EMPLOYMENT TRIBUNALS

Claimant: **Ms S Sineinikova**

Respondent: **ActivTrades Plc**

Heard at: **East London Hearing Centre**

On: **4 & 5 March, 20 April and 22 May 2020**

Before: **Employment Judge Ross**

Members: **Ms L Conwell-Tillotson**
Mr M Rowe

Representation

Claimant: In Person
Respondent: Ms. A. Mayhew, Counsel

REMEDY JUDGMENT

The judgment of the Tribunal is that:-

1. **The Respondent shall pay the Claimant £76,510.16 assessed as follows:**

   1.1. **Award for unfair dismissal:**

   1.1.1. **Basic award: £2,934**

   1.1.2. **Compensatory award: £5,421.05**

   1.1.3. **Statutory uplift on the compensatory award 25%: £1,355.26.**

   1.2. **Injury to feelings (including aggravated damages): £40,000**

   1.3. **Statutory uplift of 20%: £8,000**

   1.4. **General damages for personal injury: £7,500**

1.5. Statutory uplift of 20%: £1,500

1.6. Interest to 22 May 2020: £9,799.85

2. There is no recoupment sum.

3. The Respondent shall pay £5,000 to the Secretary of State for Business, Energy and Industrial Strategy under section 12A Employment Tribunals Act 1996.

REASONS

Introduction

1. The Reserved Judgment and Reasons on liability were promulgated on 10 September 2019.

2. On 5 September 2019, a case management order was made by the Tribunal on its own initiative, because the remedy hearing was listed for 23 September 2019.

3. In the event, the original remedy hearing was converted into a Preliminary Hearing and case management directions were given, including for the instruction of a single joint expert on the issue of stigma loss, with the issues for the expert to address being outlined. The remedy hearing was re-listed for a more realistic time estimate of 2 days.

4. In January 2020, an expert's report was obtained by the parties from Stuart Baxter. This report and his replies to questions posed by the parties are considered in more detail below.

5. The Claimant's application to call the joint expert to give oral evidence was refused, for reasons given at the time.

6. On 20 February 2020, the Claimant made an application for costs, which she supported by the production of invoices from solicitors who had advised her from time to time during the litigation.

7. The remedy hearing was heard in Tribunal on 4 and 5 March 2020, and the parties made submissions on costs at the end of this hearing. The Tribunal then met by telephone, in chambers, on 20 April 2020, in order to reach its conclusions. In the course of reading for that Chambers day, the Tribunal noted that it had not given its conclusions on whether the uplift under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 should apply to the basic award for unfair dismissal or the awards for the victimisation found proved under section 27 Equality Act 2010 ("EQA") and section 47B Employment Rights Act 1996 ("ERA"). The parties were invited by letter to make written submissions on those issues, if so advised. The Respondent sought an extension of time to respond, which was granted to 15 May 2020.

8. In addition, having re-read the letter to the parties, the Tribunal noted that the letter did not refer to submissions being required in respect of whether the uplift should be applied to the basic award. This omission was rectified in subsequent letter granting the extension of time sought.

9. Written submissions were provided by the Respondent on 15 May 2020. The Claimant provided no further submissions. The Respondent's submissions were sent to the members of the Tribunal.

10. The Tribunal then met by telephone, in chambers, on 22 May 2020, in order to address the outstanding issues relating to the statutory uplift, to consider the matters raised in the parties' submissions (including the Respondent's further written submission) and to reach its conclusions.

Reconsideration of the liability judgment

11. The Respondent submitted (paragraphs 2-10 of its further written submissions) that the Tribunal was seeking to re-open its judgment on liability.

12. The Tribunal accepted that it was proposing to reconsider its Judgment on liability under rule 73 of the 2013 Rules of Procedure. However, although recognising the fundamental importance of the need for finality in litigation, the Tribunal did not agree with the Respondent's analysis. In its original deliberation of the question of whether a statutory uplift should be applied, the Tribunal omitted to provide conclusions on whether the award made for victimisation and public interest detriment should be uplifted for failure to comply with the Code in respect of the Claimant's grievance of December 2015. We concluded that there was clear evidence that this was an accidental omission, because of at least the following:

> 12.1. The fact that the Tribunal had concluded (at paragraph 457 Liability Judgment) that there were multiple breaches of the Code.
>
> 12.2. The Claimant had alleged that there were breaches of both parts of the Code - that is, the parts applicable to disciplinary and grievance procedures – but conclusions on the statutory uplift were only given in respect of the breach of the part of the Code addressing disciplinary procedure.
>
> 12.3. The Claimant claimed the statutory uplift in respect of each head of award (ie. including the basic award and including compensation for the detriments found proved).

13. The Tribunal directed itself to the terms of Rule 73 and considered the judgment in <u>Qu v Landis & Gyr Limited</u> UKEAT/0016/19.

14. The Tribunal decided that it would be in the interests of justice to exercise its discretion to reconsider its Liability Judgment on the facts in this case, limited to the omission to consider whether to order any uplift to the awards made arising out of the successful complaints of detriment. We have concluded that it would not be a misuse of our power to reconsider the Judgment in this way.

15. We accepted that the discretion under rule 73 should not be exercised too readily; but, we asked ourselves whether the interests of justice could be served by not making good this omission. We found that justice required that the issues between the parties should be determined, and that adequate reasons are given in respect of those issues, so that the parties could know why they won or lost on particular points.

16. On the question of finality of justice, the Tribunal recognised that the discretionary power to hold a reconsideration is not open-ended; but we have exercised this power before giving our Judgment on remedy and without any real delay (given that the first chambers day after the remedy hearing was on 16 April 2020). In contrast, for example, in Qu, the Tribunal had originally made no uplift when giving its remedy Judgment, only to subsequently reconsider its judgment.

17. The Tribunal also considered that it was in the interests of justice for the reconsideration to proceed without a hearing. The Claimant had not filed any submissions or objections in response to the letter of 23 April 2020. Moreover:

17.1. any hearing would delay resolution of our decision on remedy; and

17.2. any such delay was unnecessary because the Claimant had submitted her claim for the statutory uplift at the remedy hearing and it featured in her revised Schedule of Loss;

17.3. the Claimant would not oppose reconsideration, given that our omission would, unless addressed, have the effect of preventing any further uplift to the amount of compensation awarded;

17.4. the Respondent agreed that the Tribunal could deal with any reconsideration without a further hearing.

18. However, the Tribunal concluded that it was not in the interests of justice to reconsider the failure to deal with the application for an uplift to the basic award. There are two reasons for this:

18.1. At paragraph 458 of the Judgment and Reasons on liability, the Tribunal noted that we stated that the "*appropriate uplift to the compensatory award for unfair dismissal was 25%*". The Tribunal had, therefore, considered what uplift to award in the context of unfair dismissal before this Judgment was promulgated, but failed to state our reasons for not providing an uplift to the basic award.

18.2. Section 124A(a) ERA provides that an uplift for unreasonable failure to comply with the Code may only be applied to the compensatory award. Therefore, the statutory uplift cannot, as a matter of law, apply to the basic award.

The issues

19. At the Preliminary Hearing on 23 September 2020, the Respondent agreed the following figures in the Claimant's revised Schedule of Loss:

19.1. Basic award: £2934;

19.2. Part of the Compensatory award for unfair dismissal, namely Loss of earnings (including pension contributions and 25% uplift) up to the date of the Claimant commencing new employment on 26 February 2019: £5,213.81 (£4,171.05 plus 25%).

20. By 5 March 2020, the parties had also agreed that the Respondent would pay a total of £750 in respect of the various expenses set out in section 5 of the revised Schedule of Loss.

21. The remaining issues (set out in more detail in the Case Management Summary prepared following the hearing on 23 September 2019) were as follows:

21.1. In respect of compensation for unfair dismissal, what award for loss of statutory rights should be made?

In respect of compensation for the victimisation proved under both section 27 EQA and section 47B ERA:

21.2. What award for injury to feelings should be made?

21.3. What if any award of aggravated damages should be made?

21.4. What if any stigma damages should be awarded?

21.5. What if any award for personal injury should be made?

21.6. Whether it was just and equitable to apply an uplift to the awards for the successful victimisation complaints under section 47B ERA and section 27 EQA for an unreasonable failure to comply with the ACAS Code under Section 207A Trade Union and Labour Relations Consolidation Act 1992; and if so, what uplift should be applied?

Under section 12A Employment Tribunals Act 1996:

21.7. Whether there were any aggravating features to the breaches of the Claimant's employment rights found proved; and, if so,

21.8. Whether the Tribunal should impose a financial penalty and in what sum.

22. The parties also agreed that the Tribunal should hear the application for costs at the remedy hearing, and reach a determination on that application, with both judgments being provided at the same time if possible.

The Evidence

23. The Respondent had produced a bundle for the remedy hearing. This included all relevant documents. Late additions were made to it by the Respondent, and so it was not agreed in its entirety. However, the bundle was a tool for the Tribunal; and page

references in this set of Reasons refer to pages in that bundle. At the Tribunal's request, the Respondent produced "R1", the letter of instruction to the single joint expert.

24. The Claimant filed and served a witness statement [p147-170], which we pre-read along with documents referred to in her evidence. The Claimant gave evidence and was cross-examined.

25. The Tribunal read an affidavit from Mr. Friend. We attached such weight to that as we saw fit, which was limited given the absence of cross-examination.

26. The Respondent called no live evidence, but relied upon the documentary evidence and submissions on the evidence and the law.

27. The Tribunal also pre-read the single joint expert evidence, the letter of instruction ("R1") and the questions posed to the expert together with his replies.

Expert Evidence

28. It was not alleged by the Respondent that Mr. Baxter was not an expert. He had been selected by the Claimant from a list provided by the Respondents.

29. In summary, the expert report concluded:

29.1. The Claimant had suffered loss of career prospects: it was "*extremely unlikely that C will become the preferred candidate after taking into account the stigma resulting from her Employment Tribunal claim…her future career prospects have been significantly disadvantaged*".

29.2. In respect of quantification of loss of career prospects, Mr. Baxter's opinion was that it was the difference in total annual remuneration when comparing the Claimant's current role against that of a senior Compliance role, which is estimated to be either:

£29,000 pa; or

£65,250 pa
£101,500 pa

Mr. Baxter based his assessment of the value of the Claimant's career loss on a 15 year period, using the above figures as multiplicands.

30. In response to questions posed by the Respondent, the expert evidence included:

30.1. The Claimant could have sought more senior position within Financial Services Industry during the next 12-24 months;

30.2. The Claimant had a 50-60% chance of moving to top tier FCA regulated firm without any stigma (over next 12-24 months);

30.3. There was no prospect (ever) of the Claimant removing stigma arising from an Employment Tribunal Claim.

30.4. Stigma will not vary between FCA Regulated firms including Investment Banking and CFD businesses (Contract For Difference businesses, like the Respondent), or between lower/middle and top tier firms.

30.5. The stigma is worse if a claimant is unsuccessful in a Tribunal Claim.

30.6. Stigma does not decrease either over time or as result of having other jobs post litigation. Stigma does not cease to have a material impact unless you leave the Financial Services industry.

30.7. The Claimant was extremely unlikely to be the preferred candidate even if individual institutions will ultimately take its own decision whether to recruit or not.

30.8. The Claimant's % chance of appointment with the Tribunal decision is 0-5%.

30.9. There was specific disadvantage: it was virtually impossible for the Claimant to progress her career both within the CFD industry or within a lower/middle or top tier Investment bank for the remainder of her career.

30.10. Her FCA registration was irrelevant. This was taken for granted as being held by applicants; the decision to recruit was not based on FCA registration.

In response to questions from the Claimant, the evidence included:

30.11. The Employment Tribunal litigation means that the Claimant no longer has an exemplary background.

30.12. The Claimant will face identical difficulties with regard to any job applications made in the Financial Services Industry.

30.13. In the event of redundancy, the Claimant will be without employment for some time, unless the Claimant has a career change away from FCA regulated businesses.

30.14. It was extremely rare to change such jobs and not get a salary increase.

31. The Respondent opposed the application made on paper in advance of the hearing for Mr. Baxter to give oral evidence. The application was refused.

<u>Additional findings of fact</u>

32. The Claimant was not cross-examined at all on her evidence about the injury to her feelings nor about her personal injury. We accepted the Claimant's evidence about these matters; it was not questioned and we found no reason to doubt it, not least because we found her evidence to be credible in this respect.

33. We reminded ourselves, however, that the Respondent was only liable for damage caused by those acts which were found to be statutory torts of victimisation under

section 27 EQA or detriments under section 47B ERA 1996. The first such act could not have begun before 15 December 2017 (the date of the grievance which the Tribunal concluded was not properly investigated). Furthermore, we noted that the unfair dismissal was not an act of sex discrimination or public interest disclosure detriment; injury to feelings stemming from that dismissal itself were not relevant. We noted, also, that the complaints of direct discrimination did not succeed, which meant that any injury to feelings arising from the Claimant's beliefs about direct sex discrimination could not be relevant.

34. In addition, the Tribunal recognised that it had the task of distinguishing the evidence of injury to feelings from that relating to personal injury. This was a task which required some forensic consideration of the Claimant's evidence, which we carried out.

35. Having taken into account the above points, the Tribunal found as follows in respect of the Claimant's injury to feelings from the complaints found proved under section 27 EQA and section 47B ERA:

35.1. The Claimant had suffered great exacerbation of her stress and anxiety from 15 December 2017 onwards due to the acts of the Respondent (other than those relating to dismissal). This led to her belief that she would never fully recover from the acts of the Respondent. This caused her substantial loss of confidence and fear for the consequences of what the Respondent had done.

35.2. The Claimant had suffered a high degree of injury to her feelings by the perceived damage to her public image, because employees at the Respondent would have known of the allegations made against her. The Claimant knew that the Respondent was spreading rumours about her and tarnishing her reputation. In addition, the Claimant learned that the FCA were informed that she had been suspended, when this was not the case. The Claimant explained in her witness statement (paragraph 65) that she would have to disclose to the FCA on any future Form A that allegations had been made against her, even if they were false, and that High Court litigation for an alleged debt had been threatened, even if there was no basis to the Claim. These all added to the injury to her feelings.

35.3. The Claimant was extremely distressed by the attempt to damage her professional standing and her ability to practice as an FCA approved Compliance Head. This included the very serious charge that she had misled the FCA by false completion of a Form A.

35.4. The Claimant was greatly upset by the allegations that she was guilty of criminal acts, which she knew were simply untrue.

35.5. The Claimant suffered great distress because she feared that she would not be able to get another job due to the unlawful acts of the Respondent. Her earnings were the only source of income for herself and her son.

35.6. The Respondent's failure to comply with its legal obligations under the Data Protection Act had a profound and enduring effect. This caused severe injury to her feelings because of the nature of the sensitive

personal material retained, which included details of an assault by her former partner.

35.7. Moreover, the Claimant realised that the Respondent was retaining the sensitive personal data in order to hurt her; despite the Employment Judge at a Preliminary Hearing questioning how this data could be retained, the Respondent refused to return it or destroy it. This continued despite the Regulator warning the Respondent that its actions were likely to be unlawful, and then finding that they were unlawful.

35.8. The grievance investigation report caused immense upset to the Claimant, producing unfounded criticism and allegations against her. She felt this was a further personal attack on her.

35.9. The Claimant was put in fear by the threat to bring High Court proceedings. This undermined further what limited sense of security remained, because she feared losing her home and her financial security.

35.10. The effects of what the Respondent did were so severe that it caused the Claimant to feel a sense of powerlessness and to doubt her abilities.

35.11. Moreover, a key effect of the treatment of the Respondent left the Claimant feeling paranoid and distressed about what would happen in the future. She believed that the Respondent was waging a campaign against her.

35.12. The Claimant felt further undermined by the Respondent’s conduct within these proceedings. Her belief in a campaign against her was confirmed by the false evidence heard from former colleagues.

35.13. The degree of stress and anxiety caused by the Respondent’s treatment, apart from causing the personal injury explained in her evidence, led to the Claimant suffering manifestations such as interference in sleep and an inability to enjoy family life.

36. In summary, the Tribunal found that the treatment by the Respondent had caused a very high level of injury to her feelings which had been sustained over a long period time, by concerted and malicious action. The injury to the Claimant’s feelings had had a profound effect on almost every aspect of her life, which, from her oral evidence and the manner in which it was given (with a mixture of emotional upset and anger, which made it no less credible), the Tribunal found had continued up to the remedy hearing.

37. We found that the injury to her feelings was likely to continue for the long-term, whether or not there was any stigma loss and beyond when she recovered from her personal injury. The Respondent’s continued actions after she left employment were largely to blame.

Personal injury

38. In terms of personal injury, there was no challenge to paragraphs 28, 29, 35, 41 or 42 of the Claimant’s witness statement. The Respondent focussed its case on

challenging causation of the psychiatric injury of depression and anxiety alleged and the medical evidence, which was alleged to be "very limited" (see paragraph 26 Respondent's submissions).

39. Although there was no expert medical evidence, the Tribunal did not find that the medical evidence was unduly limited; indeed, this was a submission inconsistent with part of the Respondent's case, which relied on the GP records. We did not accept that earlier medical records were relevant; there was never any suggestion made of the Claimant during her evidence, or any documentary evidence which suggested, that she had had previous depression or anxiety, prior to November 2017. The Claimant's oral evidence, which we accepted, was that she had had no previous psychiatric injury and nor had she been prescribed in the past the anti-depressant medication that she had been prescribed from late 2017.

40. The Tribunal considered the medical evidence, particularly the GP records. The Tribunal found that the unlawful treatment of the Claimant was not the cause of the Claimant's depression and anxiety impairments. The Claimant had been suffering symptoms consistent with that psychiatric injury which existed prior to the unlawful treatment. For example, on 21 November 2017, the Claimant had had a panic attack (pp108-109) and the Claimant was signed off sick by her GP from 27 November 2017 (p184) with anxiety and stress. Moreover, before the unlawful treatment, the Claimant was on anti-depressants.

41. However, the Tribunal found that the Claimant's symptoms were exacerbated by the unlawful treatment by the Respondent. The GP records, particularly from December 2017 to February 2018 led to the inference that her condition was getting significantly worse: see p.214-215. In particular, relying on the GP records and the unchallenged evidence of the Claimant on this issue, we found that the Claimant had an anxiety disorder, the symptoms of which increased in severity.

42. For example, on 31 January 2018, the GP notes recorded evidence from an interview with the Claimant, in which she explained that she could not cope, she was suffering work-related bullying and victimisation, and that she had recurrent panic attacks. The Claimant was started on diazepam. On the following day, 1 February, the Claimant was invited to Panic Management Therapy: see p204, 206, 208-209.

43. Further acts by the Respondent, such as the failure to address her grievance properly, the victimisation by making false allegation to the FCA against her, and the threat of High Court proceedings against her, prevented her recovering and caused her condition to deteriorate: see paragraphs 42-43 Claimant's witness statement.

44. As the GP letter headed "To whom it may concern" states (p203), when the Claimant was referred for counselling, her assessment placed her in the severe category for anxiety and depression and she received cognitive behavioural therapy. She was referred to a psychiatrist, prescribed sleeping tablets and a higher dose of anti-depressants.

45. The Claimant began further "stage 3" therapy in June 2018, which was completed on 7 November 2018 (see p.206 Care Pathway History).

46. Having assessed all the evidence, the Tribunal found that the Claimant's symptoms remained more severe for several months.

47. The Claimant appeared to turn a corner, with an improvement in her condition, by about November 2018. There are various pieces of evidence which indicate this including:

> 47.1. It is apparent from the Counsellor's assessment that the Claimant's symptoms of anxiety and depression had reduced significantly by 7 November 2018: see p204 (the small table shows that the measurement for generalised anxiety has fallen from 18 to 7 from since 11 June 2018).
>
> 47.2. In the Clinical Notes at p.208, from the session on 7 November 2018, the Claimant is recorded as stating that she is managing her anxiety better, and has been able to manage her emotions.
>
> 47.3. The Claimant is not taking diazepam daily as well as citalopram by mid-late in 2018; she asks for diazepam only when particular stressors arise, such as asking her GP just for a few diazepam tablets ahead of the Preliminary Hearing early in 2019.

48. The Tribunal found that the Claimant's symptoms attributable to the unlawful treatment had improved by the date of the liability hearing. For example, in September 2019, the Claimant went back onto her law degree course (which she had had to defer) and she was fit to work in her new job, with no evidence of any impairment to her work. But the symptoms attributable to the unlawful treatment had not resolved by the date of the liability hearing, largely because the Respondent had continued to fail to comply with the requirements of data protection law and persisted in an untrue narrative.

49. The symptoms attributable to the unlawful treatment had not completely resolved by this remedy hearing; for example, her sleep was still disturbed. But the Tribunal found that there had been a marked improvement in those symptoms, largely because of the findings and conclusions in our Reserved Judgment on liability.

50. From the Tribunal's assessment of the available evidence, we found that the prognosis for the Claimant was good in respect of full recovery from the symptoms attributable to the unlawful treatment. The Claimant's anxiety and other symptoms were caused by her experiences during her employment and were linked to that; this is supported by the clinical notes prepared by her counsellor, which explain this: see p.209. As explained in her remedy witness statement (such as at paragraph 1), giving evidence had caused her to relive painful experiences.

51. However, having seen the Claimant give evidence (twice) and present her case at trial with great determination (despite the emotional challenge this posed for her), the Tribunal found that, on balance, she would make a full recovery from the exacerbation of her symptoms caused by the Respondent's victimisation once this case is at an end. This is supported by the clinical notes (at p209), which record her statement that she is usually robust and able to cope with stress, our own assessment of her strengths, and the evidence that she gave that she had new employment and had returned to her law degree course.

Findings of fact in respect of alleged Stigma loss

52. The bulk of the cross-examination of the Claimant was directed to the issue of whether the Claimant had suffered any stigma loss.

53. The Claimant commenced new employment on 26 February 2020 in a Compliance Director position, and holds SMF16 and SMF17 roles. We will refer to this new employer company as “X”. The Claimant’s total remuneration package in the new role is set out at p.339. Her basic salary is £130,000 per annum, with benefits, taking the total to £158,000. In addition, her bonus may be up to 50% of the basic; but the Claimant stated that the financial position of X meant that it was unlikely that she would receive any bonus this year.

54. It had taken the Claimant a short period of weeks to secure this position, which she did before presenting her ET1 Claim. Her employment consultant explained that, on or around 8 February 2018, X had reacted very positively to the Claimant’s CV: see email p.343.

55. Company X was part of a group of companies subsequently purchased by another group of companies, which we will refer to as “Y”. When the Claimant joined X, it was in the process of being purchased by Y. The purchase was not completed until 31 December 2019.

56. The Claimant’s case was that she would be made redundant in the next 3 to 6 months, because of this takeover. The reasons were that the financial position of X was poor, Y already has a Chief Compliance Officer and a Compliance Officer, the 2019 Financial Statement showed that the sub-division in which the Claimant worked was not doing well, and that this part was to be subject to review and potential restructure (evidenced by p270), and the speech from the CEO of Y demonstrated that the Claimant’s company was not doing well and subject to restructuring. Although the Claimant stated her belief, which was genuinely held, that she was likely to be made redundant, the Tribunal found that it was not satisfied that the evidence substantiated that belief. We found that there was a fairly low risk that the Claimant would be made redundant for the following reasons:

56.1. The Tribunal took account of the documents relied upon by the Claimant. These did not refer to restructuring of the Compliance function of X nor of X in particular; X was only one business within a group of assets purchased by Y. After acquisition, X was only one part of a series of businesses (the businesses are listed at p240, bottom paragraph).

56.2. The speech of the CEO of Y does not indicate that there will be redundancies in the Compliance section of X in which the Claimant works. It refers to the businesses within the group of which X formed part having an encouraging start to 2020 with strong results (see p.283), although it also stated that there could be parts of that group of businesses sold off.

56.3. The Claimant holds a senior level role in Compliance. She reports into the CEO and has a team of two reporting to her. We found that this role was equivalent to a promotion compared to the role held with the Respondent.

The Claimant stated that it was more a question of increased liability because she held more Controlled Functions than in her role with the Respondent. But we found that there were a number of features pointing to a promotion: increased responsibility (or "liability" to use the Claimant's term); increased Controlled Functions; significantly increased salary; management responsibility for others in a Compliance team.

57. The Claimant's evidence was that over the five months leading up to the remedy hearing, she had submitted 70 job applications, for MLRO posts or other professional Compliance roles. The Claimant submitted a table at pp.340-342 which listed those applications. The Claimant had received only one telephone interview with HR, despite the fact that she now had two more years of experience (since resignation) at CF10 and CF11 level, which should have raised her profile considerably (Since December 2019, under a new system of regulation, she held SMF 16 and SM17, which meant responsibility for Compliance Oversight and Money Laundering Reporting). The Claimant relied on this table to support the allegation that she would suffering stigma in the labour market when made redundant, and would be out of work for 1-2 years.

58. The Tribunal made the following findings of fact, which we found did not support the claim of stigma suffered in the labour market:

58.1. We infer from all the evidence that X must have known of this Claim. Despite this, the Claimant had not been dismissed by X or Y, and nor did she adduce any evidence that she had been disadvantaged by X or Y because of the Claim. The Claimant had now been in continuous employment for more than two years in her new role.

58.2. All the applications relied upon were made after 23 September 2019, when the Preliminary Hearing in respect of remedy took place. At that hearing, the Tribunal was referred to Chagger. The Claimant would have appreciated, having considered that authority, the number of unsuccessful applications made by the claimant in that case. In cross-examination, the Claimant admitted that part of her intention when making these applications was to show that she could not obtain a better job, but that her other intention was to find new employment. We found that after that Preliminary Hearing, the Claimant applied for Compliance roles in a blanket way.

58.3. Although the applications were not a sham, the Claimant made them without concern or focus. They were like a toe dipped in the water to assess the temperature and to see what might happen if the plunge (of seeking a new job) was taken. We are not critical of this; but neither did we find it particularly persuasive in terms of evidence of stigma loss.

58.4. For example, the Claimant's Position Statement (attached to the letter of instruction at "R1") states that the Claimant's career plan was to move away from the CFD industry and to move into investment banking, to secure better remuneration. But only very few of the roles applied for after September 2019 were investment banking roles. The Claimant had not planned to apply for a new role until finishing her law degree in 2021.

58.5. The Claimant usually applied for these roles through LinkedIn. A CV was held by LinkedIn; this was forwarded by LinkedIn for each application. This was demonstrated by a number of applications being made within minutes of each other, all with the same CV. The Claimant did not produce a bespoke CV for each application; this would have been possible if the CV held on Linked In had been revised regularly or for each post.

58.6. The only role where the Claimant received an interview (which was a telephone interview by HR) was the only role which paid the same salary as her current role. If anything, this suggested that the roles that she had applied for held less responsibility and were paid less. In the experience of the Tribunal, the recruiter was likely to have taken the view on sift that the Claimant was unlikely to take such a role. For example, at least some of the roles were more junior, such as where stated to be "entry level" posts, or that the role-holder would be part of a team, not at the level of head or director of Compliance reporting to the CEO. The Claimant admitted that she had applied for jobs including those which were paid less, because she was going to be made redundant and the thought of being out of work scared her.

58.7. The Claimant's evidence was that she was not putting in applications for the sake of it. She accepted in evidence (in reply to a question from the Employment Judge) that some applications had been for roles in which she could develop skills or experience eg. one for a global investment management fund (p455). This tended to suggest, however, that she may not have precisely the experience that such a recruiter would want in those roles.

58.8. The Claimant's evidence in respect of these job applications was inconsistent to the expert evidence, which explained that the Claimant would be rejected after the sift stage because of the Claim (ie. she was very unlikely to be the "preferred candidate"): see 7.5 expert's report. This suggests that these applications were failing for reasons other than the alleged stigma, if the opinion evidence is accepted on this point.

Relevant Law

59. The correct measure of loss is the tortious measure of loss, because discrimination cases are statutory torts: Ministry of Defence v Cannock [1994] ICR 918. Compensation in whistleblowing cases is also based on tortious principles. In both cases, compensation aims to put the victim in the position that they would have been in, had the discrimination and/or s.47B ERA victimisation not occurred.

Injury to feelings

60. The principles of law to be applied by the Tribunal when assessing injury to feelings are set out in Armitage v Johnson [1997] IRLR 162, paragraph 27, which we summarise as follows:

60.1. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

60.2. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;

60.3. Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

60.4. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

60.5. Tribunals should bear in mind the need for public respect for the level of awards made.

61. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression: see Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102.

62. Further, we took into account the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury, and the First Addendum to them. The Claim was presented on 18 May 2018. We reminded ourselves that:

> "*In respect of claims presented on or after 6 April 2018, the Vento bands shall be as follows: a* ***lower band of £900 to £8,600*** *(less serious cases); a* ***middle band of £8,600 to £25,700*** *(cases that do not merit an award in the upper band); and an* ***upper band of £25,700 to £42,900*** *(the most serious cases), with the most* ***exceptional cases capable of exceeding £42,900***."

63. The approach to an award of compensation for unlawful detriment because of public interest disclosure should be the same as that applied in cases of unlawful discrimination, namely as a statutory tort attracting an entitlement to compensation for injury to feelings and, in an appropriate case, aggravated damages: Shaw v Commissioner of Police for the Metropolis [2012] ICR 464.

Aggravated damages

64. In Shaw v MPC, the EAT (Underhill J, as he then was) held as follows:

64.1. Aggravated damages are compensatory, not punitive, in nature. They are an aspect of injury to feelings. They represent the extent to which the injury to feelings caused by the wrongful act has been made more serious by some additional, aggravating, features. (see Shaw, paragraph 21).

64.2. There are three categories of relevant circumstances for an award of aggravated damages. These are (see Shaw, paragraph 22):

64.2.1. The manner in which the wrong was committed, with the classic question being whether the conduct was high-handed, malicious, insulting or oppressive (although this is not an exhaustive definition of the kind of behaviour which may justify an award of aggravated damages).

64.2.2. The motive behind the conduct, because discriminatory conduct based on prejudice or which is spiteful, vindictive or intended to wound is likely to cause more distress than the same acts would cause without such motive. The claimant must, of course, be aware of the motive for it to aggravate the injury.

64.2.3. Any subsequent conduct by the perpetrator. Relevant subsequent conduct includes (but is not limited to) conducting the trial in an unnecessarily offensive manner, where the employer does not take the complaint seriously, or a failure to apologise.

64.3. As explained by Mummery LJ in Vento, because there is no sure measure for assessing injury to feelings, choosing the “right” figure within that range cannot be a nicely calibrated exercise. Those observations apply equally to the assessment of aggravated damages—inevitably so because they are simply a particular aspect of the compensation awarded for injury to feelings. The artificiality of the exercise is further increased by the difficulty, both conceptual and evidential, of distinguishing between the injury caused by the discriminatory act itself and the injury attributable to the aggravating elements. Because of that artificiality, the dividing line between the award for injury to feelings on the one hand and the award of aggravated damages on the other will always be very blurred, and tribunals must beware of the risk of unwittingly compensating claimants under both heads for what is in fact the same loss. (paragraph 23)

64.4. The ultimate question is not so much whether the awards for injury to feelings and aggravated damages in isolation were acceptable, but whether the overall award was proportionate to the totality of suffering caused to the claimant. (post, paragraph 23)

64.5. It is good practice to formulate aggravated damages as a sub heading of injury to feelings. (paragraph 25)

Personal injury

65. The assessment of damages for psychiatric injury is a question of fact to be determined by the tribunal.

66. Injury to feelings and psychiatric injury are distinct. But in practice, they are not always separable, leading to a risk of double recovery; it may be impossible to say when the distress and humiliation becomes a psychiatric injury.

67. Given the guidance in *Armitage* (that awards for injury to feelings should bear some broad general similarity to the range of awards in personal injury cases), the Tribunal also considered the Judicial College Guidelines for the Assessment of Damages in Personal Injury Cases, 14th Edition (ie. not the 15th Edition published in 2019). These include:

> ***"Psychiatric Damage Generally***
>
> *The factors to be taken into account in valuing claims of this nature are as follows:*
>
> *(i) the injured person's ability to cope with life, education, and work;*
>
> *(ii) the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;*
>
> *(iii) the extent to which treatment would be successful;*
>
> *(iv) future vulnerability;*
>
> *(v) prognosis;*
>
> *(vi) whether medical help has been sought;*
>
> *(vii) Claims relating to sexual and physical abuse usually include a significant aspect of psychiatric or psychological damage. ... "*

68. There are four categories of award (including the Simmons v Castle uplift): Less Severe, Moderate, Moderately Severe and Severe. Of these, the first two are particularly relevant in this case:

68.1. Less Severe: between £1,350 and £5,130. Where the claimant has suffered temporary symptoms that have adversely affected daily activities;

68.2. Moderate: between £5,130 and £16,720. Where, while the claimant has suffered problems as a result of the discrimination, marked improvement has been made by the date of the hearing and the prognosis is good.

69. Hampshire County Council v Wyatt EAT/0013/16 is authority for the proposition (if authority was needed) that it was not always necessary for a Tribunal to have expert medical evidence to decide that injury had been suffered.

70. Wyatt was an appeal against an award in a disability discrimination case. The Employment Tribunal had found that the Claimant's suspension was not an unlawful act but was the most proximate cause of her depression and triggered that depression; and the Respondent appealed against an award for personal injury on the basis that the Employment Tribunal was wrong to make such an award in the absence of expert medical evidence, which was necessary to establish both causation and quantum of this claim which are difficult issues to disentangle. The EAT held (Simler J. presiding):

> *"28. Medical evidence in particular, is likely to assist in identifying whether (i) all the injury or harm suffered by a claimant can be attributed to the unlawful conduct and (ii) that injury or harm is divisible. It may assist in determining the extent to which any treatment a claimant has undergone has been successful. It may also assist in dealing with questions of prognosis. In those circumstances, we do not agree with the Tribunal's statement that all a further medical report can do is say that the Claimant made certain claims and express a view as to whether the maker of the report believes them or not. We consider that in cases where there*

are issues as to the cause or divisibility of psychiatric or psychological harm suffered by a claimant, it is advisable for medical evidence to be obtained. Moreover, there is a real risk that failure to produce such medical evidence might lead to a lower award or to no award being made.

29. However, we do not accept the Respondent's argument that medical evidence is an absolute requirement or that an award cannot be made in the absence of expert medical evidence in every such case bar those of low-value without error of law. We would be concerned to see such a principle established, bearing in mind in particular the financial cost involved in obtaining expert medical evidence. We also consider that there are potential practical difficulties that may arise…. "

71. In this case, neither party proposed that expert medical evidence be obtained.

Divisible and Indivisible Harm

72. The Tribunal considered whether the harm was 'divisible' or 'indivisible'.

73. The Tribunal directed itself that divisible harm is where different acts cause different damage, or quantifiable parts of the damage. In these cases, the tribunal must establish and award compensation only for that part of the harm for which the respondent is truly responsible. Indivisible harm is where multiple acts result in the same damage.

74. Ms Mayhew argued that, in this case, the evidence and the findings showed that the harm was divisible because the Claimant was injured prior to the first proven act of victimisation or detriment.

75. In BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188, the Court of Appeal held:

75.1. Where the harm has more than one cause, a respondent should only pay for the proportion attributable to their wrongdoing unless the harm is truly indivisible.

75.2. Tribunals should try to "*identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong, and a part which is not so caused*." The Tribunal should see if it "*can identify, however broadly, a particular part of the suffering which is due to the wrong*".

75.3. Where such a 'rational basis' can be found, the Tribunal should apportion accordingly, even if the basis for doing so is '*rough and ready*'.

75.4. Any such assessment must consider any pre-existing disorder or vulnerability, and account for the chance that the claimant would have succumbed to the harm in any event, either at that point or in the future.

Principles of calculating pecuniary loss in discrimination cases & "stigma damages"

76. In the leading authority on pecuniary loss in discrimination cases, Chagger v Abbey National and Hopkins [2010] IRLR 47, the Court confirmed that the general rule in assessing compensation for the statutory tort of discrimination is that damages are to place the claimant into the position he or she would have been in if the wrong had not been sustained, ie the discrimination had not occurred: see paragraphs 56-60.

77. In a whistleblowing case, depending on the facts, 'stigma' damages may be awarded which are akin to those available in discrimination cases under the principles set out in Chagger.

78. The Respondent placed heavy reliance on the judgment in Chagger, arguing that as a matter of law, the Tribunal were unable to make an award of stigma damages in the facts of this case.

79. In Chagger, the claimant gave evidence that he had made 111 applications for new jobs, with no response, and he was out of work. In that case, there was no expert evidence. In considering which party had to prove stigma loss in the context of mitigation, the Tribunal considered whether the employee or the employer had to prove stigma loss. The Court stated:

> *"We suspect that, given the anecdotal and flimsy nature of the evidence, the tribunal would have said that Abbey had not been able to demonstrate the likely effect of the stigma, and that it was altogether too uncertain properly to be evaluated."*

80. However, the Court went on to state (paragraph 84):

> *"We would accept, however, that there could in theory be exceptional cases where the evidence would be sufficient for the tribunal to make an assessment. So it is necessary to know whether stigma loss is in principle recoverable. Furthermore, for reasons we give below, there is one situation at least where the only potential loss results solely from stigma factors. In that situation too it is vital to know whether, as a matter of principle, it is a recoverable head of loss. So the issue must be faced."*

81. In respect of whether stigma damages in discrimination cases were recoverable, the Court in Chagger provided guidance at paragraphs 85 – 94. Guidance on determining the amount of the stigma loss was provided at paragraphs 95-99. This guidance was all given in the context of determining stigma loss in the context of mitigation.

82. Although all the guidance in Chagger was taken into account by this Tribunal, we have extracted the following points:

82.1. Stigma loss is in principle recoverable. It is one of the difficulties facing an employee on the labour market.

82.2. If other employers refuse to employ on the grounds that they did not want to risk recruiting someone who had sued his employer and whom they perceived to be a potential trouble-maker, there is no reason why that would not be a loss flowing directly from the original unlawful act of the claimant's employer.

82.3. The fact that the direct cause is the decision not to recruit does not of itself break the chain of causation. Nor can the action of the employee in taking proceedings conceivably be treated as such an act. It is a necessary step in order to obtain a remedy for the employer's wrong; it would be absurd if it were to distance the employer from the effects of that wrong.

82.4. Once it is accepted that stigma loss is in principle recoverable, in most cases it need not be considered as a separate head of loss at all. There will be evidence about the steps which have been taken by the employee to mitigate loss, and this will in practice guide the tribunal to reach a view on the likely period of unemployment. The stigma problem will simply be one of the features which impacts on the question how long it will be before a job can be found.

82.5. It is far from the common experience that those taking proceedings against their employer thereafter become virtually unemployable in their chosen field. Moreover, the fact that in a discrimination context it is unlawful to refuse employment for that reason ought further to reduce the likelihood of employees being adversely affected in this way.

82.6. A tribunal should take a sensible and robust approach to the question of compensation, as the Court of Appeal emphasised in Essa v Laing Ltd [2004] ICR 746. Plainly it would be wrong for them to infer that the employee will in future suffer from widespread stigma simply from her assertion to that effect, or because she is suspicious that this might be the case.

82.7. Where there is very extensive evidence of attempted mitigation failing to result in a job, a tribunal is entitled to conclude that, whatever the reason, the employee is unlikely to obtain future employment in the industry.

82.8. "*There is one exceptional case where it could be necessary for a tribunal to award compensation specifically by reference to the impact of stigma on future job prospects. This is where this is the only head of future loss. An example would be if in a case such as this a tribunal were to find that the claimant would definitely have been dismissed even had there been no discrimination. He would be on the labour market at exactly the same time and in the same circumstances as he would have been had he been dismissed lawfully. Accordingly, the damage to his employment prospects from the stigma of taking proceedings would be the only potentially recoverable head of future loss. Here, however, the employee would be asserting that this is a head of loss, and the onus would be on him to prove it. In practice this would be a difficult task. If he does establish such a loss, the tribunal will then be faced with the almost impossible task of having to assess it. The tribunal would have to determine how far difficulties in obtaining employment result from general market considerations and how far from the stigma. In the unlikely event that the evidence of the stigma difficulties is sufficiently strong, it would be open to the tribunal to make an award of future loss for a specific period. But, in the more likely scenario that the evidence showed that stigma was only one of the claimant's difficulties, it may be that a modest lump sum would*

be appropriate to compensate him for the stigma element in his employment difficulties. This approach would be analogous to the lump sum awards sometimes made in personal injury cases to compensate an injured claimant for the risks of future disadvantage on the labour market: see Smith v Manchester Corpn (1974) 17 KIR 1 . Even then, however, this should not be an automatic payment; there should be some evidence from which the tribunal can infer that stigma is likely to be playing a part in the difficulties facing the employee who seeks fresh employment." (paragraph 99).

83. In a subsequent Court of Appeal decision, Small v Shrewsbury and Telford Hospitals NHS Trust [2017] IRLR 889, a case in which complaints of whistleblowing detriment under section 47B ERA were brought, the Court gave the following guidance (at paragraph 10):

83.1. Chagger establishes that, in principle, a claimant can recover for the consequences of any disadvantage he suffers on the labour market, by reason not only of having been dismissed by his previous employer but also of his having brought proceedings against that employer (so-called "stigma loss").

83.2. Normally, that factor will not require separate quantification, because it will feed into the overall assessment of the claimant's loss of earnings to the extent that it affects the time which it has taken, or may take, or should have taken him to find alternative employment "*but it accepts that there may be unusual circumstances in which it represents a distinct head of loss on its own (see paragraph 99 [of Chagger])*".

83.3. The term "stigma loss" is sometimes used loosely to cover loss going beyond the particular case considered in paragraph 99.

84. Further guidance was provided in Ur Rehman v Ahmad [2013] ICR 28 paragraphs 16-18. The EAT (Langstaff J, President) (paragraph 17) summarised how loss of a chance of finding re-employment should be calculated:

"*In every case it was necessary to ask whether, in relation to finding re-employment, stigma from the former employee's previous employment had (a) a real or substantial effect, and (b) if it did, how great an effect. In answering that question, it was appropriate to have regard to the entire history of the former employee's search for new employment, including the number of jobs applied for, how well targeted and presented the applications had been, the number of interviews obtained, how they had gone and any reasons given for rejection. While each application was relevant, it was necessary to answer the question on the basis of the job search in its entirety. It was not necessary as a matter of law for the former employees to call evidence from prospective employers in relation to the effect of BCCI "stigma" on the particular applications that had been made to them.*"

85. In Ur-Rehman, at paragraph 20, the EAT emphasised the importance of a basis in the evidence to prove stigma loss:

"*There must be evidence to support a claim for loss consisting of difficulty in obtaining or keeping employment due to "stigma", particularly where the stigma consists not of taking unjustified proceedings, but successful ones against a former employer. The evidence likely to be critical is that which can answer the questions identified by the Court of Appeal on appeal from the decision of Lightman J in Bank of Credit and Commerce International SA v Ali (No 2) [2002] ICR 1258 ,*

which we have set out at para 17 above. They require more than a suggestion or suspicion that stigma might be at work—though, as with discrimination, it cannot be expected that would-be employers would happily confess to have turned an applicant away because he had justifiably complained about a breach of his employment rights by another on an earlier occasion. Stigma may have to be inferred, just as was the case with discrimination, a matter recognised in King v Great Britain–China Centre [1992] ICR 516 before statute passed the burden of proof to the employer in many cases of alleged discrimination, though this also requires a sound evidential foundation from which the inference may be drawn. If, however, (taking the evidence as a whole) there is insufficient to conclude that stigma has been working its insidious worst, then a tribunal can make no award."

Totality of loss

86. Cannock sets out general principles applicable in discrimination cases where compensation is being assessed, in the context of pregnancy discrimination: see section G of the EAT judgment. In that case, what was primarily in issue was the future loss suffered by service personnel who had left the forces because of the discrimination.

87. The general guidance at Cannock, section G, part 1 (referred to by Ms. Mayhew) was given in the context of the assessment of future loss. However, the same general point may be made in the assessment of general damages; it is not an exercise to be carried out in a slavish, arithmetical, way. A similar point is made in Shaw.

88. We found that these principles in G, part 1, of Cannock would also apply in this type of case, where a claim had been subjected to whistleblowing detriment and sex discrimination by victimisation.

89. In particular, we directed ourselves as follows:

89.1. There is a difference between the evaluation of a loss of a chance of future loss and a "fact" to be determined on the balance of probability in respect of past loss.

89.2. Tribunals should not simply add up the awards under each head. In reference to awards, a sense of due proportion involves looking at the individual components of any award, and then, standing back, considering whether the total award is a "*just reflection of the chances which have been assessed*."

90. We directed ourselves, as we explained above in our summary of the decision in Johnson, that the Tribunal must not over-compensate the Claimant whether in respect of past loss or future loss. A just approach requires that the Tribunal stands back and reviews the total award to ensure that it properly reflects the loss suffered by the Claimant, having calculated the past loss and properly evaluated the chances where future loss is in issue.

91. In Wardle (below), Elias LJ explained, however, that a Tribunal may and should assess an employee's future loss even where that involves a considerable degree of speculation:

"50. I agree with Mr Jeans that it will be a rare case where it is appropriate for a court to assess compensation over a career lifetime, but that is not because the exercise is in principle too speculative. If an employee suffers career loss, it is incumbent on the tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation. It cannot lie in the

mouth of the employer to contend that because the exercise is speculative, the employee should be left with smaller compensation than the loss he actually suffers. Furthermore, the courts have to carry out similar exercises every day of the week when looking at the consequences of career shattering personal injuries. Nor do I accept a floodgates argument. The job of the courts is to compensate for loss actually suffered; if in fact the court were to conclude that this required an approach which departed from that hitherto adopted, then we would have to be willing to take that step."

Statutory uplift under section 207A Trade Union and Labour Relations Consolidation Act 1992

92. Section 207A(1)-(2) TULRCA provides:

"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

93. Schedule A2 of TULRCA includes discrimination at work cases (sections 120 and 127 EQA 2010) and public interest disclosure victimisation complaints (section 48 ERA 1996).

94. The relevant Code of Practice is ACAS Code of Practice 1 (2015 version)("the Code"). Paragraph 1 of the Code provides:

"1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.

– Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.

– Grievances are concerns, problems or complaints that employees raise with their employers.

This Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts on their expiry."

95. Accordingly, the Code applies to all disciplinary and grievance situations (save for two particular situations to which it does not apply: dismissals for redundancy and on the non-renewal of fixed-term contracts on their expiry): Holmes v QINETIQ [2016] IRLR 664, paragraph 7, per Simler J.

96. We took into the account the guidance as to the proper approach for Employment Tribunals to take when considering whether an uplift applied, set out in Allma Construction Ltd v Laing [2012] UKEAT/0041/11 per Lady Smith. We have used this guidance to structure our conclusions below.

97. The effect of Code of Practice 1 was discussed in Lund v St Edmund's School UKEAT/0514/12. Keith J explained (with our emphasis added):

> *"So although there are particular situations to which the Code does not apply – dismissals for redundancy and the non-renewal of fixed-term contracts on their expiry – it is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action or where an employee raises a grievance. … The important thing is that it is not the ultimate outcome of the process which determines whether the Code applies. It is the initiation of the process which matters."*

98. In deciding its award, the Tribunal should have regard to the totality principle set out in Cannock, to ensure that the total award remains just and appropriate.

99. In Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604 (in the context of the now repealed adjustment of awards under the Employment Act 2002 s 31), the Court of Appeal (at paragraph 28) stated that once the Tribunal has fixed on the appropriate uplift by focussing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms. In considering the sort of sum which would be proportionate and acceptable it is of some relevance to have regard to the sums which the courts are willing to award for injury to feelings and for aggravated damages.

100. The guidance above in Wardle applies where there has been a breach of the Code and an uplift under section 207A TULRCA is to be applied: see Acetrip Limited v Dogma UKEAT/0238/18.

101. Any uplift must only be applied to those elements of the compensation that are referable to the complaint in respect of which there has been a breach of the relevant procedures: Wardle at paragraph 39.

102. Where aggravated damages and an ACAS uplift are awarded in the same proceedings, when assessing the overall award made, it is relevant for the Tribunal to consider whether there is double counting of matters that are relevant to both aggravated damages and the ACAS uplift when making both awards: Base Childrenswear Ltd v Otshudi UKEAT/0267/18 at paragraphs 47-48.

Financial Penalties

103. Section 12A Employment Tribunals Act 1996 confers a discretionary power (not a duty) on the Employment Tribunal to order that a financial penalty to paid to the Secretary of State. Whether to make an award, and the amount of the award, are discretionary, subject to an upper cap of £5000 (where £10,000 or more is awarded in compensation).

104. The explanatory notes accompanying section 16 Enterprise and Regulatory Reform Act 2013 (which introduced section 12A) stated that its purpose is "*to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law*".

105. In Waiyego v First Great Western UKEAT/0056/18, the Tribunal found only two breaches of employment rights and considered that this did not amount to a case with any aggravating features. The Tribunal had considered the parties' submissions and concluded that there was "*no deliberate, malicious or negligent behaviour on the part of the Respondents*". The EAT, having remarked that there was a lack of appellate authority on the point, concluded that given that there were only two breaches, the Tribunal was "*undoubtedly right*" not to make an award under section 12A ETA 1996.

Submissions

106. The parties prepared written submissions, which the Tribunal read. We took into account both sets of written submissions and the oral submissions made on the second day of the remedy hearing. In addition, we took into account the later written submissions provided by the Respondent on 15 May 2020. It is neither necessary nor proportionate to attempt to summarise them here. We have addressed specific submissions in the course of these Reasons, but, for the avoidance of doubt, each and every submission was taken into account even if not expressly referred to in these Reasons.

Conclusions

107. Applying the above principles of law to the findings of fact made in the Liability Judgment and those findings of fact set out above, we reached the following conclusions on the issues for determination.

Issue 1: Loss of statutory rights

108. The Tribunal decided that the value of the loss of statutory rights was not as substantial in this case as in other cases, because the Claimant had secured a new job fairly shortly after her resignation, and she remained in that role up to the date of the remedy hearing. For those reasons, the Tribunal preferred the Respondent's figure of £500 for this item of loss, which, as part of the compensatory award, must be uplifted by 25% due to the Respondent's failure to comply with ACAS COP 1.

Issues 2-3: Award for injury to feelings (including aggravated damages)

109. The Tribunal took into account the submissions of the parties on this issue, including those set out in the Respondent's written submissions at paragraphs 22 to 24. The Claimant claimed £50,000 for the victimisation under section 27 EQA and a further £50,000 for victimisation under section 47B ERA.

110. The Tribunal took into account, in particular, paragraphs 33-34 above. We were conscious of awarding damages only for the injury to feelings arising from the unlawful acts of discrimination and whistleblowing detriment found proved ie. not including any injury arising from the unfair dismissal. In this section of the Reasons, and in the section dealing with personal injury, where we refer to "unlawful treatment", this refers to victimisation under section 27 EQA or victimisation under section 47B ERA, not unfair dismissal.

111. In addition, although both victimisation under section 27 EQA and section 47B ERA was proved in respect of several acts, we reminded ourselves that we must not over-compensate by doubling up the award of compensation where there was, in real terms, only one act amounting to the unlawful treatment.

112. However, the Tribunal concluded that, amongst other treatment, the Claimant had been the victim of a concerted plan to deter her from pursuing the Claim. The plan included attempting to injure her employment prospects as a Compliance professional, her professional standing, her economic position, and deterring her from pursuing the claim against the Respondent. We found that the allegations against her were not merely negligent; the allegations were malicious and dishonest, in the sense that there was no basis in fact for them.

113. Moreover, the subsequent conduct of the Respondent, and specifically the retention of the Claimant's sensitive personal data was done in the knowledge that the retention of this data was unlawful. It was a calculated risk by the Respondent, which showed a disregard for the law as well as the Claimant's feelings and her emotional security.

114. Applying the guidance in Vento, and whilst taking into account at all times that such an award was designed to compensate the Claimant, not punish the Respondent, the Tribunal decided that:

114.1. Amongst the range found in discrimination cases, this was a more serious case of injury to feelings. The impact of the treatment of the Respondent on this Claimant was profound. It would not be just for the award to sit within either the lower bracket or the middle bracket of the Vento awards.

114.2. We found that a member of the Public who had read without indignation our findings of fact about the detriments to which the Claimant had been subjected and the degree of injury to feelings suffered as a result would be surprised if the award in this case were not placed in the upper bracket of Vento. We concluded that if this case were not placed in the upper bracket, it would be likely to damage public confidence in and weaken respect for the anti-discrimination and the public interest disclosure legislation.

114.3. Although there was not a long campaign of discrimination over many years (in contrast to Johnson), awards in the upper band in Vento are not restricted to such circumstances. However, in any event, in the present case, there were several unlawful acts as part of a concerted plan against the Claimant. The acts extended over a long period of time. Indeed, in respect of the sensitive personal data, the treatment had continued up to and including the liability hearing, which was a period of over 21 months.

114.4. Moreover, awards of general damages can only be assessed on the facts of the case; and each case must be seen in its proper context. The context in this case is that the Claimant is a Compliance professional, who had an unblemished record when this treatment arose. The Respondent engaged in very serious detrimental treatment, which caused her a very

high degree of upset and distress, shook her confidence to the core, and put her in fear of High Court litigation.

115. The Tribunal concluded that the basic award for injury to feelings in this case would fall towards the middle of the upper bracket of the Vento guidelines.

116. Taking account of the facts found and the submissions made, the Tribunal concluded that £30,000 was the appropriate sum. We found that this award had some broad general similarity to the range of awards in personal injury cases. Here, the injury to feelings had lasted to this remedy hearing, over two years after the first acts. Having seen the Claimant give evidence twice, and heard and read her submissions, this Tribunal were satisfied that she would continue to suffer from the injury to her feelings over the longer term.

117. We have taken into account the value in everyday life of this sum, by reference to purchasing power or by reference to earnings. We reminded ourselves that this treatment occurred when the Claimant was earning over £100,000 per year. Given that the award was only around 25-30% of her overall remuneration package at the time, we did not consider that such a sum was disproportionate.

118. Again, on the facts of this case, we considered that the Public would respect such an award for the injury to feelings suffered by the Claimant. In particular, a member of the Public would consider that the number of tortious and detrimental acts, over a sustained period, and the seriousness of them, would be very likely to result in such a degree of injury to feelings that this sum was merited.

Aggravated damages

119. The Tribunal considered the question of aggravated damages as a sub-heading of injury to feelings. The Tribunal took into account all the guidance within Vento and Shaw, particularly those points set out above. We were mindful that aggravated damages were compensatory; this Tribunal did not, in any event, allow itself to treat the award of aggravated damages as punitive. We recognised that the Claimant should not be over-compensated, and that there should not be double-recovery despite the line between injury to feelings and aggravated damages being a blurred one. We concluded that the figure claimed by the Claimant - £29,000 – suggested that she had taken an element of double recovery into account.

120. However, this Tribunal found that there were a number of factors in this case which did aggravate and increase the injury to the Claimant's feelings. In particular:

120.1. The manner of the unlawful treatment of the Claimant was relevant. The treatment was oppressive. It was designed to seriously damage – if not to destroy - her career and her credibility as a Compliance professional and, particularly as time went on, to deter her from pursuing her Claim. The Respondent could not complain that the outcome of this treatment was that the Claimant suffered aggravated injury to her feelings in those circumstances.

120.2. The purpose of the grievance process was subverted. The grievance investigation report was used as a tool to attack the Claimant's

professional standing as a Compliance professional. This went beyond the normal injury that she might have suffered from the detriment identified; it aggravated the injury to her feelings.

120.3. The manner of the unlawful treatment was also malicious. For example, allegations were made to the FCA which had no basis in fact.

120.4. The manner of the unlawful treatment was high-handed. It included misleading public bodies, who were Regulators whose role was to ensure that the law in respect of compliance with the system of financial regulation was complied with. It included misleading others in the Claimant's industry. The Claimant gave evidence that these matters magnified the injury to her feelings.

120.5. The Tribunal found that motive was a relevant factor. The Respondent's actions were vindictive and were intended to wound the Claimant. The Tribunal noted that it was one thing for a discriminator to subject a claimant to various detriments and not to apologise; but quite another for the discriminator to do several acts to prevent a claimant pursuing their legal rights. In this case, we found that the Respondent's approach to this litigation, with the use of tools to deter the enforcement of her rights (such as the unlawful retention of sensitive personal data and the threat of groundless High Court litigation), magnified the Claimant's injury to feelings.

120.6. Moreover, as part of a concerted plan against the Claimant by the Respondent, former colleagues of the Claimant gave evidence against her which was untrue in certain respects. This undermined her confidence and promoted a feeling of powerlessness. The Claimant came to find that her beliefs about such a plan were in fact correct, not least by the evidence given.

120.7. The Respondent's conduct after the specific incidents of unlawful treatment and during the course of this litigation are relevant. The Tribunal decided that, in particular, the failures to comply with its legal obligations under the Data Protection legislation were relevant. It is not a question of punishing the Respondent for showing a disregard for the law, which is not a matter for this Tribunal, nor of over-compensating by double recovery through aggravated damages. But it is important that cases are dealt with on their own facts, which is a point made in Shaw. On the particular facts in this case, this disregard for the Claimant's data protection legal rights was deliberate and it extended over a very long period. This deliberate disregard caused severe aggravation of the injury to her feelings because of the nature of the highly sensitive personal material retained. The retention of it severely undermined the Claimant's confidence. It triggered recollections of the violation of her dignity. It led the Claimant, in her own words, to feel "hopelessness" and "despair".

120.8. Moreover, the Claimant realised that the Respondent was retaining the sensitive personal data in order to deter her from pursuing her legal rights; despite the Employment Judge at a Preliminary Hearing questioning how

this data could be retained, the Respondent refused to return it or destroy it. This continued despite the Regulator warning the Respondent that its actions were likely to be unlawful, and then finding that they were unlawful.

121. Having considered all the above, and decided that the injury to feelings award should include an additional sum for aggravated damages, the Tribunal asked itself how this sum should be calculated. We asked ourselves, as suggested in Shaw at paragraph 24, what additional distress and upset was caused to this particular Claimant by the aggravating features in question.

122. We recognised that the Court in Shaw had referred to what might be considered conventional figures, having been shown a table by Counsel setting out that the majority of the aggravated damages awards in Harvey on *Industrial Relations and Employment Law* ranged from £5,000-£7,500. Ms. Mayhew argued that any such award in this case should be limited to £5,000.

123. However, having considered carefully the case of Shaw, the Tribunal noted that there was no authority which prevented a Tribunal awarding more than £7,500 for aggravated damages. This is not surprising: Shaw makes the point that each case must be determined on its own facts.

124. The Tribunal considered that an uplift of £10,000 would reflect the additional upset and injury caused by the aggravating features of this case. Our reasons for making this award may be summarised as follows:

124.1. The Tribunal considered that the additional distress and upset caused to the Claimant in this particular case was very substantial indeed. In the experience of this Tribunal, we considered that this was an exceptional case.

124.2. The case of Shaw – and the awards that the Court in that case was referred to – occurred some years ago. Shaw was heard by the EAT in 2011. The principle which is now well-established in the authorities and the Presidential Guidance is that the Vento brackets of awards for injury to feelings should be increased annually to reflect inflation. Given that aggravated damages are part of the injury to feelings award in some cases, it would be inconsistent for there to be conventional figures for aggravated damages which remained unchanged. Allowing for inflation, by the end of 2019, £7500 in 2011 was worth more than £9,200.

124.3. Standing back, we noted that the award for aggravated damages was one-third of the injury to feelings award. We noted that the Court of Appeal in Shaw had set aggravated damages at one-third of the injury to feelings award in that case, so our conclusion on the quantum of aggravated damages pointed to £10,000 being within the range of permissible awards.

125. In order to satisfy ourselves that the total figure for injury to feelings, including this uplift for aggravated damages, was proportionate, we took a step back and considered

whether the total sum of £40,000 for injury to feelings amounted to over-compensation or double-recovery.

126. We concluded that it did not over-compensate the Claimant for the injury to feelings suffered, gravely aggravated as that injury was. As we noted above, the uplift for aggravated damages to the basic injury to feelings award was one third (33%). We considered that a reasonable member of the Public would not consider that unwarranted or excessive in the circumstances. The total award for injury to feelings (including aggravated damages) was around 30-40% of the Claimant's remuneration when working for the Respondent. We noted the total award of £40,000 for injury to feelings was still within the upper bracket of Vento, despite all the aggravating features in this case.

127. We decided that an award at this level would serve to increase public confidence in the anti-discrimination and public interest disclosure legislation, not to diminish it. It would demonstrate to the Public that employees were to be protected from victimisation both during employment and after dismissal. We concluded that members of the Public in 2020, learning the findings of fact and the evidence in this case, would not be surprised either that that Claimant's injury to feelings had been exacerbated, nor that the total sum awarded was £40,000.

Issue 4: Stigma loss?

128. In submissions, Ms. Mayhew referred to various parts of the judgment in Chagger, which we have summarised above. The Respondent made four central arguments:

128.1. The loss was too remote. The Respondent relied on an argument that it would be unlawful for a future employer not to employ the Claimant if a reason was this litigation; and that the Respondent was not liable for that loss.

128.2. It was too speculative to make any award. At paragraph 99 of Chagger, the Court had provided guidance of critical relevance to this case. In Chagger, the loss had crystallised (or, perhaps, Ms. Mayhew meant that the loss could be crystallised). The Claimant and the expert had engaged in a whole new level of speculation, asserting that stigma attached to present transition to a more senior or better paid role (in investment banking). The Claimant would not be on the job market for such a role, with her law degree, until late 2021; it was difficult or impossible to assess market conditions and the Claimant's individual position at that time.

128.3. Ms. Mayhew drew attention to the need for evidence of stigma loss. She drew attention to differences in the facts between Chagger and the Claimant's case. In Chagger, the claimant had made 111 direct applications and been registered with agencies (so had been considered for more roles) and he had decided to re-train as a teacher; whereas in this case, the Claimant's case was based on assertion, there was no evidence of redundancy, and she was still working in Compliance, and had made an "unfiltered" set of around 70 applications, of which around 31 at least were more junior.

128.4. If the stigma loss was found proved, only a modest sum should be awarded to compensate for future employment difficulties.

129. Ms. Mayhew argued that awarding stigma loss in this case would be saying that the employee could bring a stigma loss claim as a matter of principle for future indeterminate loss, caused by third parties as yet unknown. She did accept though that the outcome in certain cases was fact-sensitive; but the Court in Chagger had stated, in any event, that it was uncommon for an employee to be virtually unemployable in their chosen field.

130. Ms. Mayhew made criticism of the expert evidence in her written submissions. It relied on no more than anecdote, not market or analytical data.

131. The Tribunal reminded itself that the purpose of considering authorities is to apply the principles of law that they set out, not to compare one set of facts with another and to see if they are the same or sufficiently similar to those in the case before us. Therefore, the facts in Chagger were not to be treated as equivalent to legal principle. With this, and all the above law and submissions in mind, we reached the following conclusions.

132. The Tribunal was not impressed with the argument that such a loss would be too speculative. The Employment Tribunal is often called upon to assess the chance of re-employment, at what salary, and at what point in the future. We applied the point made in Wardle: it is self-serving for an employer to contend that because the exercise is speculative, the employee should be left with smaller compensation than the loss that she actually suffers. Tribunals need to be able to take a robust and sensible approach to compensation.

133. The Tribunal did not accept that the loss would be too remote. As explained in Wardle the chain of causation is not broken if other employers refuse to employ. The stigma loss has been caused by the first employer; there would be no loss at all if later prospective employers did not react to the stigma which the first employer made inevitable by their actions.

134. Moreover, the Tribunal does not read the judgment in Chagger as creating a hurdle of "exceptionality" before a claim for stigma loss can succeed. Exceptionality is an outcome, not a legal test required to be met when assessing general damages in this context. The point made in Chagger is that the sound evidential basis for finding the existence of stigma loss may well be rare. This is why we rejected the Respondent's argument based on policy grounds; the Tribunal has not sought to widen the principles of stigma loss, but only to apply them.

135. As we understand the principles set out in Chagger, as a matter of law, there can be cases where an employee has obtained re-employment and yet can prove stigma loss. This is not ruled out in Chagger (which focussed on stigma loss as an aspect of loss of future earnings, which was in issue in that case), nor in Ur-Rehman (in which the claimant had, in contrast, already obtained re-employment for a period). In Chagger, the Court of Appeal expressly addressed the point of principle by using the example of the employee who has suffered no loss of earnings at all because they would have been dismissed fairly in any event. We consider that example is no different in principle from the situation in the present case.

136. Accordingly, applying Chagger (particularly paragraph 99 of the judgment), as a matter of law, the Claimant could in principle, and subject to proof, recover stigma damages.
137. However, on the totality of the evidence and facts in this case, the Tribunal concluded that the Claimant in this case had not proved stigma loss. In short, the sound evidential basis required to prove this head of loss was not established. Our reasons are as follows.

138. Fundamentally, the inference to be drawn from the primary facts was that the Claimant had not suffered any stigma loss. We repeat the findings of fact at paragraphs 52-58 above. Secondly, the Tribunal did not find that the expert opinion evidence carried much weight, when set alongside the primary facts.

Analysis of the expert evidence

139. The expert evidence of Mr. Baxter might be seen as the Claimant's trump card. However, it is important for the Tribunal to take a step back, and to recognise that the report is opinion evidence (albeit expert opinion), given at a particular point in time. The weight such opinion carries must be balanced against the facts found by the Tribunal and any inferences to be drawn from them. The Tribunal carried out such a balancing exercise.

140. In essence, the facts showed that, over two years after leaving the Respondent's employment, the Claimant was in a new role, which held more responsibility, where her current employer had subjected her to no detriment at all, and where she was earning more money. Moreover, the Claimant had succeeded in complaints of whistleblowing detriment and victimisation; from our findings of fact, her integrity as a Compliance professional was intact.

141. The Tribunal accepted several of Ms. Mayhew's criticisms of the expert evidence. We had difficulty in giving much, if any, weight to certain key statements of opinion evidence which lacked any methodology or empirical evidence base. Mr. Baxter's opinion was based on not much more than anecdotal evidence, even if he was drawing on experience.

142. For example, the opinion that it was "*extremely unlikely that C will become the preferred candidate after taking into account the stigma resulting from her Employment Tribunal claim…"* was not the product of any analysis of data or recruitment industry evidence, academic study nor an inference from any statistics. There was no objective evidence to support it. We did not find this point to be established.

143. Moreover, on this point, Mr. Baxter accepted that whether the Claimant was appointed to Compliance posts applied for would be a matter of individual judgment for the employer at the time, and that recruiters would have no difficulty in putting the Claimant forward for positions. We found these points somewhat at odds with his pessimistic opinions about the Claimant's future employment prospects in Compliance, including that she had only a 0-5% chance of appointment for a role for which she was otherwise suitable. These points (very low prospect of success, yet very high prospect of being put forward for a role) were also inherently inconsistent; a recruitment consultancy would find it unattractive to put the Claimant forward, if there was a very small chance of commission at the end of it and a larger risk of damage to their own reputation.

144. Furthermore, Mr. Baxter's opinion did not take into account that there may be at least a category or section of employers who, because of the financial crisis of 2008 and the criticisms of numerous firms and banks, could find a candidate attractive where she had taken action as a Compliance Manager to uphold a company's procedures, and therefore ensure regulatory compliance.

145. The Tribunal's experience led it to consider that the type of future employer that the Claimant had in mind (demonstrated in her position statement) – including reputable investment banks – may well not be put off from recruiting her by the fact that she had brought a successful Employment Tribunal claim. There are legal obligations on Compliance officers to raise issues of non-compliance. This is what the Claimant did in her grievance. We had difficulty in understanding why that would be so much more negative than positive for the Claimant, in applications for Compliance roles, given her experience in a role carrying more responsibility since leaving the Respondent.

146. The evidence of the Claimant was that Compliance was a rapidly evolving area, which we accepted. From the evidence, and from experience in hearing other cases at this Tribunal, we recognised that there were legal obligations imposed on financial firms and institutions imposing the requirement to comply with the system of financial regulation. The penalties for non-compliance include criminal sanctions. Therefore, we could not accept the blanket approach relied on by Mr. Baxter that, in general, financial firms and banks would not want the Claimant as a preferred candidate.

147. Indeed, the Tribunal accepted one criticism of the expert's evidence which was that he adopted a blanket approach to the impact of differing levels of seniority and different sectors within financial institutions, in terms of the attractiveness of the Claimant as a candidate: see response 6 to the Respondent's questions.

148. In addition, the Tribunal attached little weight to Mr. Baxter's opinion that the Claimant's percentage chance of appointment to a suitable Compliance role with the benefit of the Tribunal's liability decision was only 0-5%. In contrast, it appeared that Mr. Baxter's opinion was that this chance would be 0% (see response 5, p.331), if the Claim had been unsuccessful in this Claim. In the absence of any methodology nor any empirical evidence for those conclusions, the Tribunal found it inherently unlikely that our Judgment and Reasons on liability had hardly made any difference to the Claimant's prospects of re-employment, if she found herself on the job market, particularly when viewed with the fact that, since leaving the Respondent, she had held an apparently more senior and better paid position for over two years.

149. The Tribunal considered the opinion evidence that the Claimant would never remove the stigma arising from a Tribunal Claim. If correct, this could have a dramatic effect on the Claimant's career prospects. However, the expert made no attempt to explain or justify this opinion with reference to empirical or objective evidence. Secondly, the Tribunal recognised that there is a difference between stigma loss and events which form part of an applicant's background which can be set in context, after a period of time in other roles, and where performance remains successful. We decided to give very little weight to Mr. Baxter's opinion on this point, given that he appeared to give no particular weight to the fact that the Claimant had been appointed to a new role which she remained in two years later, holding more responsibility.

150. In addition, the Tribunal attached little weight to the opinion that it was "*virtually impossible*" for the Claimant to progress her career both within the CFD industry or within a lower/middle or top tier investment bank, for the rest of her career. In the absence of any empirical or some form of quantitative evidence for that conclusion, which looked at the effect of Employment Tribunal (or other) claims made by Compliance professionals (or other professionals linked to Compliance) on promotion or transitioning to a new type of business, the Tribunal found that this opinion evidence was not convincing.

151. The Tribunal noted that at the time that the expert was instructed, he was not provided with evidence of the roles applied for by the Claimant which formed part of the evidence in the Bundle. He could neither comment on those roles, nor the quality of the application made, nor take into account those rejections.

Summary

152. We concluded that the expert evidence did not prove that the Claimant had suffered stigma loss, whether taken alone or when weighed with the evidence of the Claimant and Mr. Friend.

153. In summary, we concluded that the Claimant had suffered no stigma loss. Accordingly, the Tribunal did not need to consider how any such loss should be quantified in this case.

Issue 5: Personal Injury

154. Recognising that the assessment of damages for psychiatric injury is a question of fact to be determined by the tribunal, we considered the relevant findings of fact set out above.

155. Injury to feelings and psychiatric injury are distinct. This Tribunal understood and considered the risk of double recovery. We sought to separate out the evidence of the injury to feelings suffered, and the pain and humiliation felt by the Claimant, from the evidence of personal injury, which we found to show exacerbation of her symptoms caused by the unlawful treatment. Our forensic examination of the relevant evidence is demonstrated by the above findings of fact.

156. The Tribunal considered whether the harm was 'divisible' or 'indivisible', directing ourselves to the law summarised above. We accepted the Respondent's argument that, in this case, the evidence and the findings showed that the harm was divisible because the Claimant was injured prior to the first proven act of victimisation or detriment. Therefore, we looked at our findings of fact in respect of the exacerbation of that injury, and sought to award damages only in respect of that exacerbation. The Claimant argued that the award should be £30,000; but we concluded that an award in this sum would, in effect, be awarding damages for more than the exacerbation to the injury.

157. Given the guidance in Armitage, the Tribunal directed itself to the relevant Guidelines for the Assessment of Damages in Personal Injury Cases. We concluded that an award for pain suffering and loss of amenity in the Moderate bracket was appropriate, for the following reasons:

157.1. The Claimant's symptoms could not realistically be categorised as temporary in sense of short-term. An award in the Less Severe category would not reflect the symptoms of the exacerbation suffered by the Claimant over a significant period. We did not accept the Respondent's submissions that the award should be in the Less Severe (and lowest) category of the Guidelines.

157.2. The symptoms had a substantial effect on the Claimant's ability to cope with life and education, and, to a lesser extent, her work.

157.3. The severe effect of those symptoms lasted several months, gradually improving. By November 2018, there was significant improvement, which has continued over time up to the date of this hearing. There had been a marked improvement to the date of the remedy hearing, but the symptoms had not completely resolved.

157.4. The Tribunal concluded that the Claimant was not as injured as many, less resilient, claimants might have been. She was perhaps fortunate to have a robust character who, despite her symptoms, was able to persevere and continue with work and daily activities.

157.5. The Tribunal concluded that the prognosis for the symptoms attributable to the unlawful treatment was good, for the reasons that we have explained in the findings of fact.

157.6. The Moderately Severe category of awards is suggested by the Guidelines to include cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment. Given our findings, the award for personal injury in this case does not fall within that category.

158. The Tribunal took into account the relevant findings of fact, the question of divisibility, the need to avoid double-recovery, the Claimant's recovery and prognosis, the submissions, and the points made in the above paragraph. We concluded that the appropriate award of general damages for personal injury was £7,500.

159. The Tribunal cross-checked whether the total award of compensation (including injury to feelings) was excessive or disproportionate. We noted that this award for personal injury was at the lower end of the range of awards within the Moderate category. The Tribunal concluded that the award of £7,500 was proportionate to the findings of fact made and the exacerbation suffered by the Claimant.

<u>Issue 6: Statutory uplift for failure to comply with the ACAS Code of Practice 1 on disciplinary and grievance procedures</u>

Should an uplift be applied to the awards for public interest disclosure detriment or victimisation?

160. In respect of whether the Tribunal should determine that an uplift should be made, and if so, in what amount, in summary, the Respondent argued that:

160.1. the findings of fact in support of the findings of detriment in respect of the complaints under section 47B ERA and victimisation under section 27 EQA did not relate to identifiable breaches of the Code, but to the quality of the decision-making;

160.2. although the Tribunal concluded that there was a failure to genuinely investigate the Claimant's grievance, this was already compensated for by the damages to be awarded in respect of the associated detriment, and was not a breach of the Code;

160.3. the Claimant's complaints in relation to the grievance were limited to the appointment of the investigator and refusing to delay the grievance process;

160.4. an uplift under section 207A TULRCA cannot be supported by a general finding that the Respondent handled the grievance badly, in terms of poor decision-making; clear findings of fact were required that an identifiable section of the Code was breached;

160.5. any breach was not unreasonable;

160.6. it would not be just and equitable to increase any award;

160.7. any uplift should be modest.

161. We have considered those arguments in the course of analysing what, if any, uplift should be made, by asking ourselves the questions suggested in Laing.

Does the ACAS Code apply?

162. The Claimant submitted a grievance on 15 December 2017. The contents of the grievance are described at paragraphs 160-172 of the Judgment and Reasons on liability. Therefore, the Code was engaged.

163. At paragraphs 26b and 27 of its submissions, the Respondent argues that the stages of the grievance which took place whilst the Claimant was an employee were either in compliance with the Code or not covered by it; and it argues that the Code did not apply after her resignation on 2 February 2018.

164. The Tribunal rejected the argument that the Code did not apply after 2 February 2018. Although in Lund, the EAT were considering a dispute about the application of the Code in a disciplinary situation, the Tribunal directed itself that the same point applies in grievance situations: if the employer treats a complaint as a grievance, it is the initiation of the grievance process which determines whether the Code is engaged. It was immaterial that the Claimant resigned on 2 February 2018. The Tribunal considered that it would undermine the purpose behind the statutory provisions if an employer could ignore the grievance of an employee whose employment had terminated, not least because it might be a reasonably common occurrence for a grievance to be lodged before resignation or dismissal, but also because such an approach would favour the employer who deliberately breaches the implied term of trust and confidence after receipt of the grievance in order to cause a resignation.

Has the Respondent failed to comply with the Code in any respect?

165. In respect of the first of the Respondent's arguments listed above (no identifiable breaches of the Code found by the Tribunal), the Respondent cited part of paragraph 65 in Qu. It is more helpful to consider the whole of that paragraph to view the passage cited in its proper context (and with our emphasis added):

> "*65. The claim in this case was for unfair and unlawful dismissal arising out of the Respondent's handling of the PIP process conducted over a period of 13 months by Mr Lee and other managers, and to which the **ACAS Codes of Practice** on disciplinary and grievance investigations applied. In addition, the Employment Tribunal found that the Claimant had been unlawfully victimised in other respects about which he complained through various grievance processes. Again, the **ACAS Code** applied to those investigations. There are findings as set out above (and elsewhere in the Liability Judgment) that are directly relevant to minimum procedural standards specified in the **ACAS Code** dealing with disciplinary action and grievance investigations. For example, in relation to disciplinary matters the Code requires an employer to establish the fact of the case, inform the employee of the problem, hold a meeting with the employee at which the employee may be accompanied, decide on appropriate action, which should be communicated to the employee in writing, and give the employee an opportunity to appeal. In relation to grievance issues the Code provides for a formal meeting to be held without unreasonable delay after a grievance is lodged; for an opportunity by the employee to explain their grievance and how it ought to be resolved; for a proper investigation to establish the facts; and where the employee feels that the grievance has not been satisfactorily resolved, the opportunity to appeal. Read fairly, it seems to me that the Tribunal's findings in the Liability Judgment do sufficiently identify the provisions of the **ACAS Code** with which the Respondent failed to comply and do set out adequately the basis on which the Employment Tribunal concluded that the Respondent had failed to comply with those provisions. These are not findings based on any assessment of the quality of the Respondent's decision-making. They are findings about failings in the process that was adopted, and importantly include an implicit finding that the Claimant's grievances in relation to the PIP process leading to his dismissal were not considered in good faith. That latter finding is itself a finding of breach and not an assessment of the quality of the Respondent's decision-making (see if necessary, De Souza (above) at paragraph 54).*"

166. The Tribunal in the present case found, in effect, that the grievance was not dealt with in good faith; it was not a question of the quality of the decision-making or the process used. The independence of Mr. Gordon was compromised, there was no genuine investigation, and, in fact, the grievance report was a tool for the Respondent to attack the credibility of the Claimant: see paragraphs 60-65 and 148-149 of the Liability Judgment.

167. We concluded that findings of fact in our Judgment on liability did sufficiently identify the provisions of the Code that were breached. We agree with and adopt what was said by Simler J in Qu: the Code implicitly requires, where investigation is necessary (and it must have been deemed necessary in this case, because the Respondent purported to carry one out), *"a proper investigation to establish the facts"*. ACAS, and probably both employer and employee representative bodies, would be surprised with the propositions put forward by the Respondent in this respect. The Code is a tool for the

spectrum of people engaged in employment relationships, not a technical piece of statutory drafting.

168. In respect of the third of the Respondent's arguments, the Respondent contended that the Claimant's complaints in respect of the breach of the grievance part of the Code were limited only to those two matters stated at Issue 23(4) and (5) in the List of Issues. The Tribunal did not accept that it was strictly limited to the wording of the list of issues in this respect.

169. Primarily, the Claimant had alleged as a substantive complaint of public interest disclosure detriment (issue 7(9)) that her grievance was not properly investigated.

170. It is true that this substantive complaint is not also repeated at paragraph 23 of the List of Issues (which deals with the ACAS Code specifically). But the statutory questions are those identified by Lady Smith in the Laing case (relied upon by the Respondent). These questions do not include whether a claimant has correctly set out the List of Issues.

171. Moreover, the Respondent's argument in this respect is unattractive. The reality is that employees are sometimes dismissed before a grievance is determined (as in this case) and may have no way of knowing what happened in the conduct of a grievance, particularly in a case of this nature where there was a concerted, secret, plan against the Claimant.

172. However, the findings of fact and conclusions in the Liability Judgment set out fully and with clarity our decisions about the grievance process. It is obvious from those findings and conclusions that we found that the grievance process was not carried out in good faith. The Respondent has had the opportunity to appeal the Liability Judgment and an opportunity to make submissions at the remedy hearing about those findings.

173. In any event, issue 23(4) states that one failure to comply with the ACAS Code was "*the appointment of the grievance investigator*". Here, if there is fault, it lies in the summary nature of this part of the List of Issues; but the meaning of this line was well-known to the parties and the Tribunal at the time of the liability hearing. It was part of the Claimant's case that the investigator, Mr. Gordon, was not independent: see paragraph 88 of the witness statement of the Claimant for the liability hearing.

174. The Respondent contends that there was no breach of paragraph 32 of the Code; but it is implicit in paragraph 32, when read with the rest of the relevant parts of the Code (specifically paragraphs 2 and 4) that the investigating manager should be independent and act fairly.

175. Paragraph 4 of the Code requires a grievance process to be dealt with fairly. The overarching breach in this case was that the grievance was dealt with in a totally unfair way and the conclusions were tainted by lack of independence or fairness by the investigating officer. This was contrary to paragraphs 4 and 32 of the Code, particularly when read with the emphasis on promoting "Fairness and transparency" in Paragraph 2 of the Code. In particular, there was a failure to genuinely investigate the Claimant's grievance: see our conclusions under issue 7(9) of the Reasons for the liability judgment (at paragraph 382) and the findings of fact referred to therein. The grievance manager did not carry out an impartial or necessary investigation: see paragraphs 148-149 and 104-

105 of the findings of fact of the Liability Judgment. The approach adopted was wholly inconsistent with the purpose of a grievance investigation.

176. In short, the findings of fact in our Judgment on liability did sufficiently identify the provisions of the Code that were breached. It was not necessary to engage in a "tick-box exercise" in the course of providing our findings of fact, nor list by number each provision of the Code found to be breached.

Was that failure (or failures) unreasonable?

177. The Tribunal were satisfied that these failures to comply with the Code were unreasonable. The Respondent had the resources to carry out a proper investigation and to deal with the grievance fairly; but it chose not to do so. The Respondent did not attempt a proper investigation into the issues of breaches of its Compliance procedures and financial regulation provisions, nor into allegations of sex discrimination. Given the gravity of those allegations, this was unreasonable in view of the detail of those allegations and the fact that they were made by its own Head of Compliance.

Was it just and equitable in all the circumstances to increase the award?

178. The Tribunal concluded that it was just and equitable in all the circumstances to increase the compensation flowing from the detriments found to be caused by protected acts and public interest disclosures.

179. In respect of the second of the Respondent's arguments (at paragraph 160.2 above), the Tribunal did not accept that, because part of the general damages awarded was in respect of the failure to genuinely investigate the grievance, no statutory uplift could be awarded for that alleged breach. The Respondent's argument is either wrong in principle or does not apply on the facts in this case.

180. On the Respondent's argument, where a substantive complaint of detriment amounted to a breach of the Code, there could never be a statutory uplift. Such a limitation is not mentioned in the statutory provisions, which would be a surprising omission if it were the law. Moreover, such a limitation would be inconsistent with the statutory purposes behind the uplift provisions – because it might well result in the more flagrant breaches, which were pleaded as acts of detriment, not attracting any uplift.

181. In any event, on the facts in this case, the Tribunal found that the breaches of the Code (of paragraphs 4 and 32) were very serious ones. The overarching breach was that the grievance process was wholly unfair; it was not a genuine exercise and its purpose was subverted. In particular:

> 181.1. There was a failure to genuinely investigate the Claimant's grievance: see our conclusions under issue 7(9) of the Reasons for the liability judgment (at paragraph 382) and the findings of fact referred to therein. The grievance manager did not carry out an impartial or necessary investigation: see paragraphs 148-149 and 104-105 of the findings of fact of the liability judgment. The approach adopted was wholly inconsistent with the purpose of a grievance investigation.

181.2. The grievance process was not carried out in good faith. Despite the public interest disclosures contained within it (which were relevant to the clients of the Respondent, female staff of the Respondent, and the wider interest of the public), the grievance investigation report was used as a tool, to attack the Claimant's credibility as a Compliance professional.

182. There were serious breaches of paragraphs 4 and 32 of the Code, and the nature of the breaches taken as a whole were grave.

183. The Tribunal concluded that the uplift should be applied to the award for injury to feelings (including aggravated damages) and personal injury. Those elements of the compensation are directly and substantially related to the complaint in respect of which there have been breaches of the Code.

By what percentage should the award be increased?

184. At first, the Tribunal was minded to award an uplift of 25% in respect of the compensation awarded under section 47B ERA and section 27 EQA given the lack of mitigation for the Respondent's unreasonable failure to comply with the Code. However, having considered the appropriate legal principles and all the submissions, we concluded that the appropriate uplift should be 20% for the following reasons:

184.1. There was far more than mere breach of the grievance process. The purpose of the grievance process was subverted as we have explained. Thus, the nature and gravity of the breaches were very serious.

184.2. The Respondent put its own desire to attack the Claimant for making the grievance containing the protected disclosures and protected acts found proved ahead of any consideration of compliance with procedure or fairness. The treatment of her grievance was designed to damage the Claimant's standing in the industry; it went beyond merely protecting the interests of the Respondent company.

184.3. We noted that, although the unfair treatment of the Claimant's grievance was only one of the detriments found proved, it was a substantial one, and it had ongoing consequences; because had the grievance been carried out properly, the treatment of the Claimant thereafter may well have been more restrained and the degree of injury may have been reduced.

184.4. An award of aggravated damages had been made. We noted that one reason for the award of aggravated damages was the treatment of the Claimant's grievance. Applying Otshudi, we considered that there would be double-counting of matters that are relevant to both aggravated damages and the ACAS uplift when making both awards if the maximum uplift were awarded.

184.5. Having reviewed the relevant statutory provisions, we considered that the Tribunal had the power to make differential awards in respect of the uplift to the compensatory award for unfair dismissal, and the uplift to the compensation awarded for discrimination and detriment. Section 207A(2) ERA states:

> *"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that:*
> *… the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies;"*
>
> There is no statutory restriction to a single "matter". This provision envisages that the proceedings may refer to a number of matters.

185. The Tribunal has taken into account the impact of the uplift on the overall award. We have considered the passage from Wardle, at paragraph 29, per Elias LJ, who was considering a case where an uplift of 50% had been awarded:

> *"I do not suggest that these are entirely analogous situations, but I think that, save in very exceptional cases, most members of the public would view with some concern additional payments following an uplift for purely procedural failings which exceeded the maximum payable for injured feelings."*

186. However, in this case, this guidance is of limited assistance because:

186.1. The uplift here is not for pure procedural failings. There was no genuine grievance investigation. The process was not merely unfair; its purpose was subverted into an attack on the Claimant.

186.2. The sums to be awarded following the uplift come nowhere near exceeding the award for injury to feelings.

187. The provisions within section 207A TULRCA have the effect of being a statutory penalty of further compensation, for unreasonable non-compliance with the Code. This Tribunal, however, took a step back and considered the overall compensation after this uplift was applied. We noted that this uplift added a further £9,500 to a general damages award of £47,500. We considered whether the Public would consider this uplift, and the total figure, to be disproportionate or excessive.

188. Again, the Tribunal concluded that the Public would consider that this uplift was proportionate compensation given the serious breaches of the Code. It was an award which was slightly lower than that awarded for aggravated damages, amounted to less than 25% of the total award of injury to feelings (including aggravated damages), and this uplift award is not significantly higher than the award for personal injury.

189. The Public would expect something as important as an ACAS Code of Practice, which is formulated for the benefit of both employers and employee to assist them to resolve disputes fairly, to be complied with. We concluded that they would be surprised, if not shocked, if an employer could ignore the Code and behave as the employer had in this case yet avoid a substantial uplift.

The "totality principle"

190. The Tribunal took into account the need to look at the totality of the compensation, and whether it was proportionate or involved over-compensation.

191. The Tribunal concluded that the Public would retain its confidence in the anti-discrimination legislation and the Employment Tribunal if an award of £57,000 was made for the complaints proved under section 47B ERA and section 27 EQA.

192. The Tribunal concluded that the Public would consider the overall award of compensation to be proportionate compensation given the nature and gravity of the unlawful conduct, the personal injury suffered because of it, the high degree of aggravating features, and the seriousness of the breaches of the Code.

193. We considered that the Public would consider that this case demonstrated the need for employees to be protected from malicious acts against them by a former employer. The Respondent knew what it was doing in its actions towards the Claimant; the Public would realise that it had made the stakes very high for the Claimant, such as by a false complaint to the FCA (which was in effect alleging a criminal offence). A reasonable member of the Public would conclude that the Respondent had the resources to handle the Claimant's grievance properly and fairly, but it chose to take a different course; and that it could hardly complain now, after a vindictive campaign against the Claimant, about an award of £57,000 compensation for the successful complaints of detriments and the further compensation for unfair dismissal.

Interest award

194. A tribunal is able to award interest on awards of compensation made in discrimination claims brought under s124(2)(b) EQA, to compensate for the fact that compensation has been awarded after the relevant loss has been suffered (see s139 EQA and Employment Tribunal (IADC) Regs 1996).

195. The current rate of interest which applies is 8% per annum.

196. Interest due on the injury to feelings award (including statutory uplift) is calculated as prescribed in Regulation 6(1)(a) ET (IADC) Regs. In this case, there was a series of acts of discrimination commencing on 20 December 2017 which each contributed to the injury to feelings. Taking a rough, ready and pragmatic approach, the Tribunal has chosen the mid-point between the first act of victimisation and the last act of victimisation identified in the Judgment (13 April 2018) as the starting point for the calculation of interest, whilst recognising, of course, that certain acts of discrimination concerning the Claimant's personal data continued over time. The starting day is therefore 57 days after 20 December 2017, being 15 February 2018.

15 February 2018 to 22 May 2020 = 828 days/365 = 2.2684 years

£49,500 x 2.2684 x 0.08 = £8,983.23

197. Interest on the award (including statutory uplift) for the psychiatric injury runs from the date half way between the discriminatory act and the calculation date: see Regulation 6(1)(b) ET (IADC) Regs. We have taken the midpoint as 15 February 2018. This interest is calculated as follows:

£9000 x 1.1342 x 0.08 = £816.62

198. The total award for interest is therefore £9,799.85.

Grossing Up?

199. The Respondent accepted that there should be grossing up of that part of the Claimant's taxable losses in excess of £30,000.

200. However, in this case, only the award for unfair dismissal is a termination payment; the award for injury to feelings (including aggravated damages and the statutory uplift) arose due to discrimination during and after employment, but was not connected to the termination of employment in any way. Therefore, no grossing up is required: the Claimant is not subject to tax on either the award for unfair dismissal (which is below £30,000) nor the award for victimisation and public interest disclosure detriments (which is not connected to termination of her employment).

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201. Ms. Mayhew's submissions asserted that the Respondent's behaviour in this case did not cross the "*threshold*" (as she put it) of "*deliberate, malicious or negligent behaviour*". Her submissions lacked any justification from the facts found by the Tribunal for this statement.

202. The Tribunal considered First Great Western v Waiyego. In that case, the EAT did not conclude that there was a threshold of "*deliberate, malicious or negligent behaviour*". In Waiyego, the EAT considered that, whatever the threshold, the employer's conduct did not come close to it. We noted, however, that the EAT directed itself to the explanatory notes accompanying the new provision.

203. In contrast to Waiyego, the Tribunal in this case has concluded that there were repeated breaches of employment rights, and that those breaches were, generally, deliberate. We concluded that there were aggravating features to the breaches of the Claimant's employment rights. This is apparent from the conclusions in respect of liability.

204. The aggravating features are also demonstrated in our conclusions in this set of Reasons, particularly those in respect of the aggravated damages part of the injury to feelings award.

205. It is to be noted that the aggravating features were not trivial; they were substantial. They included malicious and false allegations (including to the FCA), a deliberate plan to damage the Claimant's credibility and remove the Claimant from her post, serious breaches of the ACAS Code and deliberately ignoring basic principles of fairness. The way in which the grievance process was turned into a tool in an attempt to damage the Claimant is a further example of deliberate and malicious behaviour.

206. We concluded that the Tribunal should impose a financial penalty of £5,000 for the following reasons:

206.1. The nature, gravity, and the number, of the aggravating features put this case at the top end of the range of potential penalties.

206.2. The Respondent had paid no regard whatsoever to the protection conferred by the public interest disclosure legislation. Moreover, the Respondent had no regard to some basic tenets of the anti-discrimination

legislation which have been in force for many years. In fact, the Respondent had gone out of its way not just to subject the Claimant to detriment, but to try to irreparably damage her career for raising matters of public interest and sex discrimination.

206.3. The Respondent paid no regard whatsoever to the Claimant's data protection rights. It deliberately ignored the Data Protection Act, despite being told that it was acting unlawfully by the Claimant and the ICO and warned that it likely to be doing so by the Tribunal. This non-compliance was used as a tool against the Claimant, to deter her from pursuing her rights as an employee. The Tribunal found that the Respondent's actions in this regard indicated that the award in this case had to be towards the very top of the range of awards in order to demonstrate that no company can consider itself above the law, nor seek to hide its own wrong-doing by use of unlawful means.

206.4. The Tribunal considered whether an order of the maximum sum of £5000 was disproportionate or unreasonable when set against the compensation already awarded. The Tribunal was satisfied that it was not disproportionate. A reasonable member of the Public who knew of this penalty provision would be very concerned if an award lower than the maximum possible award was made in this case, given the numerous breaches of employment law and the cynical conduct by this employer after the Claimant filed her grievance in December 2017. We concluded that a reasonable member of the Public would want to deter other employers behaving in this way, in order to reduce deliberate and repeated breaches of employment law in the future.

206.5. The Respondent had not suggested or provided any evidence that it did not have the means to pay this award. The evidence before us led to the inference that it could pay this award. Further, we note that the liability to pay is reduced by 50% if the penalty is paid within 21 days of notice of this order.

206.6. We were satisfied that the Public would have enhanced confidence in the Employment Tribunal system and the employment protection legislation if the maximum award were made in this case.

Employment Judge A. Ross
Date: 8 June 2020