Case Number: 3201818/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Robinson**

Respondent: **On Air Dining Limited**

Heard at: **East London Hearing Centre**

On: **13 December 2019 and (in chambers) 17 January 2020**

Before: **Employment Judge Jones**
Members: **Mr P Quinn**
Mr P Pendle

Representation

Claimant: Mr M Humphreys (Counsel)

Respondent: Mr W Lane (Solicitor)

REMEDY JUDGMENT

The judgment of the Tribunal is that:-

1 The Respondent is ordered to pay the Claimant the following as his total compensation for his successful complaints of constructive unfair dismissal, breach of contract/unlawful deduction of wages and detriments for making public interest disclosures.

For constructive unfair dismissal:

Basic Award: **£1,467.00**

Compensatory Award:

Loss of salary (32 weeks x £819)		**£26,208.00**
Loss of other benefits: -		
Car (32 x £93.67) -	**£2,997**	
Car insurance (32 x £20.43)	**£654**	
Road fund (32 x £3.65)	**£117**	
Family Dental insurance	**£526**	

(32 x £16.43)
Employer pension contributions of
1% from September 2017 £369

Total £30,871.00

Plus: Loss of statutory rights 350

Total £31,171.00

Section 207A ERA (ACAS) uplift of 25% (£31,171 x 25%) = £7,793

Total compensatory award = £31,171 + £7,793
£38,964.00

Total compensation for unfair dismissal = £40,431.00

For breach of contract:

Balance between contractual wage and SSP
from 5 July 2017 – 5 September 2017= £6324.00

paternity leave pay claim £1,459.00

total compensation for breach of contract: £7,783.00

Whistleblowing claims:

Injury to feelings and Aggravated Damages
£24,000.00
Damages for Psychiatric injury
£6,000.00
£30,000.00
Plus 10% (Simmons v Castle uplift) £3,000.00
£33,000.00
Less sums paid to the Claimant in June 2018
£1,153.85

Total of £31,846.15

Interest applied in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

The applicable interest rate is 8%.

£31,846,15 x 8% = £2,547.69
£31,846.15 + £ 2,547.69 = £34,393.84

Total compensation awarded to the Claimant is as follows:
£40,431 + £7,783 + £34.393.84 = £82,607.84.

2. The Respondent is ordered to pay the Claimant the net sum of £82, 607.84.

3. This sum will need to be grossed up to take into account any liability for additional tax liability the Claimant will incur to HMRC as a result of this payment. The parties will make written submissions on the method to be used for grossing this award up, to the Tribunal, if they are unable to reach an agreement.

4. They must do so by 1 June 2020.

REASONS

1 The Claimant was successful in his complaints of unfair dismissal, automatic unfair dismissal, wrongful dismissal, breach of contract and detriment following making protected public interest disclosures.

2 The Claimant seeks a remedy for his successful claims including an uplift because of the Respondent's failure to comply with the ACAS Code of Practice and loss of wages. The Claimant was automatically unfairly dismissed because he made protected disclosures and the Claimant seeks injury to feelings including aggravated damages and compensation for psychiatric injury as his remedy for that claim.

3 He also seeks a financial penalty under section 12A of the Employment Tribunals Act 1996.

Law

4 The Claimant sought neither reinstatement nor re-engagement with the Respondent. He was content that the relevant declarations were already in the Tribunal's written judgment.

5 A remedy award in a successful complaint of unfair dismissal case is usually made up of two main elements: a basic award and a compensatory award. In this case, the basic award was agreed between the parties.

Compensatory award

<u>The unfair dismissal complaint</u>

6 The Tribunal awards remedy for unfair dismissal under sections 123 and 124 of the ERA. Section 123 states that, subject to the provisions of section 124, the amount of the compensatory award due to a successful Claimant shall be such amount as the Tribunal considers to be just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

7 Such losses as can be compensated would include not just wages lost due to being unfairly dismissed but also any additional benefits attached to the employment that had been lost. The compensatory award can take into account losses extending into the

future. The Tribunal must rely on its relevant findings of fact in order to determine how much and for how long it would be just and equitable to award to the claimant compensation for such future losses.

8 The Claimant is under a duty to mitigate his/her loss and the Tribunal would need to consider whether this has been done in deciding which losses will be compensated. This particularly refers to the duty on the Claimant to make diligent searches for alternative employment following dismissal. The burden is on the Respondent to show that the Claimant acted unreasonably in failing to mitigate his loss.

9 Section 124 confirms that a compensatory award shall not exceed a year's wages. As this cap is disapplied to the remedy calculation for successful claims under section 103A ERA, the Claimant submitted that to the extent that any compensatory award exceeds the cap, he relies on his successful automatic unfair dismissal claim for his remedy.

10 The Claimant also succeeded in his complaint of wrongful dismissal but acknowledged that the loss arising from that claim was subsumed within the calculation of compensation for unfair dismissal and so he did not seek further remedy arising from it.

11 The Claimant sought an ACAS uplift to his remedy for unfair dismissal and cited the Respondent's failure to investigate the allegations of fraud and its failure to give the Claimant the right of reply to the allegations as its main failures to comply with the Code. The Claimant cited paragraphs 238, 253, 254, 283-285 and 322 of the judgment in support of his claim for an uplift of 25%.

12 Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 deals with this. Subsection (1) and (2)(a) to (b) give the Tribunal the power, if it considers it just and equitable, to increase any award it makes to an employee by no more than 25% if the claim concerns a matter to which a relevant Code of Practice applies and the employer has failed to comply with that conde and the failure was unreasonable.

Compensation for the successful whistleblowing claims

13 The Claimant claims an award for injury to feelings, and an award for aggravated damages, as compensation for his successful complaint that he suffered detriments because he made protected disclosures. Although an additional award for breaching the ACAS Code was referred to in his submissions, this was not included in the schedule of loss.

14 The Respondent submitted, by reference to the case of *Dunnachie v Kingston upon Hull City Council* [2014] ICR 1052, that the Claimant should not be entitled to compensation for injury to feelings for an unfair dismissal but only for the detriments the Tribunal found that it had done.

15 The Claimant referred to the case of *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268 in which the EAT held that subjecting a whistleblower to a detriment is a form of discrimination and that it was appropriate to apply the *Vento* guidelines in determining an appropriate award. The court stated that it was important that as far as possible, there is consistency in awards throughout all areas of discrimination and it could see no reason why a whistleblower should be treated differently. Detriment suffered by whistleblowers

should be regarded by tribunals as a very serious breach of discrimination legislation. The EAT also confirmed in this case that awards of aggravated damages are also appropriate in a public interest disclosure case.

Injury to Feelings

16 The Court of Appeal has given guidance on the assessment of compensation for injury to feelings. In the case of *Vento v Chief Constable of West Yorkshire police (No.2) [2002] EWCA Civ 1871* the Court set bands within which they held that most Tribunals should be able to place their awards. Those bands have been amended through subsequent case law and more recently, they have been the subject of Presidential Guidance, after the consideration of the President of the Employment Tribunals The 2017 Guidance was uprated in March 2018 so that awards for injury to feelings in exceptional cases can be over £42,900. In cases of the most serious kind, the injury to feelings award would normally lie between £25,700 – £42,900. In the middle band, in less serious cases the award would be between £8,600 - £25,270; while for less serious cases such as for one-off acts of discrimination or otherwise, the award would be between £900 -£8,600.

17 Awards for injury to feelings are purely compensatory and should not be used as a means of punishing or deterring employers from particular courses of conduct. On the other hand, as stated in *Harvey*, discriminators must take their victims as they find them; once liability is established, compensation should not be reduced because (for example) the victim was particularly sensitive. The issue is whether the discriminatory conduct caused the injury, not whether the injury was necessarily a foreseeable result of that conduct. (*Essa v Laing* [2004] IRLR 313).

18 In making an award for injury to feelings a Tribunal needs to be aware of the leading cases. Much will depend on the particular facts of the case and whether what occurred formed part of a campaign or harassment over a long period, what actual loss is attributable to the discrimination suffered, the position and seniority of the actual perpetrators of the discrimination and the severity of the act/s that have been found to have occurred as well as the evidence of the hurt that was caused.

19 The Claimant referred to the following three Employment Tribunal cases which he considered comparable as to the level of injury to feelings; which he believed supported his submission that this was an Upper Vento Band case.

a. *Browne v Central Manchester University NHS Foundation Trust* (Manchester) (Case Nos 2407264/07, 2405865/08, 2408501/08) (8 December 2011, unreported) was a case in which the claimant who was quite senior, suffered race discrimination over two months until the termination of his employment. The relevant facts as far as our case was concerned were that some of the discriminatory acts were done by the deputy chief executive, that the treatment brought him close to mental breakdown and led to him having suicidal thoughts and that his personal and family life was affected. He was awarded £20,000 for injury to feelings and a sum for aggravated damages.

b. *Scanlon v Redcar and Cleveland Borough Council* (Newcastle upon Tyne) (Case No 2510997/04) (16 November 2009, unreported) in which the claimant who was also in a senior position, was victimised by the chief

executive by a series of acts or omissions in a disciplinary process which was started because she pointed out that the respondent had made an appointment in breach of its equality obligations. The events took place over a prolonged period of time and affected her health and caused her distress. The most serious impact was the loss of her career. She was awarded just over £20,000 for injury to feelings and a separate sum for aggravated damages.

c. *Timurlenkoglu v Royal Mail Group Ltd (Reading)* (Case No 2702182/2010) (24 September 2012, unreported) in which the claimant, a disabled person, suffered disability discrimination which lasted two years. The case report notes that the appalling manner in which the claimant was treated by the respondent, bearing in mind its size and resources, was nothing short of shameful. He was awarded £17,600 for injury to feelings and a separate sum for aggravated damages.

Aggravated Damages

20 In respect of aggravated damages, the Tribunal was aware of the case of *Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162. In order to award aggravated damages, the necessary aggravation can come from the way the case has been handled, the way it has been defended or even from oppressive conduct post-termination.

21 In the case of *HM Land Registry v McGlue* UKEAT/9435/11/RN the EAT upheld the Tribunal's decision on the injury to feelings award but did not uphold the award of aggravated damages. The court discussed the circumstances in which an award for aggravated damages can be made. One such circumstance is the manner in which the wrong was committed. The distress caused by an act of discrimination may be made worse (a) by being done in an exceptionally upsetting way i.e. in a high-handed, malicious, insulting or oppressive way; (b) by motive: i.e. conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress as long as the claimant is aware of the motive; lastly (c) by subsequent conduct: for example where a case is conducted in an unnecessarily offensive manner or a serious complaint is not taken seriously or there has been a failure to apologise where that is an issue.

22 Other cases refer to aggravated damages being appropriate where there was evidence in the hearing that an employer has treated/rewarded the perpetrator of discrimination, for example promoting him before knowing the result of an inquiry into his conduct. In *HM Prison Service v Salmon* [2001] IRLR 425 aggravated damages were awarded and the EAT held that this was appropriate in circumstances where the employer had treated a complaint about harassment in a trivial way.

23 In *Scanlon* above, aggravated damages were awarded where it was held that the conduct of the respondent throughout the proceedings had been high handed and oppressive. The chief executive took over the disciplinary process to ensure the Claimant's dismissal and a councillor had made serious allegations about her that he knew were untrue in the council chamber, in a public forum. The proceedings were also conducted in the same way. Those particular facts warranted an award of £20,000 in aggravated damages.

24 In *Browne* above, the Claimant was awarded aggravated damages of £5,000 because: the respondent made no apology, it did not take the claimant's grievances seriously and he was visibly upset in the hearing when he was accused of making spurious and opportunistic complaints.

25 In the case of *Timurlenkoglu* referred to above, the claimant was awarded £2,000 because notwithstanding the tribunal's judgment some eleven months previously, the respondent had still not effectively dealt with the claimant. He was still in the same position and his difficulties had not improved.

26 A Tribunal has the power to award interest on awards made in discrimination cases both in respect of pecuniary and non-pecuniary losses. We refer to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. We can consider it whether or not a party has asked us to do so. The interest is calculated as simple interest which accrues daily. For past pecuniary losses interest is awarded from the half-way point between the date of the discriminatory act and the date of calculation. For non-pecuniary losses interest is calculated across the entire period from the act complained of to the date of calculation. The Tribunal retains discretion to make no award of interest if it deems that a serious injustice would be caused if it were to be awarded but in such a case it would need to set out its reasons for not doing so.

Psychiatric injury

27 In the case of *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481 the Court of Appeal held that if a victim of unlawful discrimination suffered stress and anxiety to the extent that psychiatric and/or physical injury can be attributed to that unlawful act then the Employment Tribunal has jurisdiction to award compensation, as long as the requirements of causation are satisfied. In that case, the court's view was that in such a situation it would be wise for the complainant to obtain a medical report to show the extent of his injuries.

Section 49(2)(a) of the Employment Rights Act 1996 states that in awarding compensation to a worker who has been subjected to a detriment, the tribunal should have regard to the infringement to which the complaint relates. In the case of Virgo Fidelis referred to above, the EAT stated that:

> "*to compensate simply for the offence rather than the resulting injury or psychiatric damage would offend against the general principle that the aim is to compensate not to punish. The reference in section 49(2)(a) to the 'infringement' to which the complaint relates is no more than a reminder to tribunals to have some regard to the nature of the complaint when assessing the resultant loss, in that the more serious the offence, the more likely it is that feelings have been injured.*"

28 The Respondent submitted that if the Tribunal was going to compensate the Claimant under this head, it should be careful to divide the injuries arising from the other stresses the Claimant had in his life at the time, from any effects of the detriments outlined in the liability judgment. The Claimant referred to the case of *Hampshire CC v Wyatt* UKEAT/0013/16 in which the court stated that where the evidence shows that the psychiatric injury had one or more separate material causes in addition to the respondent's unlawful act or breach of duty, then, provided the resultant harm suffered by

the Claimant is truly divisible, a Tribunal assessing compensation will have to conduct an analysis to estimate and award compensation for that part of the harm only for which the respondent is responsible. In a case where the harm or injury is truly divisible, the objective is to identify the harm for which the respondent is responsible and award compensation for that and not to award compensation for any harm that would have occurred in any event as a result of some separate material cause. Where a Respondent's act was the proximate cause of the injury, it is likely that it will be required to compensate for the whole of that injury.

29 How does the Tribunal decide whether the harm suffered is divisible or indivisible? This is a question of fact. It is more likely that an injury will be held to be indivisible if the competing causes are closely related to the injury and it is difficult to separate out their consequences. Each case will depend on the evidence but the EAT noted that there may be real difficulties for a Tribunal trying to disentangle these issues in order to assess the extent to which a respondent should be held liable for compensation – especially in cases involving psychiatric injury. In such cases, the EAT advised that any medical evidence produced will need to be considered, along with any other evidence and that Tribunals should take particular care.

Simmonds v Castle uplift

30 The Claimant submitted that any award of compensation for injury to feelings and for psychiatric injury should also include an uplift. The Respondent opposed this.

31 Since 2013 awards of general damages in civil cases have been subject to an 10% uplift following the decision in the case of *Simmons v Castle* [2012] EWCA Civ 1093. This has been the subject of differing decisions at the EAT. The definitive judgment was made by the Court of Appeal in the case of De Souza v Vinci Construction UK Ltd [2017] IRLR 844 in which the Court found that the 10% uplift should apply in employment tribunal awards in respect of non-pecuniary losses.

32 It stated that:

> *"The language of s.124(6) means that the amount awarded by the employment tribunal for a particular head of loss should be the same as if an award in respect of the identical loss had fallen to be made in the county court. That was the natural meaning of the requirement that the two amounts should correspond. Injury to feelings or psychiatric injury caused by an act of discrimination in the workplace (and complained of in the employment tribunal) is not inherently different from the same injury caused by an act of discrimination in a different context and pursued under a different part of the 2010 Act in the county court. It would be unacceptable for the approach to compensation to be different depending on under which part of the Act it arises, or for an injury of the same level of seriousness to attract a different award. The clear purpose of s.124(6) is to ensure that does not happen. Although it could be regarded as anomalous that employment tribunal claimants should get the benefit of an uplift designed to compensate for a reduction in net recovery which they have not suffered, that does not justify qualifying the plain words of the statute, which straightforwardly require that the level of awards in the employment tribunal and the county court should correspond, or ignoring the important policy considerations that underlie that requirement. There is no distinction to be drawn for these purposes between awards for psychiatric injury*

and for injury to feelings. Both are subject to the Simmons v Castle uplift in the county court."

Financial penalty

33 Section 12A of the Employment Tribunals Act 1996 relates to this. This would not be a payment to the Claimant but to the Secretary of State. The Claimant asked that the Tribunal impose a financial penalty on the Respondent in the sum of £5000.

34 Section 12A states that where an employment tribunal determining a claim involving an employer and a worker—

(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

(2) The tribunal shall have regard to an employer's ability to pay—

(a) in deciding whether to order the employer to pay a penalty under this section;

Harvey states that the factors that may be taken into account by a tribunal when determining whether there are aggravating features justifying the imposition of a penalty will depend on the individual circumstances of the case. This could include the size of the employer, the duration of the breach of the employment right, and the behaviour of the employer and employee. They further suggested that a tribunal may be more likely to find aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team or where the employer had repeatedly breached the employment right concerned. Factors that might point the tribunal away from ordering a penalty are where an employer had been in operation for only a short time, is a micro business has only a limited HR function or the breach was a genuine mistake.

Grossing up

35 The parties agreed that they would write to the Tribunal to make submissions on grossing up once they had the headlines of the remedy award. The Tribunal could then decide on the grossing-up on the papers, without the parties incurring the costs of another court attendance.

Evidence at the Remedy Hearing

36 The Tribunal had live evidence from the Claimant. He also produced a signed witness statement. On 18 November 2019, the Claimant served an updated schedule of loss on the Respondent. On 5 December, he sought to serve his witness statement for this hearing on the Respondent but waited for clarification as to whether it was going to serve one. The Respondent failed to confirm its position and in the end, the Claimant

served his witness statement on 12 December. The Respondent did not serve any witness statements for the remedy hearing. Both parties made written and oral submissions today.

37 The Respondent accepted the claim for a Basic Award. It also accepted the claim for loss of earnings as part of the Compensatory Award but queried whether the Claimant should be compensated for the lack of the contractual benefits claimed.

38 The details of the Claimant's pay were as follows:

Net weekly basic pay (calculated on the basis that he was paid a basic salary of £60,000)	£819
Gross weekly basic pay	£1,154
Contractual notice period	1 month
Claimant's date of birth	27 August 1980
Period of service	12 June 2014 – 5 September 2017
Complete years of continuous service	3 years
Age at effective date of termination (EDT)	37 years

Decision

Unfair Dismissal

39 The Claimant is entitled to a Basic Award of £1, 467 and an award of £300 for loss of statutory rights.

40 The Claimant resigned with immediate effect on 5 September 2017. On 29 September he was informed that the Respondent was not going to pay his outstanding holiday pay. This caused him some distress as he had been in receipt of Statutory Sick Pay in the period leading up to his resignation. The Respondent's decision and its failure to pay his holiday pay added to the financial difficulties that the Claimant and his family faced at the time. The Claimant had to contact the Respondent to chase up his holiday pay. That also added to his stress and anxiety.

41 The Claimant was unwell at the time of his resignation and was on antidepressant medication. He was receiving treatment for his mental health issues. This included attendance at therapy sessions through the NHS Veteran's Mental Health Service.

42 The Respondent did not lead any evidence on jobs the Claimant should have got or comparable jobs in the sector that were available or accessible to him. We accept the Claimant's evidence that he submitted over 90 job applications for new jobs.

43 He also contacted friends in recruitment for introductions and 'cold' called CEOs of companies he wanted to join that he had found on websites such as LinkedIn. He had several meetings and 'scoping' interviews as a result of those calls but nothing materialised for a few months. A scoping interview was where no job had been advertised but the Claimant initiated a meeting to see if the company was interested in taking him on. He was therefore proactive in seeking work. He had scoping interviews with over 15

companies. However, as he continued to be unwell, this affected his ability to put forward the most positive version of himself at interview.

44 The interviews he attended at the end of 2017 were difficult for the Claimant. His ill-health and the effects of the treatment he received from the Respondent which lead up to his resignation (which were outlined in the judgment), affected his self-confidence and feelings of self-worth which were at an all-time low. The Claimant was suffering from depression and stress. In his second witness statement he describes how his medication was increased at the end of August and he began a course in alternative psychotherapy to try and alleviate his mental state. The Claimant's relationships with his wife, family and friends were reaching breaking point around this time. He therefore found it difficult to project a positive, confident approach at interview and was unsuccessful at securing new employment.

45 This continued until the beginning of 2018 when he was able to put some distance between him and the way he had been treated at the Respondent. By then he had revamped his CV and was able to put his experience with the Respondent into perspective. The time that had passed and the difference in his CV and improvements in his mental health produced positive results. The Claimant was invited to three final interviews. We had evidence in the bundle relating to all three interviews. One company decided that the Claimant did not have the requisite experience that it needed. The second company changed its mind about filling the vacancy and the third took some time to get back to the Claimant. In the interim, the Claimant continued to look for a suitable role.

46 After 6 weeks of interviewing with a company, the Claimant was appointed to a role at a similar level to the one he occupied at the Respondent. The Claimant is paid at a higher salary and is in receipt of a car allowance, season ticket, medical insurance and employer pension contributions at his new job.

47 The Claimant has therefore found alternative employment. He began his new employment on 16 April 2018.

48 He was paid £60,000pa at the Respondent and is now paid £72,500 at his new job. There is therefore no claim for ongoing loss of earnings after 16 April 2018.

49 The Claimant lost 32 weeks salary between the end of his employment with the Respondent and the start of his new job. The Claimant was also entitled to additional benefits as part of his remuneration from the Respondent. Those are the use of a company car, car insurance, road fund, family dental insurance and pension contributions of 1%.

50 The Tribunal rejected the Respondent's submission that as the Claimant had not been using the company car at the time of his dismissal, he should not be fully compensated for it. The Respondent's treatment of the Claimant as outlined in the liability judgment contributed to his ill health and his absence from work. The Respondent cannot benefit from its own wrongdoing by retaining the car allowance.

51 It is therefore our judgment that the Claimant has mitigated his loss. Also, that he has lost 32 weeks wages plus benefits for that period.

52 It is this Tribunal's judgment that as part of his compensatory award, the Claimant should be awarded loss of wages for 32 weeks plus the benefits for that period.

Should the Tribunal award an ACAS uplift?

53 The ACAS Code of Practice and the ACAS Guide to Discipline and Grievances at work state that employers should raise and deal with issues promptly and should not unreasonably delay matters. Employers should carry out any necessary investigations, to establish the facts of a case and employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

54 In this case the Respondent failed to investigate properly or promptly, the disciplinary matters levelled against the Claimant. Paragraphs 348 and 350 of the liability judgment refers. The Respondent had not investigated the disciplinary allegations before he went off sick nor the fraud allegations which were first raised in May.

55 As stated in paragraphs 254 of the judgment, even if the Respondent genuinely believed from around May that the Claimant had committed fraud, the allegation was never put to him, he was not sent details with the invitation letter of 10 August, there was no form of analysis of the documents that were finally sent to him on 30 August to show how the Respondent concluded that they were evidence of fraud as opposed to any other explanation. Not only is it part of the duty of trust and confidence between employer and employee that the employer will conduct reasonable investigations before making serious allegations against an employee; it is also part of the ACAS Code of Guidance.

56 The Respondent failed to inform him of the details of the fraud allegations even when it was advised by its Occupational Health advisor that failing to do so was having a detrimental effect on the Claimant's health.

57 The Claimant's inability to attend an investigation meeting led the Respondent to decide that it was appropriate to go straight to a disciplinary meeting. The Claimant was given short notice of the disciplinary hearing, which gave him insufficient time to prepare, especially as he was doing so with limited documents and without access to his records on the Respondent's systems.

58 The Respondent's letter of 4 September to the Claimant contained a final warning because the Claimant had failed to attend a disciplinary meeting on 1 September when the Claimant had given notice beforehand that he would not be able to attend due to being on pre-arranged leave and because it was extremely short notice.

59 All of these matters are components of the Respondent's failure to comply with the ACAS Code of Practice.

60 It was our judgment that the Claimant had not failed to comply with the Code. That was stated in paragraph 349 of the liability judgment.

Was the Respondent's failure to comply with the Code unreasonable as required by section 207A(2)(c)?

61 The Respondent did not give a reason in the liability hearing for its failure to comply with the Code. The Respondent referred in the remedy hearing to the fact that it did hold some disciplinary meetings and that it had given the Claimant the opportunity to appeal against the warning, as examples of it complying with the ACAS Code.

62 Compliance with the Code needs to be in relation to all aspects of disciplinary and grievance matters and should not be piecemeal.

63 The Respondent is correct in that this was not a case in which there has been total failure to comply with the Code. However, its failures were in relation to significant matters such as a wholesale failure to investigate serious allegations of fraud or tell the Claimant about them when asked. The Respondent failed to investigate the fraud allegations promptly or at all. When the Claimant was on pre-arranged holiday and he gave notice that he would not be able to attend an investigation meeting, the Respondent's response was to change the meeting to a disciplinary meeting and issue him with a warning for his failure to attend.

64 Taking all of that into consideration together with the conclusions in the liability judgment, it is this Tribunal's judgment that Section 207A TUL(C)RA is engaged and that these proceedings related to a matter to which the Code of Practice applies, namely disciplinary proceedings against the Claimant and the Respondent's failure to comply with the Code in relation to those disciplinary proceedings in the way outlined above and in the liability judgment and reasons. The Respondent's failure was unreasonable. It is therefore just and equitable in all the circumstances that the uplift should be applied to the Claimant's award for unfair dismissal.

65 It is this Tribunal's judgment that the Claimant's award should be increased by 25%.

The breach of contract claim

66 This relates to the Claimant's entitlement to paternity pay for two weeks beginning on the date of the Claimant's child's birth – 20 June – 4 July 2017. The claim was also for full pay for the period 5 July to the date of the Claimant's resignation (4 September), for which he has already been paid SSP but during which he was fit to return to work on a phased return basis and the Respondent refused to allow him to do so.

67 It is our judgment that the Claimant was entitled to be paid 2 weeks paternity pay. It is also our judgment that he should have been paid full pay for the period 5 July to 4 September.

The whistleblowing claims

68 In the Tribunal's judgment, the Claimant was subjected to 5 detriments for having made protected disclosures. In respect of the detriment claims the Claimant submitted that he was entitled to:

An award for injury to feelings
An award for aggravated damages
An ACAS uplift pursuant to section 207A as referred to above.

Good Faith

69 We considered the Respondent's submissions that the Claimant had not made his disclosures in good faith. The basis of the submission was that around the same time he was in discussions with the Respondent to settle his then, potential employment claims against it, he also made his disclosures. In our judgment, these were two separate matters. The Claimant did not threaten the Respondent that he would make the disclosures unless they agreed a settlement. He did not link them together. There was no evidence that he thought of those things are interlinked.

70 The Respondent made no submissions and led no evidence on the issue of good faith at the liability hearing. It was raised for the first time at the remedy hearing. At the liability hearing, the parts of the Claimant's witness statement that referred to the settlement discussions were appropriately redacted and we did not hear evidence on it. As we agreed to the redactions, we were implicitly aware that there had been discussions between the parties as there would usually be in most cases.

71 At the end of the liability hearing we made findings which led us to conclude that, in the circumstances where he had mental health issues, was only in receipt of Statutory Sick Pay at the time he resigned and was therefore experiencing financial difficulties; and expecting a baby, the Claimant did not act in bad faith when he entered into discussions with the Respondent to try to resolve their differences rather than come to an Employment Tribunal.

72 He was unwell and it is likely that he could not face going through any further disciplinary proceedings with the Respondent. He told the HRFace2Face representative for the Respondent that part of his stress related condition was caused by the breakdown of his relationship with Mr Hulme. It is likely that the Claimant considered that if it was possible to reach a settlement of any potential claims that he did have, that would save him further stress and anxiety in having to go through proceedings and that such a settlement would also be desirable for the Respondent.

73 Around the same time, it is our judgment that the Claimant raised his disclosures with the investors with the genuine hope that they would investigate what he believed had been going on in the business. He raised the disclosures with the investors while the settlement discussions were going on with Mr Hulme. The Claimant had a real concern that there was wrongdoing going on in the business and it is likely that he believed that the investors would investigate it and address it. he did not make the disclosures to assist the settlement discussions.

74 Paragraph 267 of the judgment refers. Taking all the circumstances into consideration, it is this Tribunal's judgment that the Claimant had genuine concerns that Mr Hulme had not been acting in compliance with his fiduciary duties to the company and that was the predominant motivation for raising these public disclosures. We did not have evidence of an ulterior motive. We confirm that judgment.

75 It is this Tribunal's judgment that the Claimant acted in good faith when he made the protected public interest disclosures.

Injury to feelings

76 We accept the Claimant's submissions that he is entitled to an injury to feelings award for his successful complaint that he was subjected to detriment because he made protected disclosures.

77 The award of injury to feelings is in respect of the detriments the Claimant suffered as opposed to the dismissal.

78 The Claimant suffered 6 detriments. Five of those were done on the ground that the Claimant made protected public interest disclosures. Those detriments were as follows:

a. The Claimant's suspension on 10 August 2017

b. The Respondent making the allegations set out in Mr Hulme's letter of 10 August

c. Mr Hulme's assertion in an email of 17 August that non-attendance at an investigatory meeting would mean proceeding directly to a disciplinary hearing and would amount to a further disciplinary matter, despite the fact that the Claimant was on sick leave.

d. Mr Hulme's allegation included in his letter of 4 September 2017 that the Claimant's pre-booked holiday had not been authorised; and

e. Mr Hulme's decision to withhold the Claimant's holiday pay.

79 These were not one isolated breach. Going through them: - the Claimant's suspension, notified to him by letter dated 10 August was for obtaining and holding electronic signatures and making changes to rights of shares, without prior agreement/knowledge of the other directors. The Respondent referred to the second allegation as fraud, which is a serious criminal offence. In our judgment, putting aside whether there was any substance to them or whether the Respondent really believed that he had committed fraud, it was clear that the Respondent had known about these matters for months and only decided to proceed with them once the Claimant made disclosures.

80 The third detriment was a threat contained in a letter dated 17 August to the Claimant. At the time, the Claimant was off sick with a stress condition which had been confirmed by medical certificates and the Respondent's occupational health advisor. The Claimant had previously been given the opportunity to provide written submissions but that was taken away in this letter.

81 The last two detriments related to the Claimant's pre-booked holiday which Mr Hulme disputed and withheld the holiday pay. Although these were not as serious as the disciplinary allegations, they had a detrimental effect on the Claimant both financially and were further allegations of dishonesty.

82 The effect of these detriments on the Claimant was devastating. He was already suffering from stress and had been unable to work. He made those protected disclosures in the genuine belief that Mr Hulme was engaged in financial wrongdoing in the company. In response the Respondent did not investigate his concerns or do anything to address them but instead, the Respondent subjected him to these detriments.

83 The Claimant's feelings were hurt by these detriments. He was hurt that Mr Hulme could accuse him of fraud when he worked hard, treated his obligations at work with the utmost diligence and took them seriously. The Claimant was very upset about this.

84 There was no dispute by the Respondent in the remedy hearing that the Claimant was entitled to an award for injury to feelings given the particulars of the judgment we reached. The Claimant was affected and his feelings were hurt by the way the Respondent treated him.

85 This was especially so when the Claimant knew that he had not done as alleged and had to live with the accusation for some time. The Claimant believed that the Respondent knew that he had not done as alleged but was continuing to pursue those serious allegations against him.

86 In this Tribunal's judgment, the Claimant was very distressed by the detriments he suffered as a result of raising the protected disclosures. He did not expect to be treated in the way that he was. He was expecting the investors to investigate his concerns and come back to him. Instead, he was treated in the way set out above which hurt his feelings, upset him and exacerbated his mental health issues (which we return to below). His personal and family life was affected. He was in shock at the way Mr Hulme treated him when he had been under the impression that they had a good working relationship before this.

87 This went on for a short period of time – between August – September 2017.

88 In this Tribunal's judgment, the Claimant's award for injury to feelings should be towards the top of the middle band.

Aggravated Damages

89 The Tribunal agreed with the Claimant that this was a case in which an award of aggravated damages was appropriate.

90 We are aware that aggravated damages are an aspect of injury to feelings and are meant to be compensatory rather than punitive of the Respondent.

91 It is our judgment that the Respondent knew well before August 2017 that the Claimant had the signatures of the investors on file. The evidence was it had been referred to in communication between them, before the Claimant went off sick. Mr Hulme told the Claimant to '*use his IT skills'* to put their signatures on a special resolution and it was our judgment that this was a euphemism for using the photo-shopped signatures that he and the Claimant kept on file. It was particularly oppressive of him to then use the

possession of those signatures as a ruse to instigate disciplinary proceedings against the Claimant in retaliation for the Claimant making his disclosure.

92 Similarly, whether or not he knew for certain that the Claimant had not committed fraud, Mr Hulme had certainly been aware of the documents that he later relied on as evidence of fraud, as early as May 2017. He deliberately withheld details of the allegations from the Claimant until August, despite being told by Occupational Health that it was likely to be detrimental to his mental health to do so and despite being asked repeatedly for those details by the Claimant and his solicitor.

93 The Claimant is awarded an additional sum for the particularly spiteful way that the Respondent dealt with these matters. The decision to withhold the Claimant's holiday pay was oppressive where the Respondent was aware of his financial situation. The Claimant was in receipt of SSP and the Respondent knew that the Claimant was expecting a baby and that his wife had been made redundant a few months earlier. Money was tight for the Claimant and his family. Mr Hulme was also aware that the Claimant had booked the leave. The Respondent's decision not to pay him for the leave and to accuse him of taking unauthorised leave was intended to wound the Claimant and was vindictive as well as being to his detriment.

94 There were also acts done by the Respondent after the Claimant's dismissal which we heard evidence about at the liability hearing and at the remedy hearing. In May 2018 the Respondent erroneously reported to HMRC that the Claimant earned £10,000 more in wages than he had, which took him over the tax relief threshold and required him to have to pay additional tax. The Claimant spent the next 9 months chasing the Respondent through emails so that it could send the correct figures to HMRC. This caused the Claimant additional expense, stress and anxiety while he was settling down in his new job which he started in April 2018.

95 There was a total lack of remorse and no apology for the distress that these matters caused to the Claimant and his family.

96 The Tribunal is aware of the danger of double counting. This was discussed at the remedy hearing. The Tribunal awards the Claimant the sum of £24,000 as his total injury to feelings. This incorporates the sum of £4,000 for aggravated damages. This reflects the following facts: that these detriments were done by the Respondent's CEO who was responsible for maintaining standards in the company, had been done in a particularly high handed, malicious and vindictive manner and because, despite quite strong findings in the liability judgment, there was no apology or recognition at the remedy hearing, by the Respondent of how its actions had affected the Claimant.

97 There was no indication by the Respondent at the remedy hearing that it had reflected on the issues referred to in the judgment or that it acknowledges the way in which its treatment has affected the Claimant.

98 The Claimant is awarded the total sum of £24,000 for injury to feelings, incorporating aggravated damages in the sum of £4,000.

Personal Injury

99 This was a case in which the Claimant's mental health was affected by the way he was treated by his employer. The Claimant also had personal and other pressures on him which also affected his mental health between 2017 – 2019.

100 Stress from work appeared early in the notes – from 7 March 2017 when the Claimant was given a medical certificate at the start of what was supposed to be annual leave. The note was of stress at work and stress at home. The letter from the practice confirmed that the Claimant experienced symptoms of depressions, including low mood, insomnia, nightmares, loss of appetite, and generalised anxiety from early 2017. The only other pressures the Claimant was under at the time was because he was wife was experiencing pregnancy-related illness and had recently been made redundant.

101 At the end of March, he was prescribed Propranolol to address moderate anxiety but that had limited success. The situation with work worsened even though the Claimant had been at home since the beginning of March because of the effect of the communications the Claimant received from the Respondent while at home. Mr Hulme denied that the Claimant had booked off his leave, which we judge that he had. The Claimant was trying to appeal against the decision to give him a warning. In his grievance letter to the Respondent dated 10 March the Claimant stated that he was having sleepless nights, that he was worried for his job and that he felt that he was being treated inconsistently by the Respondent. These matters all served to worsen his stress and anxiety.

102 This means that even before he made his protected disclosures the Claimant was already suffering from stress and anxiety related to work, such that he was unable to work from March 2017 onwards.

103 The Claimant's symptoms of anxiety and depression worsened and began to affect his personal relationships. The GP notes records the Claimant's attendance at the IAPT Counselling sessions.

104 The GP notes record that he was at a very low point, partly because of ongoing issues at work and personal matters such as having to attend to a new baby as well as a two-year-old child at home. The letter from the practice notes that around the summer of 2017, the ongoing situation at work precipitated a crescendo in his symptoms so that he was prepared to accept anti-depressants, which were prescribed for him.

105 We had evidence from the Claimant about how the detriments affected his mental health. In his witness statement for the remedy hearing the Claimant set out the effects that these detriments had on his mental health and wellbeing. His evidence was that the suspension was unbelievable because he knew that the allegations were entirely baseless and worse yet, he knew that Mr Hulme knew it too. This initiated a mental breakdown and a worsening of his depression and anxiety. He became incapacitated by the stress, had difficulty sleeping and was in shock at the level of what he described as Mr Hulme's vindictiveness.

106 Although he had previously been experiencing stress and mental health strain, his evidence was that these detriments had a further significantly detrimental effect on his mental health.

107 It is clear to the Tribunal that the Claimant suffered psychiatric injury from the detriments done to him by the Respondent following his public interest disclosures. The Respondent's decision to bring disciplinary proceedings against him in August 2017 based on fraud charges that were first highlighted in May caused him distress and is likely to have been responsible for the 'low point' referred to in his medical notes which led to him being prescribed with antidepressants and which he described as a further mental breakdown.

108 It was our judgment, recorded at paragraph 252 that the way in which those allegations were dealt with was unfair, unreasonable and knowingly detrimental to the Claimant's health. We said that because the OH advisor had informed the Respondent that it would greatly assist the Claimant's return to good health if he was informed of what the fraud allegations were about, but the Respondent failed to follow that advice, to the Claimant's detriment.

109 The Respondent was aware that the Claimant was off sick and that was why he would not be able to attend the investigation meeting on 23 August. Despite this, in response, Mr Hulme threatened the Claimant in the email of 17 August that if he did not attend the investigatory meeting, the Respondent would proceed directly to a disciplinary hearing and his failure to attend would amount to a further disciplinary matter. This had a devastating effect on the Claimant's mental health and wellbeing. As did the letter of 4 September notifying the Claimant that the leave he took on 1 September had not been authorised and the refusal to pay him for that leave.

110 Following receipt of the letter of 4 September 2017, his stress levels became overwhelming and his relationships with his wife, family and friends reaching breaking point. His medication was increased and he started alternative psychotherapy to try to alleviate his mental state. He also tried the NHS stress management course, which did not help that much at the time.

111 The situation did not improve and the Claimant was diagnosed as suffering from mild-moderate anxiety and depression in April 2018. He also had mild-moderate PTSD. Mr Roberts reported that the Claimant worked hard in those sessions and made significant progress. He was discharged in September 2018 as no longer meeting the criteria for it.

112 Those all contributed to the Claimant's deteriorating state of mental health from August 2017, which continued to him being diagnosed with mild-moderate PTSD the following year in April 2018. He was referred to Martin Roberts for CBT counselling which began in April 2018. It was not until September 2018 that his symptoms began to ease, which is when those sessions ended. Although he was discharged from Mr Robert's therapy sessions as his condition was no longer severe enough to meet his criteria, he was still not well.

113 We had a report from Martin Roberts who is an independent Cognitive Behavioural Psychotherapist in the remedy hearing bundle.

114 Unfortunately, even after he started his new job in April 2018 the Claimant continued to experience detrimental treatment from the Respondent which had an adverse effect on his mental health.

115 In August 2018, and well after the Claimant's resignation, the Respondent made a report of criminal activity to the Police which was serious enough for the Police to raid the Claimant's home and seize laptops owned by him and his wife. We referred to this at paragraphs 196 and 197 of the liability judgment. The Respondent submitted at the remedy hearing that it did not have control over the Police. However, the Police are guided in their reactions by the seriousness of the report made to them. The facts were that the Claimant resigned on 3 September 2017, having made protected disclosures on 3 August 2017. The Respondent had been aware of the fraud allegations from May 2017. What happened in August 2018, so many months later, to lead it to consider that it was appropriate and urgent to report possible crime to the Police? The Claimant believed and it is likely that this was related to the liability hearing which began a month later in September 2018 rather than the allegations themselves which have still not been investigated, as far as we were told. It is likely that the report to the Police was simply done to cause the Claimant aggravation and distress.

116 The Police raid caused the Claimant and his family distress, anxiety and embarrassment. The Claimant had to take time off from his new job to recover. When Mr Hulme was cross-examined about the Police raid in the liability hearing the Claimant was upset to see Mr Hulme treating it lightly and smiling about it.

117 Unfortunately, the stress of the Police raid and the liability hearing in September/October 2018 put significant stress on the Claimant and his marital relationship came under additional strain. The Claimant and his wife attended 13 sessions with Relate, the relationship counselling support service, between July and November 2018. They separated in February 2019. They got back together in June 2019 and at the time of the remedy hearing, were continuing the process of rebuilding their relationship.

118 It is also correct that the Claimant had other stressors in his personal life. There were financial difficulties caused by him being off work sick and on SSP just after his wife had been made redundant. She was also suffering from pregnancy-related illness. As stated above, they separated for a period of approximately 3 months. This occurred just after the Police raid. We would not underestimate the additional strain and stress that it must have caused the Claimant and his family to go through that experience when he knew he had not committed fraud.

119 The Respondent's report to the Police resulted in a detriment to the Claimant; it was one of the detriments listed in the claim as it occurred just before the start of the liability hearing. It was a detriment that the Claimant suffered as a result of making the protected disclosures and it was part of the liability judgment.

120 The Claimant submitted that his psychological injury falls within the category of moderate. The Respondent submitted that we should be aware of the overlap of the Claimant's personal issues or in other words, to do our best to divide the Respondent's liability from that of the other events in the Claimant's life.

121 It is this Tribunal's judgment that the impact of the detriments in this case are not easily identifiable or separable. It is our judgment that the detriments materially contributed to the psychological injuries the Claimant experienced and contributed to his existing condition. The detriments affected his marriage and other relationships in his personal life.

122 The Claimant had been working when his wife was made redundant and he worked through her pregnancy related illness. Although it was a worrying time, he was able to continue working at that time. Those were therefore not the reasons why the Claimant developed psychological injury to the extent he was unable to attend work and needed psychiatric counselling and antidepressants.

123 In conclusion, the medical evidence before us shows that the Claimant's mental health took a significant downturn in the summer of 2017, around the time of the detriments. It did not recover significantly until September 2018, although his evidence at the remedy hearing was that he was still not totally well.

124 In this Tribunal's judgment, the Claimant has proved on the balance of probabilities, that the detriments he suffered as a result of making protected disclosures, caused or materially contributed to the psychological injury he suffered from the summer of 2017. His psychological injury was not caused by his personal matters although they may have contributed.

125 It is our judgment that the Claimant has proved that the Respondent's detrimental treatment of him in August and September 2017 was a material cause of the psychological injury he suffered. As stated in *Wyatt*, the Respondent's actions were a proximate cause of the injury that started in the summer of 2017 when the Claimant was prescribed antidepressants and it is out judgment that the Respondent should be responsible for that injury.

126 The Tribunal awards the Claimant £6,000 as compensation for personal injury.

Interest

127 The Respondent disputed that the Claimant was entitled to interest on his awards for detriments suffered as a result of making protected public interest disclosures.

128 We considered the judgment in the case of *Virgo Fidelis* mentioned above and the statement that it is important that there should be consistency in awards throughout all areas of discrimination. There is no reason why detriment suffered by a whistle-blower should be treated differently.

129 It is therefore our judgment that interest should be added to the Claimant's awards, as it would in an award in successful discrimination claim.

Section 12A (1) Employment Tribunals Act Penalty

130 The Tribunal considered whether the impose a penalty on the Respondent in this case.

131 It is this Tribunal's judgment that the Respondent has breached the Claimant's worker's rights and that there were aggravating features, as outlined above.

132 We had no evidence at the remedy hearing of the Respondent's ability to pay any penalty ordered.

133 We considered the paragraph in *Harvey* referred to by the Claimant in submissions. This stated that the factors to be taken into account when deciding whether to award a penalty could be: - the size of the employer, the duration of the breach of the employment right and the behaviour of the employer and employer. Where the action was deliberate or committed with malice, the organisation had a dedicated HR team or where the employer had repeatedly breached the employment right concerned. On the other hand, it was less likely to be appropriate where the employer had only been in operation for a short time, is a micro business or has only a limited HR function or the breach was a genuine mistake.

134 We agree with the Claimant's submission that there were aggravating features in this case. Those have been addressed above and the Tribunal has already made an award of aggravating damages in respect of those features.

135 The Respondent agreed in the hearing that although it was small, it could not be described as a micro business. We were told that there were about 43 people employed within it. The Respondent did not have a dedicated HR person or team although it had engaged HRFace2Face to assist it with managing the Claimant and then did not follow its advice.

136 The Respondent dealt with the allegation of fraud in a way that was unfair, unreasonable and knowingly detrimental to the Claimant's health.

137 It is our judgment that the requirements of section 12A(1)(a) – (b) are met in this case.

138 However, the Tribunal declines to use its discretion to order the Respondent to pay a penalty in this case. The aggravating features have already been addressed above as have the detriments to which the Claimant was subjected.

139 It is this Tribunal's judgment not to use it discretion in this case to order a penalty.

Judgment

140 The Claimant is entitled to the following remedy:

For constructive unfair dismissal:

Basic Award:		£1,467.00
Compensatory Award:		
Loss of salary (32 weeks x £819)	£26,208	
Loss of other benefits: -		
Car (32 x £93.67) -	£2,997	
Car insurance (32 x £20.43)	£654	

Road fund (32 x £3.65)	£117
Family Dental insurance (32 x £16.43)	£526
Employer pension contributions of 1% from September 2017	£369
Total	£30,871.00
Plus: Loss of statutory rights	350.00
Total	£31,171.00

Section 207A ERA (ACAS) uplift of 25% (£31,171 x 25%) = £7,793

Total compensatory award = £31,171 + £7,793 £38,964

Total compensation for unfair dismissal = £40,431

For breach of contract:

Balance between contractual wage and SSP from 5 July 2017 – 5 September 2017	£6324.00
paternity leave pay claim	£1,459.00

total compensation for breach of contract: £7783.00

Whistleblowing claims:

Injury to feelings and Aggravated Damages	£24,000.00
Damages for Psychiatric injury	£6,000.00
	£30,000.00
Plus 10% (Simmons v Castle uplift)	£3,000.00
	£33,000.00
Less sums paid to the Claimant in June 2018	£1,153.85
Total of	£31,846.15

Interest applied in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

The applicable interest rate is 8%.

£31,846,15 x 8% = £2,547.69
£31,846.15 + £ 2547.69 = £34,393.84

Total compensation awarded to the Claimant is as follows:

£40,431 + £7,783 + £34.393.84 = £82,607.84.

The Respondent is ordered to pay the Claimant the sum of £82,607.84 as his total compensation for his successful complaints of constructive unfair dismissal, breach of contract/unlawful deduction of wages and detriments for making public interest disclosures.

As discussed in the hearing, if the parties are unable to reach an agreement on the grossing up issue such that the Claimant is left with the sum of £82, 607.84 after the application of tax then they must make written submissions to the Tribunal by 1 June 2020. The Tribunal will decide the issue.

If they are able to reach agreement then they should notify the Tribunal in writing, as soon as they have done so.

Employment Judge Jones
Date: 15 April 2020