal awarded each of the Claimants £1,016 for loss of statutory rights.

Pension Loss

138. Each of the Claimants suffered loss of their employers' pension contributions at 6%. Ms Agarwal's net weekly pension loss was £73.86. Mr Meshram's net weekly pension loss was £170.45.

Other Lost Allowances and Entitlements

139. The Claimants' lost "City Allowances". These amounted to £23.82 net per week for Ms Agarwal and £23.26 net weekly for Mr Meshram.

140. Both Claimants lost the benefit of medical insurance but neither produced evidence of a replacement medical insurance policy having been purchased. They could not recover past loss of medical insurance cover, from the date of dismissal to the date of the Remedy Hearing, as they had incurred no financial

loss thereby and any sum paid would be a windfall, *Knapton v ECC Card Clothing Limited* [2006] ICR 1084. They might have been able to recover the cost of medical assurance after the date of the Remedy Hearing, but the Tribunal was only considering Mr Meshram's loss to June 2019 and Ms Agarwal had obtained alternative employment which had extinguished all her losses.

141. The net weekly value of Ms Agarwal's medical insurance cover was £12.08.

142. Ms Agarwal claimed for loss of her company mobile telephone. She agreed in evidence that the company mobile telephone had been provided for company use and that she had given it back to the First Respondent at the end of her employment. Ms Agarwal told the Tribunal that she had always had another, private, mobile telephone for her own use. The Tribunal concluded that Ms Agarwal had not sustained any loss in this regard – the company mobile telephone was not supplied for her personal use and she did not need it for company business when she was no longer working for the First Respondent.

143. Ms Agarwal also claimed for loss of payment for Broadband at her home. She told the Tribunal that she submitted the relevant Broadband bills to the First Respondent on monthly basis. The loss was £20 per month. Ms Agarwal produced copies of some bills from Sky for broadband provision, showing the cost as £20 per month. These were not current bills but the Tribunal accepted that Ms Agarwal continued to pay for broadband at her property, but was no longer reimbursed for this after she was dismissed.

144. Ms Agarwal told the Tribunal that, after she lost her job with the First Respondent, the fixed interest term of her mortgage came to an end and she and her husband sought to refix the mortgage interest rate for another term. She told the Tribunal that lenders would not provide such favourable rates to her family because she was no longer earning and her husband would be meeting the mortgage payments on his own. She said that HSBC UK, for example, would not lend as much money to her husband and her because she was not earning.

145. Ms Agarwal produced very little evidence regarding this. She produced only the eventual mortgage offer from Nat West bank and a computer print out of the maximum amount HSBC might lend, based on a particular income.

146. The Tribunal did not accept, on this limited evidence, that the Claimant had suffered loss, in that she and her husband were unable to secure favourable borrowing rates on the same size of mortgage as they had previously borrowed, from the myriad banks and building societies offering mortgage services in the market.

Interest and Grossing Up

147. The Claimants are entitled to interest at 8% on economic loss from the midpoint between the date of dismissal and the date of calculation. They are

entitled to 8% interest on their injury to feelings award from the act of discrimination to the date of calculation.

148. The Claimants are also entitled to have their taxable awards above £30,000 grossed up for tax, *Shove v Downs Surgical plc* [1984] IRLR 17.

Calculations

Ms Agarwal

149. **Injury to feelings:** £24,000. ACAS uplift £2,500. Aggravated Damages: £5,000. Total £31,500.

150. **Of this: pre-dismissal injury to feelings**: £12,000 (of £24,000) plus £2,500 (ACAS Uplift) plus £5,000 (Aggravated damages) = £19,500. (The Tribunal assessed pre-dismissal injury to feelings at £12,000, to include Mr Buckley's actions. The £10,000 to which the ACAS uplift applied did not include Mr Buckley's actions.)

151. **Therefore: Post-dismissal injury to feelings:** £12,000.

152. **Loss of earnings:** Effective date of termination: 31 August 2018. Date of Remedy Hearing: 22 January 2010.

153. **Net weekly loss at date of dismissal:** The parties had not agreed on the net weekly pay (Ms Agarwal said £823.90, the First Respondent said £800.17). The Tribunal assessed Ms Agarwal's net weekly pay to be about £820.00, using NI and personal allowance figures. The Tribunal accepted the First Respondent's figures for pension and other benefits as the First Respondent was likely to have the relevant records for these. Ms Agarwal therefore also received £73.86 net pension weekly, net City Allowance of £23.82 weekly. She received a £20 monthly broadband payment, £4.62 per week. Ms Agarwal's weekly loss was £922.30 net at the date of dismissal.

154. **From 1 September 2018 – 31 March 2019 Ms Agarwal's net loss was 30.4 weeks x £922.30 = £28,037.92.**

155. From April 2019, pursuant to a 3.5% annual increment, Ms Agarwal would have received a salary of £60,840 gross per annum. That would equate to £43,823 net per year, or £842.75 per week. Ms Agarwal's net weekly loss from April 2019 was therefore about £945.05.

156. Ms Agarwal would also have received a bonus of £1,500 in 2018/19.

157. From 1 April 2019 to 22 January 2020, Ms Agarwal's net loss was 42.6 weeks x £945.05 = 42.6 x £945.05 = £40,259.13. Plus £1,500 bonus = £41,759.13.

158. Net pay in lieu of notice: £7,936.

159. Pay in alternative work: £14,884. The Tribunal accepted Ms Agarwal's figures.

160. Past loss 1 September 2018 – 22 January 2020. £28,037.92 + £41,759.13 = £69,797.05. Subtract (£7,936 + £14,884). Total past loss: £46,977.05 net.

161. **Future Loss.** Ms Agarwal obtained new employment on 4 November 2019, earning a basic gross salary £85,000.00 per year (with a £45,000.00 On Target Earnings bonus). The terms of the contract provided that she would receive health insurance, travel insurance, life assurance, critical illness benefit, a pension of 5% employer contributions and car allowance of £5,000 a year. Her gross pay at the First Respondent would have been £60,840 gross per annum. Her new employment was clearly considerably better paid.

162. **Ms Agarwal does not have future loss.**

Interest

163. The Tribunal therefore awarded Ms Agarwal £46,977.05 net for past economic loss for discrimination/victimisation, from 31 August 2018. The date of the Remedy Hearing was 22 January 2010. There were 365 + 144 days = 509 days from the date of dismissal to the date of the hearing.

164. Ms Agarwal was entitled to interest from the midway point at 8%. The calculation is £46,977.05 x 0.08 x 509/365 x 0.5 = £2,620.42 interest.

165. **Total past economic loss and interest is £46,977.05 + £2,620.42 = £49,597.47.**

166. The Tribunal awarded Ms Agarwal £19,500 total compensation for pre-dismissal injury to feelings. She was entitled to interest from the date of these injury to feelings. Ms Hide's grievance outcome decision was on 21 December 2017.

167. There were (365 + 365+ 32 =) 762 days between 21 December 2017 and 22 January 2020. The interest calculation is £19,500 x 0.08 x 762/365 = £3,256.77.

168. **Total pre-dismissal injury to feelings and interest is £19,500 + £3,256.77 = £22,756.77.**

169. The Tribunal awarded Ms Agarwal £12,000 post-dismissal injury to feelings. There were 365 + 144 days = 509 days from the date of dismissal to the date of the hearing.

170. The interest calculation is £12,000 x 0.08 x 509/365 = £1,338.74 interest. Her total post dismissal injury to feelings award was £12,000 + £1,338.74 = £13,338.74.

171. These awards were for Ms Agarwal's discrimination/victimisation claims.

172. **She was also entitled to recover £1,016 for loss of statutory rights in her unfair dismissal claims.**

Grossing Up

173. From 6 April 2018 awards in respect of injury to feelings are taxable because *ITEPA 2003 s406* has been amended by *s5(7) Finance (No 2) Act 2017* so that injury includes psychiatric injury, but not injury to feelings. From the 2018/19 tax year onwards, awards for injury to feelings do not fall within the statutory exemption and HMRC will treat injury to feelings awards in cases of discriminatory dismissals as taxable. Tribunals should therefore gross up such awards to take account of tax. However, injury to feelings awards in respect of pre-termination discrimination are not subject to tax and should therefore not be grossed up.

174. Ms Agarwal ought not to be taxed on her award for injury to feelings for pre-dismissal injury to feelings.

175. The first £30,000 of Ms Agarwal's award is tax-free.

176. Her total award, excluding pre-dismissal injury to feelings, is £49,597.47 past economic loss + £13,338.74 post dismissal injury to feelings + £1,016 loss of statutory rights = £63,952.21.

177. The taxable portion of this is £33,952.21.

178. Ms Agarwal would have a personal allowance of £12,500. £33,952.21 - £12,500 = £21,452.21.

179. She would pay tax at 20%. £21,452.21 is the figure after tax; it is 80% of the figure which should be awarded. The figure she would need to be awarded to be left with £21,452.21 is (£21,452.21/8 x 10) = £26,815.26. An additional £5,363.05 needs to be added to the award on account of grossing up.

180. **If this is added to the award for economic loss for discrimination/victimisation, the total for economic loss is £49,597.47 + £5,363.05 = £54,960.52.**

<u>Calculations</u>

Mr Meshram

181. **Loss of earnings:** Effective date of termination: 31 August 2018. Cut off date for the purposes of this Hearing: 3 June 2019.

182. **Net weekly loss at date of dismissal:** The parties had not agreed on the net weekly pay (Mr Meshram said £1,615.00, the First Respondent said £1,577.77). The Tribunal calculated the net weekly pay as £1,581. It accepted the First Respondent's figures for pension and other benefits as the First

Respondent was likely to have the relevant records for these. Mr Meshram therefore also received £170.24 net pension weekly and net City Allowance of £23.26 weekly. Mr Meshram's weekly loss was £ 1,774.50 net at the date of dismissal.

183. **From 1 September 2018 – 31 March 2019 Mr Meshram's net loss was 30.4 weeks x £1,774.50 = £53,944.80.**

184. Mr Meshram would also have received a salary increment of 1.9% in the year 2017-2018, if he had received a grade C performance grade, rather than a D. The Tribunal accepted the First Respondent's figure for this - £1,546.30 net. This covered the period April 2017 – March 2018.

185. This increment needed to be added to Mr Meshram's 2018/2019 net loss for the period 1 April 2018 – 31 March 2019. **£53,944.80 + £1,546.30 = £55,491.10.**

186. The Tribunal decided that Mr Meshram was likely to have performed at a similar level thereafter. Therefore it decided that Mr Meshram would have received a further increment of about £1,546.30 net per annum from 1 April 2019. This represented an additional net weekly loss of £29.74.

187. **From 1 April 2019 – 3 June 2019 Mr Meshram's loss was £1,774.50 + £29.74 (2017/18 increment) + £29.74 (2018/2019 increment) = £1,833.98.**

188. **9 weeks x £1833.98 = £16,505.82.**

189. Mr Meshram would also have received bonuses in 2017/18 and 2018/19. The Tribunal accepted the First Respondent's figures for these – it had the relevant information relating to C grade employees at SP1 grade. Mr Meshram would therefore have received £20,779.92 gross and £18,391.80 gross respectively. The net amounts, assuming tax at 40%, would have been £12,467.95 and £11,035.08.

190. Net pay in lieu of notice: £ 20,511.06.

191. Mr Meshram did not earn any pay in alternative work in the relevant period.

192. **Past loss 1 September 2018 – 3 June 2019. £55,491.10 (2018 – 31/3/19) + £16,505.82 (1/4/19 – 3/6/19) + £12,467.95 (2017/18 bonus) + £11,035.08 (2018/2019 bonus) = £ 94,499.95.**

193. However, it was only 60% likely that Mr Meshram would have remained in employment. There was a 40% chance that he would have lost his employment in any event.

194. His past loss was therefore 60% x £94,499.95 = £56,699.97

195. Subtract (£20,511.06) pay in lieu of notice.

196. **Total past loss for victimisation/protected disclosure detriment: £ 36,188.91 net.**

Interest

197. The Tribunal therefore awarded Mr Meshram £36.188.91 net for past economic loss for victimisation/detriment, from 31 August 2018 – 3 June 2019. The date of the Remedy Hearing was 22 January 2010. There were 365 + 144 days = 509 days from the date of dismissal to the date of the hearing.

198. Mr Meshram was entitled to interest from the midway point at 8%. The calculation is £36,188.91 x 0.08 x 509/365 x 0.5 = £2,018.65 interest.

199. **Total past economic loss for victimisation/detriment and interest is £ 36,188.91+ £2,018.65 = £38,207.56.**

Injury to Feelings

200. The Tribunal awarded Mr Meshram £26,000 for injury to feelings.

201. **The Tribunal considered that £14,000 of the award related to pre-dismissal acts, which were extended and egregious, and £12,000 related to the dismissal.**

202. The pre-dismissal unlawful acts occurred over a period of time from about January 2018 – August 2018. The Tribunal took the midpoint of theses dates as the date when the injury to feelings was suffered and calculated interest from 30 April 2018.

203. There were (365 + 266 =) 631 days between 30 April 2018 and 22 January 2020. The interest calculation is £14,000 x 0.08 x 631/365 = £1,936.22.

204. **Total award for pre-dismissal injury to feelings and interest is £14,000 + £1,936.22 = £15,936.22.**

205. Post-dismissal injury to feelings were £12,000. There were 365 + 144 days = 509 days from the date of dismissal to the date of the hearing.

206. **The interest calculation is £12,000 x 0.08 x 509/365 = £1,338.74 interest. Mr Meshram's total post dismissal injury to feelings award was £12,000 + £1,338.74 = £13,338.74.**

Unfair Dismissal

207. These awards were for Mr Meshram's discrimination/ victimisation/ protected disclosure claims.

208. **He was also entitled to recover £1,016 for loss of statutory rights in his unfair dismissal claims. However, it was 40% likely that he would have**

left the First Respondent's employment in any event, so the First Respondent should pay him £636.60 on account of unfair dismissal.

Grossing Up

209. Mr Meshram ought not to be taxed on his award for pre-dismissal injury to feelings.

210. His total award for pecuniary loss is £38,207.56 + £636.60 = £38,844.16. His post dismissal injury to feelings award was £13,338.74.

211. **The total of these figures was £52,182.90**

212. The first £30,000 of Mr Meshram's award is tax-free. The taxable portion of his award is therefore £22,182.90.

213. Mr Meshram would have a personal allowance of £12,500.

214. The figure on which he would have to pay tax is £9,682.90.

215. Mr Meshram would pay tax at 20%. £9,682.90 is the figure after tax; it is 80% of the figure which should be awarded. The figure he would need to be awarded to be left with £9,682.90 is (£9,682.90/8 x 10) = £12,103.63. An additional £2,420.73 needs to be added to the award on account of grossing up.

216. **If this is added to the figure for past economic loss for victimisation/detriment, the total for this is £2,420.73 + £38,207.56 = £40,628.19.**

217. **The Tribunal therefore ordered the Respondents to pay Mr Meshram, on account of victimisation and protected disclosure detriment, £40,628.19 for past economic loss including interest and a figure for grossing up, £15,936.22 for pre-dismissal injury to feelings and £13,338.74 for post-dismissal injury to feelings. It ordered the First Respondent to pay Mr Meshram £636.60 on account of unfair dismissal.**

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Employment Judge Brown

Dated: 28 Feb 2020

Judgment and Reasons sent to the parties on:

02/03/2020

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For the Tribunal Office