# EMPLOYMENT TRIBUNALS

| Claimant | | Respondent |
|---|---|---|
| **Mr D Mele** | **v** | **1. Angela Mortimer plc**<br>**2. Mr John Mortimer**<br>**3. Mrs Angela Mortimer** |

**Heard at:** Central London Employment Tribunal (CVP videolink)

**On:** 28 and 29 April 2021 & 28 May 2021 (In Chambers)

**Before:** Employment Judge Brown

**Members:** Mr P de Chaumont-Rambert
Mr R Baber

**Appearances**

**For the Claimant:** Mr J Susskind, Counsel

**For the Respondents:** Mr P Keith, Counsel

# REMEDY JUDGMENT

**The unanimous judgment of the Tribunal is that:**

**1. The Tribunal reconsiders and sets aside its liability judgment that the Second Respondent subjected the Claimant to protected disclosure detriment and victimized him by not permitting the Claimant to return to the First Respondent's building.**

**2. The Tribunal does not change its liability judgment in any other way.**

**3. It was 80% likely that the First Respondent would have dismissed the Claimant fairly, following a fair procedure, in any event.**

**4. The prescribed period was 9 August 2019 – 29 April 2021.**

**5. The First Respondent shall pay the Claimant £26,153.15 in compensation for unfair dismissal comprised as follows:**

**i. £14,529.19 for past loss of earnings. <u>This is the prescribed element.</u>**
**ii. An additional £523.38 for past loss. This is the non-prescribed element of past loss.**
**iii. £11,100.57 for future loss.**

**6. It is appropriate to apply an ACAS Uplift of 10% to the injury to feelings award in this case.**

**7. The Respondents shall pay the Claimant a total of £15,019.79 compensation for injury to feelings, including ACAS uplift and interest of 8% to date.**

# REASONS

**Preliminary**

1. By its Liability Judgment in this case the Tribunal decided that

1.1. The First Respondent unfairly dismissed the Claimant pursuant to s98(4) ERA 1996 on the grounds of redundancy.

1.2. The First and Second Respondents subjected the Claimant to protected disclosure detriments and victimized him by doing the following:

1.2.1. On 10 July 2019 the Second Respondent said to Ms Goodall words to the effect that: she and Ms Doling "should not have supported [the Claimant] during the investigation"; she and Ms Doling should not have attended the meetings with Mr Confrey as they "could be responsible for the company going under"; he knew "about the WhatsApp group" and would ask for it to be used in court; she should be "in court with" the Second Respondent to "support" him;

1.2.2. The First Respondent failed to put in place proper measures to prevent intimidation of Ms Goodall by the Second Respondent;

1.2.3. On 9 and 12 August 2019 the Claimant not being permitted to return to the First Respondent's building;

1.2.4. On or about 9 August the Second Respondent told employees not to contact the Claimant or to give him information.

1.3. These detriments formed a course of conduct, or were a series of linked acts, and were all brought in time.

2. The parties had agreed that the Tribunal should not make decisions about *Polkey* at the liability hearing, but that these would be determined at the remedy hearing.

**Reconsideration**

4. The Respondents had made an application that the Tribunal reconsider parts of its liability judgment. On 19 March 2021 EJ Brown had ordered that the Respondents' application that the findings at sub-paragraphs 1.2.1 to 1.2.4 above, of the Judgment, be varied to clarify the liability of the First and Second Respondents respectively, would be considered by the Tribunal at the outset of the remedy hearing on 28 April 2021.

5. The Tribunal reconsidered and set aside its judgment that the Second Respondent subjected the Claimant to protected disclosure detriment and victimized him by not permitting the Claimant to return to the First Respondent's building. This allegation had not been made against the Second Respondent. The Tribunal did not change its judgment in any other way. The First and Second Respondents were joint and severally liable for the other protected disclosure and victimisation detriments, as the First Respondent was liable for the actions of the Second Respondent, who was its CEO and employee.

**Evidence at Remedy Hearing**

6. At the outset of the remedy hearing the Claimant made an application that the Tribunal exclude Mr Horsley's witness statement in its entirety, save paragraphs 94 – 95, which dealt with injury to feelings.

7. Mr Susskind, for the Claimant, said that the statement had been provided late, on Monday 26 April 2021 night, so that the Claimant had not had time to give instructions on it, or to seek disclosure regarding the issues raised in it. He said that many of the paragraphs in the late statement were either irrelevant to the remaining issues in dispute, or sought impermissibly to unpick issues which are res judicata. Mr Susskind that that the witness statement also adduced new evidence in relation to the *Polkey* issue, which, if permitted to stand, would destroy the possibility of a fair hearing for the Claimant on that issue; it opened a new field of dispute with several new areas of factual inquiry. He said that these new facts would require proper time for instructions, disclosure, responsive evidence, and cross-examination. Mr Susskind said that the *Polkey* issue had not been pleaded by the Respondent and the late production of evidence in relation to it was an abuse of the Tribunal's process, which should not be tolerated. He said that a postponement to a later date would not be in accordance with the overriding objective, as it would introduce further delay, to the significant detriment of the Claimant, who had already given a witness statement detailing the detrimental effect of the proceedings on his health.

8. Mr Susskind said, in answer to questions from the Tribunal, that the Respondents had failed to produce any disclosure in relation to Mr Horlsey's evidence in numerous paragraphs – including paragraphs [12] – [15], [17], [23], [29], [33], [36 - 37], [40 – 45], [63]. He said that there was no way for the Claimant to test that evidence.

9. Mr Susskind also said that paragraphs [96 – 99] gave evidence about alleged misconduct by the Claimant which was an entirely new allegation and had not been foreshadowed. Insofar as contributory fault had been pleaded, it had been pleaded on different facts.

10. Mr Keith, for the Respondents, said that it was well known that *Polkey* would be in issue at the remedy hearing and that it had been open to the Claimant to seek disclosure on it. He said that the Tribunal could attach appropriate weight to Mr Horsley's statement if it traversed matters which had already been decided. Mr Keith agreed that, while *Polkey* was in the Agreed List of Issues, contributory fault was not.

11. The Tribunal decided that it would admit Mr Horsley's witness statement in evidence, save paragraphs 96 – 99, which deal with alleged misconduct by the Claimant. It adjourned the remedy hearing to 29 April 2021 to allow the Claimant time to give instructions to his representatives and to prepare rebuttal evidence.

12. The Tribunal said that it was appropriate to permit the Respondents to adduce evidence on matters which were relevant to *Polkey* and whether the Claimant would have been dismissed in any event; *Polkey* was in the agreed list of issues and the parties had also agreed, at the liability hearing, that *Polkey* would be addressed in the remedy hearing. It was fair for that issue to be decided at the remedy hearing and for the Respondents to call evidence on it.

13. The Respondents were not in breach of order in producing the witness statement when they did. The parties had not agreed directions for preparation for the remedy hearing.

14. However, the statement had been produced late, in that the Claimant had not had opportunity to give instructions on it, or evidence in rebuttal. It would not be fair to proceed with the hearing on the first day, 28 April 2021. The Claimant and his representatives could use the remainder of the day to prepare their case. The Tribunal would adjourn the remedy hearing to 29 April 2021. That was a proportionate approach. It would not be proportionate, nor necessary, to adjourn to a later date. That would cause delay, which as not in accordance with the overriding objective . This was a remedy in an ordinary unfair dismissal claim and victimization/protected disclosure detriment claim with 4 detriments over a relatively short period of time. There needed to be finality to proceedings and a proportionate production of evidence.

15. Insofar as there were missing documents, the Tribunal said that the Claimant could address this in evidence and submissions and the Tribunal could attach appropriate weight to evidence where full disclosure had not been given. The Tribunal would not allow any further documentary evidence from the Respondents to contradict arguments from the Claimant, at this stage, apart from documents already attached to Mr Horsley's statement.

16. Insofar as Mr Horley's statement dealt with matters which had already been decided in the liability judgment, so that they were subject to issue estoppel, the Tribunal would disregard those parts of Mr Horsley's statement.

17. Tribunal heard evidence from the Claimant. The Tribunal also heard evidence from

18. The Tribunal was provided with a 2 Part Bundle of Remedy Documents, some additional enclosures, a second witness statement from the Claimant, a Schedule of Loss, a second witness statement from Chris Horsley for the Respondents, appendices to Chris Horsley's statement, a Supplemental Bundle, and costs applications from both parties, with a costs schedule from the Claimant.

19. The Tribunal also had available the original liability hearing bundle and index and the original liability witness statements and index to them.

20. Both parties made submissions. The Tribunal reserved its judgment.

**Costs Applications**

21. The Claimant renewed a costs application. The Respondents also made a costs application. The Tribunal has considered costs in a separate costs judgment.

**Background and Issues**

22. The Claimant was dismissed on 9 August 2019 when his employment was terminated by reason of redundancy.

23. The parties agree that the Basic Award of £12,337.50, has been offset by a statutory redundancy payment.

24. The Claimant claims a Compensatory Award at the cap, £86,444.00, as set out in his Schedule of Loss dated 27 April 2021

25. Contributory fault is not in issue.

26. The First Respondent contends that, had they adopted a fair procedure, they would have dismissed the Claimant fairly in any event on 9 August 2019.

27. In its liability judgment, at para 498 and 499, the Tribunal was satisfied that the dismissing officers genuinely believed that the International Division was unprofitable, and that their belief was based on accurate financial figures. The Tribunal found that the International Division had made significant losses in the 6 months leading up to the Claimant's dismissal and that it owed more than £1Million in intercompany debt to AMplc.

28. The Tribunal decided that the Claimant's dismissal for redundancy was nevertheless unfair because:

    a. The dismissing officers were not asked to consider other employees for redundancy and never genuinely applied their mind to the question of how the pool should be defined.

b. The dismissing officers had not considered whether the other leaders within the International Division (Amal Benjelloun and Frederique Paccagnella in Brussels, Shirley Maffre, Catherine Tardieu, and Alexandra Vercken in Paris, and Monique Rowe in Geneva) should be part of the pool. Shirley Maffre was the Claimant's co Director in Paris and therefore must have been carrying out at least some of the same duties as the Claimant.

c. There was never any analysis conducted of the Claimant's skills, or other International Division leaders' skills. Nor was there any consultation about these, or about selection criteria which might be used to select from the leaders of the International Division. Nor was there any analysis of the costs of other International Division employees to the business, as opposed to the Claimant.

d. The Respondents failed to act reasonably with regard to consultation. They withdrew the possibility of an alternative role in Paris for the Claimant without even consulting him about it, including about the remuneration package which might be attached to it. The alternative "offer" of work was withdrawn two days before the deadline which had been set for the Claimant to respond. There was no consultation about alternative configurations of the Claimant's existing role, for example whether the Claimant might work part time or reduce his salary.

29. The Tribunal did not find that Mr Johnson and Mrs Barnard acted unreasonably in failing to consider other employees in other Divisions for redundancy.

30. The Tribunal therefore needed to consider what was the likelihood that the First Respondent would have dismissed the Claimant fairly, had they acted fairly regarding the selection of the pool and consultation.

31. The Respondents say that the Claimant would have been fairly dismissed by reason of redundancy by 9 August 2019 in any event because:

a. The Claimant was the only person with a non-billing role. To have selected anybody else for redundancy would have lost the First Respondent that person's sales generation.

b. The Claimant could not have undertaken a full-time billing role without living in the same country; this would mean relocating (presumably at R1's expense), in which C has shown no interest to date.

c. The Claimant had not had a full-time billing role in decades. However, even if he could have stepped into a full-time billing role with no further training, he would have had to spend time developing and building up the business. The International operation as a whole was in perilous financial straits and could not afford him this luxury of time.

32. In the alternative, the Respondents contend that the Claimant would have been fairly dismissed by reason of redundancy by October 2019 because the "temp licence" would not have been renewed for the Paris Operation otherwise.

33. They contend that in October 2019, Progressis was told by Socamett, the relevant French agency, that its temp licence (the licence required to recruit to temporary roles, which provided around 46% of the income in Paris) would not be renewed because of a lack of profitability and available cash in the business. The Respondents say that they negotiated with Socamett and, in order to renew the licence, it was agreed that profitability would be improved by cost cutting, principally by the Claimant's salary saving of £90k–£100k annually.

34. The Respondents contend that, had Progressis still been paying the Caimant's recharged salary, it would not have been sufficiently profitable for the temp licence to have been renewed. Progressis could not survive without 46% of the Paris profits and the Claimant would have been made redundant in October 2019.

35. In the further alternative, the Respondents say that, had the Claimant remained an employee in October 2019, the temp licence would have expired in December 2019 along with 46% of the income in Paris, and the Claimant would have been made redundant at this point.

36. Lastly, the Respondents say that the whole company's income fell significantly as a result of the Covid-19 pandemic in March 2020. Progressis's profit fell by 61%, and only managed to stay afloat due to the profit of £33,000 in the six months to March 2020. This profit was less than the International Director's cost to the Division. It would not have been able to make this profit had the International Director role still been in place and so the Claimant would have to have been dismissed in March 2020 at the latest.

**Findings of Fact**

**Polkey**

37. Chris Horlsey produced a table of factual information relating to the Divisional Leaders within the International Division, Appendix CH2 to his statement.

38. From that table, the Claimant had a basic salary of £65,000, Redundancy costs of £28,587.50 and personal billings of £0.

39. Shirley Maffre had a basic salary of £53,432, redundancy costs of £53,305.56 and personal billings of £57,314 in 2019

40. Alexandra Verken had a basic salary of £50,886, redundancy costs of £57,527.77 in 2019 and personal billings of £133,258.

41. Catherine Tardieu had a basic salary of £40,709, redundancy costs of £33,444.44 and personal billings of £98,845 in 2019

42. Frederique Paccagnella had a basic salary of £52,508, redundancy costs of £25,702.27 and personal billings of £162,376

43. Amal Benjelloun had a basic salary of £47,060

44. Monique Rowe had a salary of £56,000, redundancy costs of £9,956.70 and no direct personal billings, albeit a direct team billing on £169,643

45. The Tribunal noted that these figures were not supported by documentary evidence showing salary payments or fee generation. However, the Tribunal accepted that the figures for salary and redundancy costs and personal fee generation were broadly correct. They accorded with the tenor of the evidence at the liability hearing. The Tribunal also accepted that redundancy costs for employees in France and Belgium are higher than those in the UK.

46. The Tribunal noted that Mr Horsley's table did not include separate figures for commission.

47. It observed that all the other employees were directly generating income during 2019.

48. The Tribunal noted that the basic salaries for Mses Rowe, Maffre, Verken and Paccagnella were all in excess of £50,000. The First Respondent would therefore have also made significant savings from not having to pay those employees' basic salaries, had those employees been dismissed instead of the Claimant.

49. From these figures, the Tribunal concluded that other redundancies would have generated significant savings, and so there were other cost cutting options available to the Respondents – Monique Rowe had a high salary, very low redundancy costs and no personal billings.

50. Ms Maffre did have high redundancy costs, but her personal billings were very low compared to her salary. The First Respondent would have sustained modest losses from her personal billings. It would not have been difficult for the Claimant to replicate that level of billing.

51. The Tribunal accepted the Claimant's evidence that he had brought in £120,000 worth of contacts in the last 2 years of his employment on the client side. Albeit that these were not direct billings, the Claimant's income generation was comparable to Ms Maffre in 2019.

52. Mr Horsley said that the Geneva office would have closed in November 2019 in any event.

53. Nevertheless, the Tribunal concluded that it was not the case that the First Respondent had no other options for redundancies which would have resulted in comparable savings, without irreplaceable loss of personal billings – Mses Rowe and Maffre were the most obvious alternatives.

54. In short, while the Tribunal concluded that it was more straightforward for the First Respondent to make the Claimant redundant, because he was in a non-billing role, but, nevertheless, making other International Division leaders redundant would also have represented significant savings.

55. Mr Horsley also produced a table (Appendix CH3) showing what the Claimant's actual commission would have been for the period August 2019 to April 2021, had he remained International Director during this period. This was based on the same mechanism under which he was receiving commission before his redundancy, i.e. 1.5% of the total income for the International Group, subject to the International Group billing over £7,000 on average per head for that month. The Tribunal accepted that this was accurate.

56. There was an issue as to whether the Claimant would have accepted an alternative role in Paris, given that he lives in London with his partner.

57. The Claimant told the Tribunal he could travel to and from Paris the same day, with a return Eurostar ticket costing £80. The Claimant also told the Tribunal that he had a place in London and place in Paris, so that he could live in Paris during the week.

58. It appeared that the Claimant would be returning home to London at the weekend. The Tribunal found that the fact that he does live in London, and would need to be away from home for extended periods of time, would inevitably have made him hesitant about accepting a role based in Paris.

59. The Tribunal acknowledged, however, that the Claimant could travel to Paris and back in one day.

60. Furthermore, as matter of logic, not all work would have to have been done while present in a particular office. The Tribunal accepted that the Claimant's evidence that he was able to generate significant interest in job vacancies through his use of Linked In, for example.

61. While Mr Horsley said that the consultants in the International offices already had local contacts, the Tribunal observed that a Company's contact list would be likely to be protected by covenants. In any event, another employee could take over the Company's client list in an area, just as they would need to in the case of annual and sick leave periods.

62. The Claimant told the ET that he already had a strong knowledge of the local recruitment market, and a network of local contacts in Paris. He said that he was constantly in contact with candidates and clients, networking and building up local markets. The Tribunal accepted this evidence. It was consistent with the staff in France reportedly being "exceedingly nervous and unsettled" about the prospect of the Claimant leaving and the French staff believing that clients viewed the Claimant as "the face of the French operation".

63. The Respondents contended that a role based in Paris would have represented a demotion for the Claimant – his role would become comparable to other team leaders. The Claimant's remit would also be restricted to continental Europe.

64. The Tribunal accepted that, if the Claimant had stayed, it would have been in a new role in Paris – he would not have continued to be International Director. With other redundancies, the Claimant's role would need to take on those leaders' responsibilities and to become directly money-generating.

65. The Tribunal noted that, when a role based only in the Paris operation was suggested to the Claimant in August 2018, he had described it as “too insulting to even be discussed or be contemplated”, in his 2 August 2018 email.

66. The Claimant told the Tribunal that he had “ expressed my frustration about the "offer" because John was, at that time, refusing to acknowledge the contribution I had made the International Division and, more importantly, I was not facing dismissal. It is unfair to rely on my comment in 2018 as evidence that I would never have taken a similar role that was offered to me a year later, in the context of a redundancy consultation in which I was facing the prospect of losing my job and my livelihood. At that stage, as I said in oral evidence, I was open to it. Even if it meant swallowing my pride at being treated unfairly.”

**Conclusion - Polkey**

67. Taking into account all the relevant facts, the Tribunal concluded that the Claimant was more likely not to have accepted a demoted role, in Paris. He had rejected that alternative in trenchant terms when it was offered to him previously. The Claimant’s poor relationship with Mr Mortimer would not have assisted him to accept a demotion with any degree of equanimity.

68. The Tribunal found that it was also more likely than not that the First Respondent, acting fairly, would still have chosen to make the Claimant redundant when it did, rather than choosing a more complicated combination of other redundancies to achieve the same savings.

69. The Tribunal considered whether it was, in fact, 100% likely that the First Respondent, acting fairly, would have made the Claimant redundant on 9 August 2019.

70. The Tribunal considered whether, in reality, the relationship between the Claimant and the Respondents had broken down so irretrievably that it was 100% likely that the Claimant would have left the business, in any event, on 9 August 2019, following a fair procedure.

71. The Tribunal considered that it was not 100% likely that the Claimant would have been made redundant in any event, had a fair procedure been followed. It noted that, Mr Mortimer’s letter of 15 March 2019, putting the Claimant at risk of redundancy, mentioned a potential alternative role of lower status than the Claimant’s present role, concentrating on the French operation, with the same salary, said to be £60,000, but a less favourable bonus structure.

72. That indicated that, notwithstanding the poor relationship between the two men, the First Respondent was still, at that point, contemplating that the Claimant could remain in the business. The relationship had not broken down at that point.

73. Had the First Respondent applied a fair selection process, and assessed the Claimant’s skills fairly against others’ skills, there was still a realistic prospect that the Claimant would have been retained.

74. The Tribunal noted that the Claimant was relied on for management assistance, staff training, recruitment and hiring, financial, tax, legal and corporate governance support, and that the Claimant was bilingual, and that Monique Rowe had told the Respondents that she would leave the Geneva office if Mr Mele left. Furthermore, Mr Johnson had acknowledged that staff in France were "exceedingly nervous and unsettled" by the prospect of the Claimant leaving, that clients viewed the Claimant as "the face of the French operation", that the Claimant was seen to be "key to motivating the staff" and to have "contributed massively" to growing the Paris/Lyon operation". Mr Johnson had also observed that, in the absence of the Claimant in Belgium, "the Brussels operation would undoubtedly require additional support - which probably means the all-important new business generation/networking that DM provides" and that, in Switzerland, "Davide provides moral support and helps network and bring in new business".

75. Furthermore, there were other realistic savings options which, when fairly examined, would have made comparable savings. Ms Maffre, in particular, was considerably unsettled; she had repeatedly said that she wanted to leave. There was positive evidence that, on a fair analysis, the First Respondent would have found that Ms Maffre's redundancy was preferable to the Claimant's.

76. In addition, faced with the alternative of redundancy, there was a realistic possibility that the Claimant would have accepted a demoted role in Paris.

77. Taking all these matters into account, including that:

    a. it was likely that the First Respondent would have selected the Claimant for redundancy following a fair procedure, and

    b. it was likely that the Claimant would not have accepted a demoted role in Paris, but that

    c. it was not 100% likely that the Claimant would have been made redundant following a fair procedure on 9 August 2019.

    The Tribunal decided that it was 80% likely that the First Respondent would have dismissed the Claimant fairly, in any event, on 9 August 2019.

**Loss to Date of Hearing**

78. The Tribunal decided that, if the Claimant had been retained, he would have been paid a gross salary of £60,000. That was the salary which was envisaged in Mr Mortimer's "at risk" letter in March 2019. The Tribunal found that the Claimant would not have been paid £65,000 gross. In 2019/2020 that £60,000 salary would have been £43,336 net. The Claimant's net salary loss was therefore £833.40 per week net.

79. There had been 89.4 weeks between the date of dismissal and the date of the remedy hearing.

80. 89.4/ 52 x £833.40 per week net = £74,505.96 net salary loss to the date of the remedy hearing.

81. The Tribunal added £9,725 commission loss to that sum.

82. It had accepted the figures from Appendix CH3, showing that £9,725 would have been the Claimant's actual commission for the period August 2019 to April 2021, had he remained International Director. While that was based on the mechanism pursuant to which he was receiving commission prior to his redundancy, the Claimant would have started to earn commission personally. The Tribunal found that the Claimant would have had to build up his personal commission. It also found that the period would have been exceptionally challenging because of covid19.

83. Doing the best that the Tribunal could, it found that the Claimant would have earned the same personal commission in the period August 2019 to April 2021 as he would have earned under his old International Director commission structure.

84. £74,505.96 net salary loss + £9,725 commission loss = £84,230.96 net loss of pay to the date of the remedy hearing.

85. He received net notice pay of £11,585. His net loss was therefore £72,645.96.

86. This was the prescribed element – to which recoupment would apply. The prescribed period was 9 August 2019 – 29 April 2021.

87. It was 80% that the Claimant would have been dismissed fairly in any event. £72,645.96 reduced by 80% = £14,529.19. This is the prescribed element of past loss.

**Other Losses to Date of Hearing**

88. The Tribunal accepted that the Claimant would have continued to receive employment benefits to the value of £2,166.88. It was unlikely that the First Respondent would have denied him these benefits. To that needed to be added a sum for the Claimant's loss of statutory rights, which the Claimant valued at £450. This was a modest sum, which the Tribunal accepted.

89. These non-prescribed elements of past loss totalled £ 2,616.88.

90. £ 2,616.88 reduced by 80% = £523.38. This is the non-prescribed element of past loss.

**The Claimant Mitigated his Loss**

91. The Claimant Mitigated his Loss. The Tribunal accepted that the Claimant, despite considerable effort, had not been able to find another job.

92. The Tribunal noted that the Claimant had produced over 700 pages of documents showing his efforts to find alternative work, both through recruitment agencies and by direct application to potential employers. It noted that the Claimant had applied for a range of roles, with a range of salaries. The roles appeared to be relevant to the Claimant's previous experience.

93. It did not find that, if the Claimant had made reasonable efforts to mitigate, he would have obtained another role. There was no evidence on which the Tribunal could properly find that the Claimant would have secured a particular alternative role, at a particular salary, by a particular date.

**Future Loss**

94. The Tribunal considered that the Claimant would have continued, in 2021/2022, to be paid £43,336 net per year and would have continued to receive employment benefits equivalent to £2,166.88 per annum, as well as personal commission.

95. The Claimant would have continued to build up his personal commission in 2021/1022. The Tribunal concluded that the continuing effects of covid19 and the fact that the International Division had been making loses in the 6 months to August 2019 together meant that the fortunes of the Division would not improve dramatically. Accordingly, the commission likely to be earned by the Claimant would not increase significantly in this period.

96. It was therefore likely that the Claimant would have earned £10,000 personal commission net in the year after the remedy hearing.

97. The Tribunal noted the evidence in the Claimant's extensive mitigation documents. It noted that, despite numerous applications, he had not yet found alternative work.

98. From email exchanges in Bundle 1, p49, p53, p76 for example, it appeared that the Claimant has been considered to be too senior for some roles for which he had applied.

99. The Tribunal accepted that it would continue to be very difficult for the Claimant to find an alternative equivalent role. This would be all the more so because of the effects of covid on the economy, including the redundancies which will have resulted, leading to competition in the job market.

100. The Tribunal considered that it would take the Claimant another year to find alternative work. By April 2022, the effects of covid, in particular, ought to have receded, following vaccination programmes in Europe.

101. The Tribunal concluded that the Claimant would sustain a further year's future loss.

102. £43,336 net per year + £2,166.88 employment benefits + £10,000 net personal commission = net future loss of £ 55,502.88.

103. Taking into account that it was 80% likely that the First Respondent would have dismissed the Claimant fairly in any event, the Claimant's future loss is £11,100.57.

104. The Claimant's total past and future loss was £26,153.15.

**Temp Licence**

105. There was very little doubt that the First Respondent would have needed to make very significant savings, similar to the savings made by the Claimant's redundancy, by the date of the Claimant's dismissal.

106. The Tribunal concluded that, if the Respondent had selected other Divisional leader/s for redundancy, rather than the Claimant, Socamet would have been satisfied that there had been equivalent cost cutting. The licence would have been renewed. There was no additional likelihood that the Claimant would have been dismissed later in 2019.

**No Redundancy because of Covid**

107. On the evidence, the First Respondent has not made any employee redundant because of covid19. The Tribunal concluded that the First Respondent, likewise, would not have made the Claimant redundant in March 2020.

**Injury to feelings – Findings of Fact**

108. The First and Second Respondents subjected the Claimant to protected disclosure detriments and victimized him by doing the following:

**a.** On 10 July 2019 the Second Respondent said to Ms Goodall words to the effect that: she and Ms Doling "should not have supported [the Claimant] during the investigation"; she and Ms Doling should not have attended the meetings with Mr Confrey as they "could be responsible for the company going under"; he knew "about the WhatsApp group" and would ask for it to be used in court; she should be "in court with" the Second Respondent to "support" him;

**b.** The First Respondent failed to put in place proper measures to prevent intimidation of Ms Goodall by the Second Respondent;

**c.** On 9 and 12 August 2019 the First Respondent did not permit the Claimant to return to the First Respondent's building;

**d.** On or about 9 August the Second Respondent told employees not to contact the Claimant or to give him information.

109. The Tribunal accepted the Claimant's evidence that Ms Goodall told him about her 10 July 2019 interaction with Mr Mortimer the day after it happened. It found that the Claimant had been very upset that his CEO was trying to pressurise Ms Goodall, the Claimant's friend and colleague, into withdrawing her support for the Claimant.

110. The Tribunal found that the Claimant felt that other witnesses were likely to feel intimidated into not giving truthful evidence, either to a grievance process, or in court. The Tribunal accepted the Claimant's evidence that he felt that he could not trust the integrity of the Grievance process, and felt truly alone.

111. The Tribunal found that Mr Mortimer's conduct in this regard has, in fact, had a negative effect on the Claimant and Ms Goodall's relationship going forward, which is a source of sadness for the Claimant.

112. The Tribunal accepted the Claimant's evidence that it was a matter of immense personal hurt and shame to him that, after two and half decades, he was not even given a chance to collect his belongings or bid his farewells, so that he felt he had been unceremoniously and ignominiously 'booted out'. The Tribunal accepted the Claimant's evidence that the impression given was that he had been dismissed for misconduct and that this was emotionally devastating.

113. The Tribunal also accepted that the Claimant had been close friends with some of his colleagues in the workplace, but that the Claimant had not maintained any of these friendships. It concluded that Mr Mortimer's instruction to colleagues not to contact the Claimant was likely to have partly caused this. The Tribunal found that the Claimant had been deeply upset by the loss of all these friendships.

114. Further, the Tribunal had found that the Second Respondent's purpose in victimising Mr Mele was "to ensure that employees did not provide full and truthful accounts in relation to his allegations".

115. The Tribunal found that this conduct by Mr Mortimer was highhanded and oppressive.

116. However, the Tribunal did not find that the way in which the Respondents had conducted the proceedings was designed to be intimidatory or to cause unease or distress. The Tribunal has considered, separately, whether it was appropriate to award costs arising out of the Respondents' conduct of the proceedings

**Law - Injury to Feelings**

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

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

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

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

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

122. Further uprated for inflation, the middle band is now about £9,100 - £27,400 (Addendum to Presidential Guidance).

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

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

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

**Aggravated Damages**

126. Aggravated damages are available for an act of discrimination (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162, [1997] ICR 275, EAT). The award must still be compensatory and not punitive in nature, *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291, EAT. In that case, a whistleblowing case, compensation was assessed on the same basis as awards in discrimination cases.

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

(a) The manner in which the wrong was committed. The basic concept here is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase “high-handed, malicious, insulting or oppressive” is often referred to – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. An award can be made in the case of any exceptional or contumelious conduct which has the effect of seriously increasing the claimant's distress.

(b) Motive. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a).

(c) Subsequent conduct.

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

**Award – Injury to Feelings**

129. The Tribunal took into account that there were 4 separate acts of detriment, albeit that they took place over a short period - about only one month. They were serious acts of detriment, with serious resulting injury to feelings. The Tribunal refers to its findings of fact, above, in relation to injury to feelings. The Claimant’s injury to feelings has continued until the date of the remedy hearing.

130. The proper award was in the middle *Vento* band.

131. The Tribunal also found that some of the acts were aggravated by their nature. Mr Mortimer's conduct was intended "to ensure that employees did not provide full and truthful accounts in relation to his allegations" and was highhanded and oppressive.

132. The Tribunal found that the Respondents' actions resulted in a very sad end to long and successful service.

133. Nevertheless, the dismissal itself was not an act of detriment. The Tribunal concluded that the Claimant would inevitably have been distressed by his dismissal in any event. The Tribunal needed to be careful to award compensation only for the injury to feelings arising out of these 4 acts, which did not include dismissal.

134. The Tribunal decided that this case was not as serious as *St Andrews Catholic School v Blundell* UKEAT/0330/09. It did not merit an award in the upper middle band.

135. Taking into account the aggravating features of Mr Mortimer's conduct, the Tribunal assessed injury to feelings at £12,000. This included an element of aggravated damages.

**Acas Uplift**

136. The Claimant sought a 25% uplift pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), which provides in material part:

"(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%. […]

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."

137. The relevant Code of Practice is the Code of Practice on Disciplinary and Grievance Procedures: Paragraph 4 of the Code provides that "whenever a

disciplinary or grievance process is being followed it is important to deal with issues fairly."

138. The Tribunal referred to its liability findings that Mr Mortimer instructed the Claimant's fellow employee not to support the Claimant and not to give an honest account to an investigation into a grievance brought by the Claimant.

139. The Tribunal accepted the Claimant's submission that intimidating witnesses was not dealing with the issues fairly.

140. The Tribunal found, however, that the redundancy process itself was not affected by protected disclosure or victimisation.

141. Any ACAS uplift could be applied only to the compensation awarded for the detriments which affected the grievance process.

142. The Tribunal decided that it was appropriate to make an uplift to the injury to feelings award, to reflect the serious breach of the ACAS Code of Practice. However, given that the Claimant had already received compensation for his injury to feelings, it was not appropriate to make an award at the top of the allowable range. Furthermore, the uplift did not apply to the whole of the injury to feelings, as not all detriments related to the grievance process..

143. The Tribunal decided that an uplift at the lower end of the range was appropriate. It decided that a 10% uplift should be applied to the injury to feelings award. This meant that the injury to feelings award was increased by £1,200.

144. Total injury to feelings, including the ACAS uplift, was £13,200.

**Interest on Injury to Feelings**

145. The Tribunal awarded interest on injury to feeling at 8% from the date of dismissal to the date of the remedy hearing. There were 366 days + 263 = 629 days in this period.

146. The interest calculation is £13,200 X 0.08 x 629/365 = £1,819.79.

147. Total injury to feelings, including ACAS uplift and interest to date is £15,019.79.

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Employment Judge **Brown**

Date: 1 July 2021

SENT to the PARTIES ON

01/07/2021.

FOR THE TRIBUNAL OFFICE