EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Pirie**

Respondents: **(1) Unilever de Centroamerica SA de CV**
(2) Unilever plc
(3) Unilever UK Central Resources Ltd

Heard at: London South

On: 29 & 30 January 2020, in chambers 06 February 2020

Before: Employment Judge Freer
Members: Ms J Forecast
Ms M Foster-Norman

Representation:
Claimant: Mr N Porter, Counsel
Respondents: Ms Y Genn, Counsel

RESERVED JUDGMENT ON REMEDY

It is the unanimous judgment of the Tribunal that:

1) The First Respondent shall pay to the Claimant the sum of £88,881.50 in respect of the successful unfair dismissal claim, which comprises a Basic Award of £9,919.50 and a Compensatory Award of £78,962;

2) The Second Respondent shall pay to the Claimant the sum of £82,462.50 in respect of the successful protected disclosure claims.

REASONS

1. This is a remedy hearing arising from the Tribunal's judgment on liability promulgated on 23 November 2019 that the Claimant's claim of a detriment on the ground of having made a protected disclosure was successful relating to information concerning her entitlements and prospective benefits as against the Second Respondent and the Claimant's grievance as against the Second Respondent; and that the Claimant's claim of ordinary unfair dismissal was successful as against the First Respondent.

2. The Tribunal received evidence from the Claimant and Ms Rajalakshmi for the Respondent and a two bundles of documents comprising 749 pages in total.

A brief summary of the relevant law

3. The statutory provisions relating to remedy for unfair dismissal are set out in sections 112 to 127 of the Employment Rights Act 1996.

4. The Basic Award is calculated according to a statutory formula based on a week's pay (which is subject to a statutory cap), the number of complete years of employment at the date of dismissal and a multiplier based on the Claimant's age at the date of dismissal.

5. The Compensatory Award is: "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

6. The Compensatory Award is limited to making good the Claimant's financial loss. The Tribunal cannot bring into its calculations any consideration of punishment for the employer or feelings of sympathy for the Claimant. The Compensatory Award is confined to compensating only proven financial loss. (see **Morgans –v- Alpha Plus Security Limited** [2005] IRLR 234, EAT).

7. So far as possible, the Tribunal should use the facts at its disposal in order to reach an accurate assessment of compensation, but it is also recognised that a Tribunal will often be compelled to adopt a 'broad brush' approach (see **Norton Tool Company Ltd –v- Tewson** [1972] ICR 501, NIRC).

8. Section 123(4) of the Act provides: "In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales".

9. The judgment in the case of **Savage –v- Saxona** [1998] ICR 357, EAT, recommended a three step approach to determining whether a Claimant has failed to mitigate their loss: (1) identify what steps should have been taken by the Claimant to mitigate their loss; (2) find the date upon which such steps would have produced an alternative income; (3) thereafter reduce the amount of compensation by the amount of income which would have been earned.

10. It may not be reasonable to expect a Claimant to take the first job that comes along, especially one attracting lower pay than the Claimant might reasonably expect to receive. In particular, a Claimant does not necessarily have to lower their sights immediately in seeking new employment with regard to the kind of job for which they are prepared to apply (**Orthet Ltd –v- Vince-Caine** [2005] ICR 374, EAT). On the other hand, undue delay in accepting some type of work in the hope of receiving a better offer may result in compensation being reduced.

11. The burden of proof is on the Respondent to show that the Claimant has failed to mitigate loss (**Fyfe –v- Scientific Furnishings Ltd** [1989] ICR 648, EAT). The Tribunal is under no duty to consider the question of mitigation unless the Respondent raises it and provides some evidence of a failure to mitigate.

12. A Claimant who has been unfairly dismissed, unless reinstated or re-engaged, will lose a number of statutory employment protection rights that are dependent on the Claimant having remained in employment for a qualifying period. Accordingly, the Tribunal can award a sum to reflect a Claimant's loss of statutory rights.

13. It is well-established law that the principle contained in **Polkey –v- A E Dayton Services Ltd** [1987] IRLR 503, HL, applies to the consideration of the just and equitable element of the Compensatory Award. A Tribunal may reduce the Compensatory Award where an unfairly dismissed employee may have been dismissed fairly at a later date or if a proper procedure had been followed.

14. There is no need for an 'all or nothing' decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

15. In **Software 2000 Ltd -v- Andrews** [2007] IRLR 568*,* the EAT reviewed the authorities and set out some guidance, such as:

> "If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself".

16. By combination of Section 207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 124A of the Employment Rights Act 1996, where a claim by an employee is made under any of the jurisdictions listed in Schedule A2 of the 1992 Act and is also one to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies, where a party has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or decrease any Compensatory Award by no

more than 25%.

17. Such an adjustment shall be applied immediately before any reduction for contributory fault and any adjustment under section 38 of the Employment Act 2002 for a failure to provide employment particulars.

18. By virtue of section 122(2), a Tribunal may reduce the Basic Award where the conduct of the employee before the dismissal was such that it would be just and equitable to do so. Also, by virtue of section 123(6), the Tribunal may reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the employee.

19. For a protected disclosure detriment a tribunal must award such an amount as it considers is just and equitable having regard to the infringement to which the complaint relates and any loss which is attributable to the act, or failure to act, which infringed the claimant's right (s49(2) Employment Rights Act 1996).

20. The loss to be compensated shall be taken to include: any expenses reasonably incurred by the claimant in consequence of the act, or failure to act, to which the complaint relates; and loss of any benefit which the claimant might reasonably be expected to have had but for the act or failure to act and may include compensation for injury to feelings (s49(3) Employment Rights Act 1996).

21. The claimant is to be put into the financial position they would have been 'but for' the unlawful conduct of the Respondent. It is the personal loss, or estimated loss, arising directly or naturally from the unlawful act.

22. The appropriate awards of compensation for the purposes of injury to feelings are set out in the *Vento* guidelines, updated by the case of *Da'Bell* and are helpfully summarised and updated on-line in Presidential Guidance. The amount should incorporate the 10% uplift confirmed in the case of *Simmons v Castle*. Awards for injury to feelings should be purely compensatory and not punitive.

23. The Tribunal has helpfully been referred to many further authorities and principles by the parties in written material during the course of the remedy hearing and these have been taken into account by the Tribunal.

Findings of Fact and Conclusions

Unfair dismissal

Basic Award

24. With regard to the Basic Award, the amount was agreed between the parties as £9,919.50. The Tribunal concludes that this amount is not reduced by the payments the Claimant received from the Respondents because those payments were not redundancy payments in light of the Tribunal's express conclusion that there was no redundancy dismissal. Therefore a Basic Award is payable by the Respondent to the Claimant in the sum of £9,919.50.

Compensatory Award

25. The first point that the Tribunal considers it should address is its decision and reasons from the earlier liability judgment at paragraphs 230 and 231 and the conclusions at paragraph 369 and 370, which for ease of reference are as follows:

> 230 Ms Taylor created an e-mail on 21 March 2016 that set out for headcount planning purposes WL3 roles and opportunities for Finance Directors, which confirmed the potential BFS roles and their locations (page 169). At this stage these were not guaranteed roles, for example the role in Greece on the list did not materialise. Mr Natarajan was not provided with this document.
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> 231 The Claimant was not advised of similar roles that were available in the UK. Two of the BFS roles were uncertain as to location, being either in Kingston or Port Sunlight in the UK, or in Katowice, Poland. Ms Rajalakshmi accepted in cross-examination that the BFS jobs could have been in Kingston or Port Sunlight.
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> 369 Although the position regarding visas was within the range of reasonable responses (indeed it was probably correct), it was objectively unreasonable for the UK BFS positions and the Deos role not to be brought to the Claimant's attention, or be offered to her but subject to local terms and obtaining a suitable visa or visa extension, and also through not explaining to the Claimant the understood potential difficulty over obtaining visas.
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> 370 The Claimant may have had some input into the visa issue and perhaps have gained some support for her applications. Further if Ms Rajalakshmi felt reasonably able under Unilever processes to allow the Claimant to apply for the Deos role knowing of the visa situation but with a view that if she was the best candidate that was "something that would be looked at" and if the Claimant was the best candidate for the role then the necessary application for her to work in the UK would at least be made, then the same approach could reasonably have been adopted with regard to the UK based BFS posts. It was objectively unreasonable not to raise these matters with the Claimant for her input when she was facing the termination of her employment and had expressed a view to being potentially amenable to working on local UK terms and conditions".

26. The Tribunal concluded that a potential BFS role was available for the Claimant to be situated in the UK and it was not open for the Respondent to re-argue at the remedy hearing, as it did, that no such role existed.

27. If the Respondent's contention is correct, it would imply that the Tribunal made a finding of unfair dismissal on the basis that the Respondent failed to offer to the Claimant a role that did not exist. The Tribunal did not make any such conclusion.

28. Paragraph 230 quite clearly says ‘at that stage’. The remaining paragraphs find as fact that the Poland roles that became available could have been done in the UK.

29. The Tribunal relied principally upon the evidence of Mr Natarajan and Ms Rajalakshmi at the liability hearing.

30. It was Mr Natarajan’s evidence that: “by early May there was only really going to be an exit. I was still persisting with the Kato roles but she had closed her mind and I had no other roles”.

31. The facts were that the BFS roles were in existence and they were roles that could have been done in the UK.

32. There was no evidence from the Respondent, for example, that having offered the two posts in Katovice to the Claimant, had she confirmed she was interested the Respondent would have said that actually the roles did not exist.

33. The questions put to the Claimant in cross-examination during the liability hearing were on the basis that she could have accepted those jobs and the fact that they were on local terms was no reason to turn it down. Indeed the Respondent’s submission at the liability stage related to the Claimant’s “reasons for not accepting the role in Poland” and also “If the other BFS roles were going to locate into Kingston/Port Sunlight the question is did SR either block C from access to those opportunities . . .”.

34. It was Ms Rajalakshmi’s evidence at the liability hearing when having identified that there were three BFS positions she was asked: “So [the BFS role] could have been in Kingston or Port Sunlight?” Ms Rajalakshmi answered: ‘Yes”. Ms Rajalakshmi stated that UK based jobs were not offered to the Claimant for visa related reasons.

35. The Claimant acknowledged the position in paragraph 5 and 30 to 32 of its Skeleton Argument provided at the outset of the Remedy hearing: “The subsequent position adopted by the Respondent (after the Preliminary Hearing and Judgment) raise the contention that in fact there were no other roles to which the claimant could have been deployed”. The matter was expressly discussed at the start of the remedy hearing.

36. Concerned that the Respondent did not miss an opportunity to put questions to witnesses on the issue of a UK based BFS role, the Tribunal raised the matter at the end of the Claimant’s cross-examination. Counsel for the Respondent stated that she was surprised by the Tribunal’s view on the matter. However it is noted that the Respondent addressed the issue in its written Outline Submission, at paragraphs 14 to 22 in particular, which was prepared before the matter was raised by the Tribunal.

37. It was confirmed on behalf of the Respondent’s that no further examination of any witnesses was required and the Tribunal was invited by the Respondent to review its liability decision on the existence of a UK based BFS role.

38. Time limits aside, the Tribunal is entirely satisfied that the Respondent's failure to offer the Claimant a BFS role that could have been done in the UK, but subject to local terms and obtaining a suitable visa or visa extension, was part of the reason for the finding of unfair dismissal, as the Tribunal considers is adequately set out in the liability decision reasons. There is nothing to reconsider.

39. Therefore the questions that arise from the Tribunal's conclusions at the liability hearing are had the Claimant been offered a BFS position to be undertaken in the UK, whether she would have accepted it and whether there were any visa issues that precluded her from doing so.

40. The Tribunal accepts the Claimant's submissions that it was never put to her that had that role been offered she would have refused it, and it was the Claimant's evidence that she would have accepted any offer if only to stay in the organisation to assess if there were any other roles that materialised back in LATAM during that period of time. The Tribunal concludes that even ignoring the fact that the Claimant is a very bright individual, it would have been inevitable that she would have adopted such an approach.

41. With regard to Visa requirements the Tribunal refers to paragraphs 206 to 222 generally, but in particular 210, 211, 222 and the conclusion at paragraphs 368, 370 and 374 of the liability judgment:

> 210 Therefore, it was potentially possible for the Claimant's Tier 2 visa to be extended for a maximum further period of two years to undertake the Deos, or any Financial Director role, as they would be in the same occupational category as her original IA contract in London. In those circumstances the resident market test would not be applied.
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> 211 However, the Tribunal accepts the evidence of Ms Rajalakshmi that the Respondent operates the IA scheme to bring employees into the UK for development purposes. It is a worldwide talent investment scheme that allows employees to acquire skills and experience that they would not obtain in their own geographic area. Unilever operates that system with transparency and only provides a certificate of sponsorship for those on an IA contract. Therefore, a Tier 2 visa would not be extended within Unilever in the UK unless the person is on an IA contract.
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> 222 Mr Tiziani gave evidence that he had a conversation with Ms Rajalakshmi who had said to him that visa issues were not determinative to the Deos role and was left with the impression it could be dealt with by HR. However, Ms Rajalakshmi considered that if the Claimant was successful in her application "we would have gone back to see what could be done" and did not want to "go in and block" the application.
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> 369 Although the position regarding visas was within the range of reasonable responses (indeed it was probably correct), it was objectively unreasonable for the UK BFS positions and the Deos role not to be brought to the Claimant's attention, or be offered to her but subject to

> local terms and obtaining a suitable visa or visa extension, and also through not explaining to the Claimant the understood potential difficulty over obtaining visas.
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> 370 The Claimant may have had some input into the visa issue and perhaps have gained some support for her applications. Further if Ms Rajalakshmi felt reasonably able under Unilever processes to allow the Claimant to apply for the Deos role knowing of the visa situation but with a view that if she was the best candidate that was "something that would be looked at" and if the Claimant was the best candidate for the role then the necessary application for her to work in the UK would at least be made, then the same approach could reasonably have been adopted with regard to the UK based BFS posts. It was objectively unreasonable not to raise these matters with the Claimant for her input when she was facing the termination of her employment and had expressed a view to being potentially amenable to working on local UK terms and conditions.
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> 374 With regard to whether the Respondent should have extended the Claimant's Tier 2 visa and placed her into a job of shorter duration (e.g. a maximum of two years on the Tier 2 visa) or placed her in a short fixed-term post on local terms, while she waited to see if a position back in LATAM materialised, the Tribunal concludes that given the Claimant's IA contract was at an end; there was not an offer of an additional IA contract for the reasons set out above; the options upon termination were agreed in advance; and it was also not possible to place her into a local position on a short-term basis on a non-tier 2 visa without the resident market test applying, it was not outside the range of reasonable responses for the alternative job considerations to focus on the Claimant's suitability for permanent and indefinite suitable alternative employment and to consider visa practicalities.

42. The Tribunal concludes that the Respondent would not have extended the Claimant's Tier 2 visa. Therefore the Claimant would potentially have been localised on a short-term contract subject to the resident market test.

43. Although Ms Rajalakshmi said that the Respondent did not have employees on short-term contracts, the Respondent's evidence also was that they would have looked into the visa situation for the Deos role. There is no reason on the evidence why that same attitude could not have been taken had the Claimant wanted to undertake a BFS role in the UK.

44. Therefore the assessment of *Polkey* leads to the potential application to the Claimant's circumstances of the resident market test. The Tribunal received very little evidence on that issue. The Tribunal has seen the job description at pages 304+ of Remedy Bundle 1. The successful applicant for the role needed skills of global experience, at Director level, with international involvement. The evidence of the Respondent was that it could bring its expertise to support visa applications, immigration and market test issues.

45. On the evidence available the Tribunal concludes that there was a 50% chance that, upon the Respondent positively applying its considerable expertise to the Claimant's circumstances and the application of the resident market test, the Claimant would have been placed in a BFS role in the UK. Therefore the Tribunal applies a 50% *Polkey* reduction to the Compensatory Award to reflect the 50% chance of the Claimant not securing the appropriate visa.

46. The Tribunal concludes that it is not appropriate to apply any reduction on account of the Claimant's conduct: it was not culpable or blameworthy in respect of her dismissal.

47. The Tribunal concludes that no uplift for a failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures applies to the dismissal because the failure relating to the grievance was by the Second Respondent.

48. The Tribunal has calculated the order of deductions in line with **Digital Equipment Co Ltd -v- Clements (No 2)** [1998] IRLR 134, CA.

49. When calculating total loss, the assessment is of the amount that the Claimant would have earned in a BFS role.

50. The Tribunal prefers the Claimant's calculation of salary in a BFS role. Ms Rajalakshmi accepted in evidence that the Claimant would have been on a 3B pay scale. The Claimant's arguments on pay were supported by e-mails produced into evidence by the Respondent at the remedy hearing as documents R1 and R2, being e-mails between Ms Rajalakshmi and Mr Paul Coleman on 27 January 2020.

51. The figures in the Claimant's circumstances are an annual salary of £137,500 per annum, plus a bonus of between 25% and 50%, plus a GPSP (Group Performance Share Plan) of £20,000 per annum (accepted by Ms Rajalakshmi as being an average payment) and a car allowance of £9,600 which was not dependent on position.

52. With regard to the percentage bonus payment that would have applied, at the time of termination of employment the Claimant was classed by the Respondent as a 'middle-middle' performer on its assessment ranking, but she had previously been considered to be 'a highflyer'. The evidence of Ms Rajalakshmi was that the bonus is calculated on performance plus length of service. The Claimant had been a consistently good performer and been in the organisation for 18 years. A 50% bonus was possible and 25% bonus was likely for a moderate performer.

53. Tribunal concludes that it follows that the Claimant's bonus sum falls somewhere on a scale between 25% and 50%. Given the 'middle-middle' ranking, it is unlikely the Claimant would have been awarded a 50% bonus, but given her earlier highflying status and long service it is also very unlikely that it would have been at 25%. The Tribunal concludes on the evidence that the percentage annual bonus would have been 40% which amounts to £55,000 per annum.

54. The Tribunal concludes from the terms of the International Assignment Policy at section 10.1 'Ending an Assignment' that the Claimant would have received a Housing Budget and an Education Assistance Payment, which provide for two equal yearly payments of £92,500 (see Claimant's witness statement at paragraphs 58 and 59 and pages 376 and 68 of Remedy Bundle 2). These figures were not challenged in evidence.

55. The Tribunal concludes that the BFS role would have had a pension attached to it. The correct assessment of loss is not the pension that the Claimant had in her IA position but the pension that she would have had in a BFS post, which on the information supplied by the Respondent would have been an employer contribution of 5% of pensionable earnings with the company investing 12.5% of the difference between salary and the upper limit into the Investing Plan portion. The 5% of pensionable pay is £6,875 per annum assessed on base salary. The Tribunal received no figures on what the upper limit would have been, which was due to the Respondent not producing the figures as directed by the Tribunal. However, for reasons given below no calculation of this is required as the Claimant achieves the statutory cap for the Compensatory Award.

56. Therefore the Claimant's loss over a year period would have been £137,500 net salary, plus £55,000 bonus, plus £20,000 GPSP, plus £9,500 car allowance, plus pension of £6,875 and a localisation payment of £92,500 giving an annual sum of salary and benefits of £321,375.

57. The Tribunal concludes that it is just and equitable to award loss of earnings for a two year period as equating to a period within which the Claimant would have stayed in a BFS role whilst waiting for a position in LATAM. This also equates to the period the Claimant would have been extended on a Tier 2 visa had that been possible. The Respondent provided no material evidence that there were any positions into which the Claimant could have been placed during this period.

58. Therefore the amount of the total loss is £642,750.

59. Deducting the sum paid on termination of £102,000, which from the documents in evidence appears to be a net figure (see pages 240 and 268 of Remedy Bundle 2). The additional sum paid in respect of the Claimant's occupational pension scheme is not offset against the Compensatory Award.

60. This gives a total sum of loss arising from dismissal of £540,750 over the period under review.

61. The Tribunal concludes in all the circumstances that the Claimant mitigated her loss, finding employment after a return to Costa Rica and given the circumstances she sets out at paragraphs 17 to 19 of her witness statement. The Claimant obtained new employment that commenced on 15 April 2017. The Tribunal accepts the Claimant's unchallenged evidence that her income equated to £87,000 net per annum and her new job started on 16 April 2017, which gives a total amount in mitigation of 76 weeks at £127,154. Giving total loss of £413,596.

62. Reducing half of this amount for the *Polkey* reduction gives £206,798.

63. At this stage there would be grossing- up of the amount over the £30,000 tax free element, which on a straight 40% rate of tax calculation places the sum at over £325,000 Even without the 12.5 pension payment being calculated (and a relatively negligible amount for loss of statutory rights) the sum clearly significantly exceeds the statutory cap, which was agreed by the parties as being £78,962.00.

64. The same result would be reached even if the period of loss is halved to one year, or if the *Polkey* percentage is increased as high as 80%.

65. The First Respondent shall therefore pay to the Claimant a Compensatory Award of £78,962.

Protected Disclosure Detriments

66. With regard to the protected disclosure issue, there was no prevailing dispute over the difference in sum between the two severance packages under review - what the parties referred to as the 'Delta difference'. That sum of money was agreed between the parties during the course of the hearing as being £59,000.

67. With regard to the claim for aggravated damages, the Tribunal concludes that this element of the remedy claim is not well founded. The Tribunal concludes that there was nothing different about the circumstances of this case from any other hard fought litigation claim and there is no additional sum to be awarded that does not fall to be assessed generally part of the injury to feelings award.

68. With regard to injury to feelings, much of the injured feelings the Claimant refers to in her evidence relates to being rejected from the jobs for which she applied, which was not a finding in her favour on the protected disclosure detriment claim.

69. The award for injury to feelings can only arise from the successful protected disclosure detriment claims, which relate to non-provision of the termination materials and a failure to address properly the Claimant's grievance.

70. The Tribunal has considered the Claimant's injured feelings arising from these elements. The Claimant had been a good employee over a long period and her treatment by the Respondent in this respect was poor by both HR and a senior employee with whom the Claimant should have expected and deserved a degree of trust. Although, of course, the seriousness of the treatment is not the basis for any award, the Tribunal concludes that these elements make the Claimant's evidence credible on the injury to her feelings arising from these events. Having regard to the Claimant's evidence and the guidance in **Prison Service -v- Johnson** [1997] IRLR 162 and the relevant **Vento** bands, the Tribunal awards £13,000 plus the **Simmons -v- Castle** uplift of 10%, giving a total of £14,300.

71. The Tribunal concludes that an uplift for a failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures clearly applies in the circumstances because the finding on the protected disclosure claim relates to

the grievance process. In the circumstances the first stage of the Claimant's grievance was defective to the extent that it amounted to a protected disclosure detriment. However, the appeal was dealt with satisfactorily. The uplift can be to a maximum of 25%. The Claimant places it at 12½%, half the maximum amount, and the Second Respondent argued it should be at 10%. On balance the Tribunal prefers the Claimant's argument and considers that the halfway position of 12½% is just and equitable.

72. The sum assessed is £73,300 to which the ACAS 12.5% uplift applies, which gives a total amount payable by the Second Respondent to the Claimant of £82,462.50.

73. Any interest payable on this award was not pleaded or argued by the Claimant.

74. The sum payable to the Claimant by both Respondents is £171,344.

Employment Judge Freer
Date: 13 August 2020