EMPLOYMENT TRIBUNALS

Claimant:		**Respondents:**
Dr E Heslop	**v**	Oxford Said Business School Limited (1) Dr A White (2)

Heard at:	Reading	**On:** 10-11 May 2021 (in person) 15-16 July 2021 (by CVP) In chambers: 27 May,14 June & 5 August 2021
Before:	Employment Judge Anstis Mrs A E Brown Mr J Appleton	

Appearances
For the Claimant: Mr J Kendall (counsel)
For the Respondents: Ms J Danvers (counsel)

JUDGMENT - REMEDY

1. The first respondent must pay to the claimant £1,566.

2. The first and second respondents are jointly and severally liable to pay to the claimant a further £1,498,040.62.

REASONS

A. INTRODUCTION

Introduction

1. In a liability judgment dated 29 December 2020 we made the following findings, so far as they are relevant to this remedy hearing:

    1. The claimant was unfairly dismissed by the first respondent.

    2. The claimant's dismissal was not automatically unfair.

    3. The first and second respondent subjected the claimant to the following detriments (which are described in the reasons) on the ground of protected disclosure(s):

- *Detriment 1 (in part)*
- *Detriment 2*
- *Detriment 3*
- *Detriment 4*
- *Detriment 5 (in part)*
- *Detriment 6 (in part)*

4. *The second respondent subjected the claimant to the following detriments on the ground of protected disclosure(s), and the first respondent is vicariously liable for those detriments:*

   - *Detriment 8*
   - *Detriment 9*

5. *The claimant's claim in respect of the following detriments is dismissed:*

   - *Detriment 5 (in part)*
   - *Detriment 6 (in part)*
   - *Detriment 7*

6. *The first and second respondents unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.*

2. The numbered detriments are set out in the liability judgment, and are repeated below, to the extent we have found them as matters the respondents are liable for:

   1. *"solicit*[ing] *some or all of the supposed complaints about the Claimant" – "in the sense that* [the second respondent] *tended during his discussions and the resulting notes to emphasis the negative aspects of what he was told and in speaking to people was interested in and looking for negative comments about the claimant's behaviours rather than positive comments."*

   2. *"the* [respondents held] *a "disciplinary" meeting with the Claimant on 6 September 2018 in the absence of a fair process and contrary to the First Respondent's disciplinary policy"*

   3. *"the* [respondents informed] *the Claimant on 6 September 2018 and/or on 7 September 2018 that she had lost the trust and confidence of the senior team and/or of the second respondent"*

4. "[the respondents refused] *to permit the Claimant to return to work on 6 September 2018 and/or suspend*[ed] *the Claimant from her post and/or place the Claimant on indefinite forced leave in breach of her contract."*

5. *"the* [respondents failed] *or refuse*[d] *to provide the Claimant with the details of the alleged wrongdoing and/or performance issues both at the meeting on 6 September and continuing until her resignation on 6 November 2018" – in the period up to 18 September 2018 only*

6. *"the* [respondents] *failing or refusing, on 6 September 2018 and during the period of two months thereafter prior to the Claimant's resignation on 6 November 2018, to identify the alleged complainants." – in the period up to 18 September 2018 only*

8. *"failing to warn the claimant at any point before or after arranging the aforesaid meeting on 21st August 2018 about the matters to be raised at the meeting or that its purpose was to inform the Claimant that supposed 'concerns' had been raised about her/or to prevent her from returning to work"*

9. *"presenting the plan for the claimant to be removed from her post as a fait accompli notwithstanding the failure to follow any or any proper process"*

3. These detriments centre around the second respondent's actions in gathering material for, convening and following up on a meeting on 6 September 2018, full details of which are set out in the liability judgment. We concluded that these actions amounted to a constructive and unfair dismissal. While not finding (for reasons given in the liability decision) that the reason or principal reason for this dismissal was the claimant's protected disclosures, we suggested in our liability judgment that "*our findings on the detriments may ultimately provide the claimant with a remedy for the consequences of her dismissal under the terms of the whistleblowing legislation (in addition to any remedy for ordinary unfair dismissal).*" This is based on the principles outlined in Timis v Osipov [2018] EWCA Civ 2321. Our liability judgment cites Underhill LJ as saying (at para 91):

> *"(1) It is open to an employee to bring a claim under s 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under s 47B(1B). All that s 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.*
>
> *(2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, s 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply."*

4. The parties proceeded on the basis that this was a correct statement of the law which applied to this case and that (subject to one argument by Ms Danvers)

the claimant's claim for loss of earnings following her dismissal could be dealt with as compensation for a detriment or detriments caused by the second respondent for which the first respondent was vicariously liable, with that as compensation for a detriment it was not subject to any statutory cap.

5. We also found (for reasons given in our liability decision) that there should be no deduction from any award of compensation for unfair dismissal on account of contributory fault. While finding that the respondents had unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, we reserved to this hearing the question of the amount of any uplift, given that that should be determined in the knowledge of the amount of compensation to which the uplift applied.

6. We understand that there is presently an outstanding appeal by the respondents against our liability decision, but neither party suggested that that precluded us from proceeding to address the question of the remedy the claimant was entitled to.

7. While the claimant had originally sought reinstatement, by the time of the remedy hearing she was no longer seeking reinstatement and the only remedy sought was financial compensation. In broad terms, this could be said to fall within four main categories:

    1. Compensation for unfair dismissal.

    2. Compensation for financial losses flowing from the detriments.

    3. Compensation for injury to feelings resulting from the detriments, and

    4. An uplift on account of unreasonable failure to follow the ACAS Code of Practice.

    Given what we have said above it is likely there will be overlap between (1) and (2). We should not give compensation in respect of the same period of loss twice.

The hearing(s)

8. Although we had originally envisaged this hearing proceeding by CVP, it was converted at the request of the claimant to an in-person hearing for the purposes of evidence and submissions on 10-11 May 2021. Similar adjustments to those for the liability hearing were made in order to ensure that the claimant's health conditions did not place her at a disadvantage in the hearing. It has appeared from correspondence between the parties prior to the hearing that there may be substantial case management points to be dealt with in respect of any further disclosure or medical evidence, but fortunately these seemed to have been resolved between the parties and there were no applications for further case management orders at the outset of the hearing.

9. During the hearing we heard oral evidence from the claimant, Dr Eleanor Murray (who succeeded the second respondent as Associate Dean for Executive Education) and two experts in labour market assessments that the parties had

permission to call – Keith Frost for the claimant and Keith Carter for the respondents. The parties provided written submissions which were supplemented by oral submissions at the end of the hearing.

10. The tribunal met in chambers on 27 May 2021. We had hoped to be able to give an oral judgment setting out our findings in principle to the parties on 14 June 2021, with the parties then to have time to discuss what financial compensation arose from those findings. This was not possible, as we needed more time to discuss our decision. The hearing was rearranged to continue on 15-16 July 2021 on the same basis as had previously been intended. The hearing on those dates proceeded by video (CVP).

11. On 15 July 2021 the hearing commenced at 11:00. We gave the parties our decision and then proceeded to given them oral reasons for it, comprising essentially parts A, B and D of these reasons, up to the stage of part D that deals with matters arising at the hearing and not including the element of part A addressing what occurred during the hearing.

12. Following some further discussion, we allowed the parties time to consider our decision and its implications, resuming around 15:00, at which point we addressed the further matters set out towards the end of Part D of these reasons. The parties were then to see what they could do by way of calculation ahead of a resumed hearing at 10:00 on 16 July 2021.

13. Thanks to Ms Danvers's initiative in constructing a spreadsheet, the parties were well placed to deal with the calculations, and a number of further points were dealt with during 16 July 2021, including the question of an ACAS uplift and a substantive application for reconsideration, each of which are referred to below. Also on 16 July 2021 Mr Kendall put forward on behalf of the claimant two suggested editorial changes to be made when our oral reasons were reduced to writing, one of which we have accepted and the other of which we did not accept (for reasons given orally at the time).

14. We gave the parties our decision on the respondent's application for reconsideration on the afternoon of 16 July 2021, reserving the reasons to be produced later in writing. We held a further meeting in chambers on 5 August 2021 for the purpose of finalising these written reasons, including the written reasons in respect of the reconsideration application and incorporating the points that had arisen during the hearing.

15. There were further exchanges of correspondence between the parties following the hearing, as described below. This led (by agreement) to a slight reduction in the amount of compensation as the original figure had contained an error in the grossing-up calculation.

An outline of the parties' positions

16. What follows is not intended as a comprehensive statement of the parties' positions at the hearing, but simply as a broad outline of the arguments made, so as to give context to the findings that follow.

17. The claimant's contention was that the respondent's actions had been so damaging that she would never work again at the same level. She had throughout her period with the first respondent and beyond carried out consultancy work through a company that she ran together with her husband. However, the damage the respondents had caused to her health was so bad that she was not in a position to seek opportunities in the way she otherwise might have. The health of her children and other commitments she had made to the Oxford area meant that she was not in a position to relocate to get work. Opportunities for people at her level were hard to come by at the best of times, let alone during the Covid-19 pandemic. While her earnings would recover somewhat, she would never again be earning at the level she was with the first respondent.

18. The claimant contrasted that with what she said would have occurred if the detriments had not taken place: she would have remained with the first respondent either in her previous role or in some adjusted role that also involved an element of work as part of the first respondent's faculty. This would have meant her maintaining more-or-less the same level of earnings through to retirement.

19. The respondents put forward a number of reasons why the claimant's employment would not have continued with the first respondent. Most fundamentally, Ms Danvers argued that we ought not to make any award of compensation for lost earnings under the heading of a whistleblowing detriment, since it followed from our finding that the principal reason for dismissal was not protected disclosures that the claimant would have been dismissed irrespective of any protected disclosures. She said that the claimant would have either resigned and/or fallen ill as a result of the accusations she faced even if they had been handled by the respondents in a way that did not involve unlawful behaviour. Beyond that, the respondents argued that the claimant would have been made redundant as a result of a restructure prompted by the consequences of the Covid-19 pandemic, and that it was unrealistic to expect that anyone of the claimant's age would stay with the same employer or in the same role for the rest of their working life. Even if the tribunal was not satisfied that an earlier termination of the claimant's employment was inevitable, percentage reductions should be applied to take account of the possibility that the claimant's employment may have ended at various points prior to her retirement.

20. The respondents also sought to challenge the claimant's mitigation efforts, providing a range of roles within 50 miles of Oxford that they said may be suitable for her, given her previous experience and particularly her former role as a manager in the health service.

21. The contrast between the parties' positions is illustrated by the claimant's schedule of loss amounting to many millions of pounds whereas the respondent's counter schedule of loss came to less than £100,000.

22. We do, however, note that the parties agreed upon a figure of £1,016 for the claimant's basic award of compensation for unfair dismissal and a figure of £500

for loss of statutory rights to be included in the compensatory award for unfair dismissal.

B. THE FACTS

The claimant's career up to her employment by the respondent

23. It is not in dispute that the claimant had enjoyed a successful career prior to her employment with the respondent. She had strong academic credentials (including a DPhil from Oxford University). She had initially worked in management in the health service in Scotland, progressing to a significant managerial post within the Scottish Government. From there, she moved to Deloitte where she worked as a management consultant. She was promoted a number of times during her work for Deloitte, ending as a director with a specialism in higher education. Along the way she set up a separate business under the auspices of Deloitte. The first respondent was a client of hers at Deloitte, and she was specifically sought out by the first respondent for the role of Director of Custom Executive Education. She was in her late thirties when she started the role, and is now in her early forties.

24. While employed by the first respondent, she was permitted to undertake some consultancy work on her own account through Lucidity Services Limited, a company she ran together with her husband.

25. Prior to her resignation from the first respondent, the claimant had enjoyed rapid career progression. She had demonstrated her skills, versatility and ambition through a range of different employers and projects, including work on her own account and setting up a new business. In the course of doing so, she had impressed one of her clients (the first respondent) so much that they offered her a job working directly for them.

The period between the meeting of 6 September 2018 and her resignation

26. The events between the meeting of 6 September 2018 and the claimant's resignation are set out in our liability decision, and will not be repeated here. We do not understand it to be formally accepted by the respondents that the detriments set out above caused the claimant's ill-health, but equally we do not understand it to be disputed that the claimant was seriously ill during the period following the meeting of 6 September 2018 up to her resignation, and that this ill-health persisted beyond the date of her resignation.

27. At this hearing we had the claimant's GP notes, from which we note the following entries during this period (we do not want to include unnecessary medical details in relation to the claimant in a public judgment, but do consider this (and the later references) to be necessary in order to address the arguments the parties have made in this case):

    8 Oct 2018 "*pretty desperate … in a horrible limbo*"

    19 Oct 2018 "*nightmare situation, really upset and low*"

    24 Oct 2018 "*not coping at all*"

"*v distressed about issues at work … not coping … very tearful a lot of the time*"

26 Oct 2018 "*feeling awful … highly stressed and is getting nearly* [sic – should be really?] *unwell*"

5 Nov 2018 "*has horrible few days, bit better today … is resigning*"

The period from her resignation up to the date of the remedy hearing

Facts in relation to the claimant

28. Since her resignation, the claimant has only had very limited earnings. These have been from consultancy work carried out through her (and her husband's) company, Lucidity Services Limited, under a contract secured (with the first respondent's permission) during her employment with the first respondent. For the period from the end of her employment through to April 2021 her total earnings appear to be agreed by the parties at £18,180.

29. The claimant has set out a number of reasons for not having been able to earn more (or obtain other employment) during the period up to the date of the remedy hearing. These are (from her statement):

- her ill-health,
- the time and energy necessary to conduct this litigation,
- her being unable to explain the circumstances in which her employment ended (at least up to the point the liability judgment was promulgated),
- difficulty in finding senior roles without "*the platform of an existing senior and prestigious position*",
- the reputational damage caused by the circumstances of her leaving the first respondent's employment,
- the Covid-19 pandemic, and
- "*job related and personal factors*", which included:
    - "*the uniqueness and prestige of* [her former] *role*" and
    - family commitments meaning she could not relocate from Oxford.

30. In a letter dated 9 April 2021, the claimant's GP said the following:

> *"Elaine has been diagnosed with anxiety, depression, hypertension and insomnia since this episode started, these are new problems starting in the autumn of 2018. She was not taking medications before this and was well before September 2018.*

She is now suffering from the following:

1. *Severe depression and anxiety. This has led to uncontrollable stress, low mood, poor functioning, difficulty with socialisation, suicidal thoughts. Her sleep has been severely affected. I have prescribed Sertraline 150mg (a high dose) for this and she has needed to have as needed diazepam and zopiclone (anxiolytics and sleeping tablets, see below).*

2. *New hypertension, this is often uncontrolled and severe (systolic over 200 which can be dangerous), I think it is a lot worse when under stress. She is on medication for this – Losartan 50mg.*

3. *Intrusive thoughts of death and dying, presenting twice with suicidal ideation which we took seriously.*

4. *Insomnia, with nightmares.*

5. *Trauma - her experiences are causing her symptoms similar to PTSD.*

I hope these problems will improve when this is resolved, although the duration of this whole affair has undoubtedly been a factor in itself.

I first saw Elaine about these problems shortly after the sacking, at that point Elaine felt very distressed about the situation and was fearful she would be punished for whistleblowing. The problems identified above unquestionably have a direct causation from this event and the subsequent events. As well as the trauma of the experience and the stress of the situation, the loss of job, respect, colleagues, income and the fear for the future of her family have all been factors in this.

Elaine has been seen by staff from psychological services (Talking space plus) as well as a psychologist I arranged for her.

They have suggested she has been suffering from complex PTSD and suggested EMDR/specialist trauma therapy. I would agree, as well as the severe depression and anxiety.

Since this has happened I suspect that the experiences have made Elaine unable to work full time and at the level she was working at. This is related to her mental health symptoms but also some of her medication, for example she has to take occasional diazepam which would mean she couldn't drive after taking this. Her prognosis is actually reasonable if this situation is resolved, she will need the right therapy and support to get her health back and then would likely be able to work at a similar level but this will take time."

Facts in relation to the first respondent

31. There has been no direct replacement for the claimant following her dismissal. We understand that initially the claimant's work was divided between those who

had reported to her and the second respondent. The second respondent moved into another position from December 2020, at which point Dr Eleanor Murray took over as Associate Dean for Executive Education, a position she holds on a part-time basis three days a week, with the remainder of her working week being devoted to her academic work as a member of the first respondent's faculty. She took over the second respondent's responsibility for the strategic direction of Custom Executive Education.

32. She described the first respondent's plans to open a new site in central Oxford (Osney Power Station) as its new centre for executive education, eventually replacing the current site at Egrove Park.

33. It was Dr Murray's contention that the first respondent had no requirement for a Director of Custom Programmes (the role the claimant previously held). There has been no position with that title since the claimant left. Dr Murray points out that the Covid-19 pandemic led to many customers deferring or cancelling their executive education programmes, with the result that revenue from custom executive education fell from around £12.5m in FY 2018/19 to £11m in FY 2019/20 and was projected to be £9m for the current financial year. She goes on to say that this drop in revenue would mean that the first respondent could no longer support the expensive position of Director of Custom Programmes. She points to likely future changes in the delivery of programmes, even once the Covid-19 pandemic is no longer such a large factor. She concludes:

> *"If the claimant had remained in post, she would have been affected by this as restructuring may have resulted in the replacement of her role with a more junior role which provides a supporting infrastructure for the interface between industry clusters and thematic groups."*

34. In response, the claimant points out that what has happened following her dismissal is not necessarily a good guide to what would have happened had she remained in post. She points to evidence indicating a reluctance on the part of institutions associated with Oxford University to make redundancies at a senior level – or at least to make redundancies where there is no equivalent role to which an individual can be redeployed. She suggests that the Covid-19 pandemic has not been entirely negative for custom education, and may have given rise to new opportunities, and that the position of Director of Custom Programmes assumes all the more importance during times of change and uncertainty within the industry. The financial performance of custom education may have been better had she remained in post. All of this will need to be considered in our conclusions.

The recruitment climate generally, and the expert evidence

35. Both parties put forward evidence from experts in the field of labour market analysis. For the claimant this was Keith Frost, and for the respondents Keith Carter.

36. Mr Frost recounts the claimant's career to date, setting out her salary at the date of her resignation as being £157,313 gross (or £94,537 net). He projects that the claimant would receive one further promotion during her time with the

respondent, and says that female executives' earnings typically peak in their early 50s. On the question of a further promotion for the claimant within the first respondent, he does not identify what that role was. The only obvious role that she would be suitable to fulfil is that of Dr White or (after he moved on) Dr Murray. However, they were both academics in their own right, which the claimant was not, despite the aspirations she may have had towards eventually developing her own academic career. Except, perhaps, for Mr Harris, the roles senior to the claimant's were all held by practicing academics with their own academic reputation. In those circumstances, and given that Mr Frost has not identified that that promoted role might be, we do not find that the claimant would have had any substantial promotion if she had remained with the first respondent. Our assessment of what her earnings would have been is based on her remaining in post as Director of Custom Programmes.

37. Mr Frost's job search was limited to roles located in the Oxford Travel to Work Area, which broadly matched the 25 mile radius from Oxford city centre which the claimant contended for and which the university used as its guide to a reasonable travelling distance for its staff. Mr Frost goes on to comment on the possibility that the claimant may have been made redundant, although it seems to us that this is better dealt with by the other evidence we have heard on the topic, rather than Mr Frost's opinion. Mr Frost speculates that the claimant "*may find that her general wellbeing and her ability to undertake a targeted, successful job search are likely to improve on the conclusion of litigation and remedy*". That broadly accords with the view expressed by the claimant's GP in the letter cited above. He continues:

> *"My … professional experience is that loss of a senior post when a person is aged in their 40s or 50s is highly likely to not only destroy their previous career trajectory, based on promotion or head hunting from the assessment of their performance in their current post, but also lead to a very significant reduction in earnings in alternative employment and a difficult job search period …"*

38. Mr Frost goes on to cite from a salary survey for female graduates, and a study of the difficulties that whistle-blowers may face on the labour market. He says that the claimant would be better placed to find work on the conclusion of the litigation, and goes on to describe labour market conditions generally during the Covid-19 pandemic. He says that the claimant will be able to secure a job with annual earnings in the region of £60,000 gross. He "*would not rule out a further promotion from her initial post*" resulting in eventual annual earnings of around £70,000 gross.

39. Mr Carter has a more optimistic view of the claimant's prospects. He says that the areas the claimant has experience in – that is, higher education, management consultancy and the NHS, continue to grow. He recounts the claimant's career, emphasising the breadth of her experience, describing her as having an "*impressive track record*". He goes on to refer to the prospects of the claimant remaining in employment with the first respondent, but as with Mr Frost's observations on that topic we prefer to rely on the more direct evidence we have for that rather than expert opinion.

40. He outlines a range of roles he considers the claimant would be suitable to undertake, setting a range of salaries against them. First, he suggests that she could reach partner or director level within a management consultancy within five years, a post he assesses as paying similarly to the claimant's role with the first respondent, or perhaps substantially more at the "Big Four" consultants. Second, he points to NHS or other public sector management roles, paying up to £125,000. Third, he points to roles in higher education at up to £90,000 or academic roles at up to around £62,000. He considers the first two options to be the most likely for the claimant, and says that it may take her around six months to complete the recruitment process.

C. THE LAW

Compensation for detriments generally

41. A complaint of infringement of s47B of the Employment Rights Act 1996 (detriments in relation to protected disclosures) is brought under s48(1A) and if successful gives rise to the remedies set out in s49 – that is, a declaration (previously given in our liability judgment) and:

> *"an award of compensation … in respect of the act or failure to act to which the complaint relates."*

42. Under s49:

> *"(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to:*
>
> *(a) the infringement to which the complaint relates, and*
>
> *(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.*
>
> *(3) The loss shall be taken to include:*
>
> *(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and*
>
> *(b) loss of any benefit which he might reasonable be expected to have had but for that act or failure to act.*
>
> *(4) In ascertaining the loss 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 …"*

Injury to feelings

43. In this case we are awarding compensation for injury to feelings arising out of whistleblowing detriments rather than the more familiar territory of unlawful

discrimination. However, "*it is … important as far as possible there is consistency in awards throughout all areas of discrimination*" and "*we see no reason for detriment under s.47B to be treated differently; it is another form of discrimination*" (HHJ Ansell in Virgo Fidelis Senior School v Boyle [2004] IRLR 268). That judgment also conveniently cites the principles for an award of injury to feelings from HM Prison Service v Johnson [1997] IRLR 162 as follows:

> *"(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.*
>
> *(2) Awards should not be too low, as that would diminish respect for the policy of the antidiscrimination 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.*
>
> *(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.*
>
> *(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.*
>
> *(5) Finally, tribunals should bear in mind … the need for public respect for the level of awards made."*

44. In making an award of compensation for injury to feelings, the tribunal operates according to the "Vento bands" (Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871):

> *"(i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race ...*
>
> *(ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.*
>
> *(iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."*

45. Those figures have since been uprated, and in this case we must apply the First Addendum to the Presidential Guidance of 5 September 2017 so that:

> *"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."*

46. The claimant also claims aggravated damages, which can apply in the categories identified by Underhill J in Commissioner of the Police of the Metropolis v Shaw [2012] IRLR 296 at para 22 under the following headings: the manner in which the wrong was committed, motive and subsequent conduct.

Loss of earnings

47. In Timis v Osipov [2018] EWCA Civ 2321 at para 84 Underhill LJ said:

> *"section 47B (2)* [of the Employment Rights Act 1996] *places no barrier to recovery of compensation for losses flowing from a dismissal which was itself caused by a prior act of whistleblower detriment. For the avoidance of doubt, such compensation would be subject to the usual rules about remoteness and discounting for contingencies (including the contingency that the employment might have terminated in any event)."*

48. In Abbey National v Chagger [2009] EWCA Civ 1202 Elias LJ held (in the context of a dismissal tainted by discrimination) that (para 43):

> *"the question is not what would have occurred had there been no dismissal, but what would have occurred had there been no discriminatory dismissal. That required consideration of the question whether dismissal might have occurred even had there been no discrimination."*

and (para 57):

> *"It is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss."*

49. In constructing what would have occurred but for the wrongful act, the tribunal has to consider what the first respondent would have done, not what a "*reasonable employer*" would have done (Abbey National plc v Formoso [1999] IRLR 222).

50. In this case we are being asked by the claimant to award career-long loss of earnings. In Wardle v Credit Agricole [2011] EWCA Civ 545, Elias LJ said:

> *"… 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 ... Where such a loss is*

established, a tribunal has to undertake that task, however difficult and speculative it may be."

and

"In the normal case, if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice, the speculative nature of the exercise means that the tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide."

51. In order to assess the loss of earnings arising from the detriments the claimant suffered (including her dismissal) we have to consider what would have happened if her protected disclosures had had no adverse effect, and we also have to consider what will now happen in the future.

ACAS uplift

52. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 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* [which include both whistleblowing detriment and unfair dismissal claims].

(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%."

53. As referred to in our liability decision, it is established that the uplift should only be made once the amount to be uplifted is known. In Wardle Elias LJ said that the tribunal should "*focus on the nature and gravity of the breach*", but also ensure that any resulting uplift is not "*disproportionate*". He cautioned 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".

D. DISCUSSION AND CONCLUSIONS

Injury to feelings

54. There is no doubt that this is a serious case. The respondents' actions have caused substantial harm to the claimant. However, the detriments we have found are, despite the harm that has been caused, confined to a particular time – August and September 2018 – and centre around one incident. In those circumstances, we do not consider that the award of injury to feelings falls within the top band. This is not one of the "*most serious cases*" nor does it result from "*a lengthy campaign of discriminatory harassment*".

55. The appropriate Vento band to reflect the injury to the claimant's feelings is the middle band, and we consider this case falls within the upper end of the middle band, with the appropriate award of compensation for injury to feelings being **£23,000**.

56. The claimant also claims aggravated damages, based on "*the failure of the second respondent to properly investigate the concerns that he solicited, and the 10 months taken by the first respondent to deliver a finding in relation to my grievances*", the contents of the ET3 and "*the respondents have continued to deny events and pursue litigation*".

57. We take it from this that she is relying on the *"subsequent conduct"* aspect of aggravated damages, described by Underhill J as originating *"where the defendant conducted* [its] *case at trial in an unnecessarily offensive manner"*.

58. We do not see this as being a case in which aggravated damages should be awarded. *"The failure of the second respondent to properly investigate the concerns"* that he solicited is nothing more than a repetition of the claimant's case as it was understood at the liability hearing. She criticises the first respondent for the length of time then taken to consider her grievances, but in many cases a respondent would have taken no steps at all in relation to such a grievance when the individual had left their employment. We do not see that the elaborate process adopted by the first respondent in conducting the grievance amounts to conduct justifying an award of aggravated damages.

59. As for the respondents' conduct of the litigation, it is true that they have throughout defended this litigation, but we do not see that their doing so gives rise to an award of aggravated damages. Despite the ultimate outcome of this case elements of the respondents' defence succeeded, including on the question of what the reason or principal reason for the claimant's dismissal was.

Loss of earnings: what would have happened?

The prospect of early termination of employment – dismissal in any event

60. Note: The four paragraphs which follow were the subject of the reconsideration application made by the respondents at the hearing and are superseded by our

decision on the reconsideration application set out at section E below. However, we have retained the paragraphs below to show the form in which oral judgment was given at the hearing and to give appropriate context to our description of the reconsideration application.

61. As outlined above, the first element of the respondents' submissions on the question of what would have happened in the absence of any detriment arising from protected disclosures was that the claimant would have been dismissed in any event. Ms Danvers said that it followed from our decision that the protected disclosures were not the main reason for the claimant's dismissal that the claimant would have been dismissed in any event. Her argument was that taking away the effect of the protected disclosures would still have left a "main reason" for dismissal that was not unlawful.

62. We do not accept that, for a number of reasons. First, the task set out for us in Chaggar is to ascertain what the first respondent would have done if the public interest disclosures had no adverse effect. Would the claimant have been dismissed by the first respondent if she had not made her protected disclosures, or if the disclosures had had no adverse effect? Fortunately in this case we have a full understanding of what the first respondent would have done. That is demonstrated by the investigation from Dee Masters and the conclusion of Dr Glover. He is clear in his conclusion that the claimant would not have been dismissed – a decision which also accords with our assessment of the situation (see paras 155-156 & 218 of our liability decision).

63. Second, if it were to be the case that the main reason for dismissal was the decisive factor in awarding any subsequent loss, this would render the decision in Timis irrelevant in many situations. Timis expressly contemplates circumstances such as these in which liability will follow when the unlawful detriment is not the main reason for the decision to dismiss, without any suggestion that in such circumstances a claimant will not be entitled to any compensation.

64. Dr Glover made very clear findings, and we conclude that there is no prospect that a process (free from unlawful detriments) operated by the first respondent in respect of the allegations against her would have led to her dismissal.

The prospect of early termination of employment - resignation

65. There is a separate point made by Ms Danvers as to whether the claimant would have resigned during any such process – that is, a process resulting from these allegations which was not tainted by unlawful detriment. This may arise either through the claimant not wishing to address the complaints that had been made against her, and/or finding the process stressful and to so affect her health as to mean that she felt the need to resign.

66. We have carefully considered this point. Our liability decision makes it clear that the respondent could not ignore this situation, and would have had to carry out a proper investigation. The claimant is a proud woman with a strong sense of her own abilities, and would not have remained sanguine in the face of such criticism. Even at the time of the remedy hearing she continued to take issue

with the terms of reference that were given to Dee Masters. The claimant would have fought her corner at every stage in such a process. This would have been difficult and stressful for her. Against that, we must balance the fact that (as we will come on to) she was employed in a role that strongly suited her personal preferences and family circumstances. The role was in a prestigious institution and offered many benefits that could not easily be found elsewhere (such as the opportunity for consultancy work via her own company, or the possibility of developing her own academic career). One of the reasons she would have strongly fought the allegations was her desire to remain in this role, and this points to the idea that she would have voluntarily resigned during a process that was free from unlawful detriments being very unlikely. The reason she resigned in this case are very specific to the process implemented by Dr White, which is a process we have found was motivated by the protected disclosures. Without that, she would not have felt the same pressure to resign.

67. We have concluded that there is a small but not negligible prospect that the claimant would have resigned even if a process free of the influence of protected disclosures had taken place. We assess this chance as being **10%**.

Other possibilities of early termination of employment - generally

68. It was the respondent's case that, even if she had overcome the allegations against her, the claimant's employment would have been terminated anyway. This was primarily in reliance on Dr Murray's evidence as to the effect of the Covid-19 pandemic on the first respondent's business, and the fact that the first respondent had not appointed a direct replacement, but also encompassed wider questions of how long a person in the claimant's position would remain in post. The claimant's case was that she would remain in post for the rest of her career. We have set out above why we reject the suggestion from Mr Frost that she would have received a promotion with the first respondent.

69. We note the caution in BMI Healthcare Limited v Shoukrey (UKEAT/0336/19/DA) that:

> *"… it is rare for loss lasting a whole career to be awarded. Before making such an award, an employment tribunal should consider the matter with great care."*

70. We have outlined the claimant's position above. She was well settled in a prestigious institution and was well paid with various other privileges such as the opportunity to carry out her own outside work. She had made financial and other commitments to living in Oxford and was now effectively required to remain in Oxford, at least in the short to medium term, on account of the medical treatment her children were receiving. There was no reason or incentive for her to leave her post. This is the way she puts it in her witness statement:

> *"Having relocated my family to take up the post, I regarded the move as a permanent one and bought a house and began renovating a property with the long-term expectation of remaining in my post and working and living in Oxford … My confidence in my job security and prospects were*

> *reflected in securing a mortgage with a 29-year term taking me through to my date of retirement.*
>
> *Given the senior and prestigious status of my role with the first respondent and the absence of other work opportunities locally which match the flexibility and benefits of my former role, I would not have sought to obtain alternative employment."*

71. And later, when referring to others at a senior level who had lost their jobs at the respondent but had retained connections and pay from the first respondent as contractors or members of the associate faculty, she says:

> *"I do not consider there is any reason to believe that my employment would otherwise have been terminated save on consensual terms which would have enabled me to transition to new and equally well-paid employment."*

72. On the question of typical lengths of service, the claimant pointed out that her peers at the first respondent had lengths of service ranging from 6-15 years, and typically ten years or more. She also relied on a response to a request for information under the Freedom of Information Act showing that in the calendar years 2017 and 2018 only 12 permanent members of staff with over four years' service were made redundant by the University of Oxford (in comparison with an overall staff complement said to be around 14,000). Dr Murray accepted that such redundancies were "*rare*".

73. In her evidence, Dr Murray pointed to the length of service of the respondent's predecessors as Director of Custom Programmes – Roger Wyn-Jones, who held the role for two years and five months, and before him Steve Ludlow, for five years and ten months. She said that the role was a particularly demanding one, given in particular the need for international travel.

74. During the course of oral evidence it emerged that Mr Wyn-Jones had only held the role on an interim basis, and had withdrawn from the role because of his long commute, but had remained engaged with the respondent in a different role. We do not see him as a good example of what may have happened to the claimant.

Redundancy arising as a result of the Covid-19 pandemic

75. The first question on this point is whether the claimant would have been made redundant by the respondent in the period between her dismissal and the date of this hearing.

76. We accept the evidence presented by the claimant that compulsory redundancies were rare within Oxford University and its associated institutions. Particularly within the first respondent, if there was to be a reorganisation it was far more common for senior individuals to be redeployed, possibly taking up academic positions, than simply being dismissed. Once employed at a senior level within the respondent the possibility of being made redundant without the offer of some sort of equivalent role was very small.

77. We cannot, however, ignore the impact of the Covid-19 pandemic. It clearly has cut the revenue derived from Custom Programmes, at least in the short term. It is likely that questions would have to be asked about where cost savings could be made within Custom Programmes. We note that there had previously been two reorganisations in Custom Programmes. It was not a part of the organisation where there were long-standing and time-honoured structures that would not have been questioned. However, those previous reorganisations had never questioned the need for a Director of Custom Programmes, and the fact that the respondent has got by since the claimant's dismissal without a Director of Custom Programmes is of limited assistance in saying what would have occurred if the claimant had not been dismissed. There is some force in the claimant's arguments that during difficult times the role of Director of Custom Programmes would become more rather than less significant.

78. One of the many uncertainties that we have to consider is whether such a redundancy situation would have resulted in the claimant being dismissed or whether she would have been offered and taken a more junior role at a lower salary as an alternative to redundancy. This is just one example of the multiple alternative scenarios that could arise when assessing loss of earnings over a substantial period of time. As described in Wardle, we have to come up with an absolute figure intended to take account of a wide variety of scenarios which may or may not occur. In this case, we assess the chance of the claimant being made redundant by the first respondent as being **10%**. This is a figure which we intend to apply to the calculations on the basis that the claimant would thereafter no longer be employed by the first respondent, but it is also intended to take account overall of the prospect that the claimant remained employed but at a lower salary. This avoids almost impossible calculations derived from the claimant having, say, a <10% chance of being left without any work at all for the first respondent and a >10% chance of being redeployed to another role on some lower rate of pay. What it does not take account of is that the claimant remained employed in a different role at the same or a higher salary, which for the purposes of calculating loss we do not consider would have any effect on the calculation at all. As will appear below, we also intend this figure to encompass the risk of any other involuntary termination of the claimant's employment in the period during which we are assessing her loss of earnings.

79. We suggest that the appropriate point in time at which this 10% reduction should be applied is April 2021. Any redundancies in response to the Covid-19 pandemic would not have been rushed by the first respondent, and we consider that April 2021 is the most likely time that any such redundancy would take effect.

Ongoing service more generally

80. The claimant presented a compelling case that she was settled at the first respondent and within Oxford more generally. Her peers tended to remain in employment for lengthy periods of time, presumably because once they were working for the first respondent and established there were few incentives to move on to other institutions. Compulsory redundancies were very rare. She was working to a five-year strategic plan for Custom Programmes, with the first respondent preparing to invest heavily in new facilities for Custom Programmes

at Osney Power Station. She had been well able to manage the overseas travel required, despite her family commitments. As we heard from the second respondent, part of the issues that had been raised concerning the claimant was that she was away so much, and it appeared likely that in the future her overseas travel would diminish. That is even before the impact of the Covid-19 pandemic on current and likely future travel is considered.

81. The claimant is presently in her early 40s and told us that she was intending to work on until she was 68, and that she had set up her mortgage on that basis. The respondent suggested that she would retire at 60.

82. We bear in mind the caution in Shoukrey (and Wardle) about an award of career-long losses. That must particularly be the case where the claimant is still relatively young. We are not prepared to say that the claimant would have remained in post through to her retirement. There are many factors that could have interfered with that in the 20-30 years that she would have to work. As we will refer to below, her need to be in Oxford may diminish as her children become older and more independent. It seems likely that at some point she would want to see new challenges in a different role – although it seems to us that the most probable way in which that would occur is by a new role (or adaptions to her current role) within the first respondent or some associated institution – for instance, commencing an academic career in parallel with her managerial responsibilities.

83. Given our findings below on what we consider will happen, it is sufficient for us to say that we consider the claimant would, once the deductions referred to above are taken into account, have remained employed by the respondent on her current role, or some other role on equivalent terms and conditions, for at least the period of the "escalator" described below, but not for the rest of her career. We consider that the possibility of her being dismissed as redundant or for some other reason during this period is adequately dealt with by the 10% reduction we have previously made based largely on the possibility of a redundancy during the Covid-19 pandemic.

Loss of earnings: mitigation

Generally

84. In our judgment, the piece of evidence which most clearly and directly encapsulates the situation the claimant finds herself in is that at the end of her GP's letter:

> *"Since this has happened I suspect that the experiences have made Elaine unable to work full time and at the level she was working at. This is related to her mental health symptoms but also some of her medication, for example she has to take occasional diazepam which would mean she couldn't drive after taking this. Her prognosis is actually reasonable if this situation is resolved, she will need the right therapy and support to get her health back and then would likely be able to work at a similar level but this will take time."*

85. That chimes with our assessment of the situation. The claimant has suffered a very damaging setback through the unlawful detriments and constructive dismissal to which she was subject. However, this is not irrecoverable. The claimant remains a person of great ability. Once this litigation is behind her, with appropriate support she will be able to rise again to her previous level.

To date

86. We understand that from the date her employment ended through to April 2021 the claimant earned £18,180, which is entirely from her work with Lucidity Services Limited.

87. We do not think the claimant's mitigation during this period can be criticised. She has given us an account of the jobs she has unsuccessfully applied for, which we consider to be more suitable than those identified in the respondent's indiscriminate search for well-paid jobs. Her health has not been good, and she has been heavily involved in this litigation. We are not yet in the situation described by her GP of having "*the situation resolved*".

What will happen – the short term?

88. The claimant estimates her earnings for the period April 2021 to April 2022 as being £20,000 – via Lucidity Services Limited. She goes on to say that she considers that she has a reasonable prospect of securing a role paying in the region of £60,000 from April 2022. We accept both these as being appropriate mitigation. We are aware that there is an outstanding appeal against our liability judgment, and it will be some time before it can be said that "*the situation*" – that is, her employment tribunal claim – is finally resolved. This would be a period within which the claimant would be getting back on her feet and in a position to start again with her career. We accept that at least initially that would have to be at a much more junior level to previously, as she rebuilt her strength and her professional reputation.

What will happen – the medium and long-term?

89. Where we disagree with the claimant is in her suggestion that that £60,000 role (or a small promotion above that) would then be the limit of her earnings. Going back to her GP's letter, once the "*situation is resolved*" she has a "*reasonable prognosis*", and "*would likely be able to work at a similar level*" "*but this will take time*".

90. Mr Frost says, and we accept, that the claimant will be in a better position to seek work when this litigation is concluded. He also says, and we accept, that at first this will be at a much lower level as she attempts to rebuild her career. She will not simply pick up at the same level she was when employed by the first respondent. Mr Frost talks of the loss of such a post as "*destroying* [the individual's] *previous trajectory*". We agree, in the sense that the individual will not pick up where they left off, but we do not agree if he means that the claimant's career will never resume its previous level. We note he is particularly speaking of the situation of people who lose their jobs in their 40s and 50s, alongside his evidence that the earnings of female executives peak in their early

50s. The claimant had just turned 40 at the time she resigned, so was at the very earliest point of the age range he had in mind, with a further ten years to go before what might typically be expected to be the peak of her earnings.

91. On the whole, the factors which the claimant has identified as restricting her ability to obtain work, such as her health, the need to care for her children and the ongoing litigation, can be expected to improve over time. Her children are currently aged 9 and 11, but in time will move to adulthood and can be expected to be less dependent on their parents. The claimant's health will improve and her former vigour will return. This will not be an easy process for her, but it is one we consider she will be able to undertake. As her GP suggests, she will be able to work her way back to a similar level of her previous work, with the biggest question being how long this might take.

92. Our best assessment of how long this would take will be ten years from when she resumes her first substantive job – that is, the role at £60,000 in April 2022. We base this on the following: she will need to start at more junior work, building herself up through various stages to the level she was previously at. This will not come easily. However, within ten years both of her children will have reached adulthood, and we do not expect there will be any lasting ill-effects from her constructive dismissal and this litigation. She will be following a similar career path to that she did in her late 20s and 30s, building up to her former status. The claimant will find her own ways to develop her career. We anticipate that it will be through a mix of different roles, including management consultancy and possibly also developing her own academic or individual consultancy work. We find that within ten years she will have worked herself up to earning the same package as she did with the first respondent. This would coincide with Mr Frost's assessment of when a female executive's earnings can typically be expected to peak.

93. This would be progression through a series of steps, but the practical way of carrying out this calculation is to take it as a linear progression of annual earning increases for ten years from April 2022, which marks the point from which she would be earning £60,000.

Loss of earnings: conclusions

94. There is a 10% chance that the claimant would have resigned during the course of an investigation into the allegations against her, without that resignation amounting to a constructive dismissal and without any of the respondent's actions being affected by her protected disclosures.

95. There is a 10% chance that the claimant would have been lawfully dismissed as redundant during the Covid-19 pandemic (to encompass also any later dismissal or re-engagement in a more junior role).

96. The claimant must give credit for her mitigation to date of £18,180, and then for a further £20,000 through to April 2022. She must then give credit for mitigation of £60,000 rising on an annual linear basis to reach her previous earnings (so that there are then no ongoing loss of earnings) over ten years from April 2022.

Other matters

The correct Ogden table discount factor

97. There was a dispute between the parties as to which Ogden table discount factor should apply to the claimant's future losses. This was the subject of some supplemental written submissions by Mr Kendall, which Ms Danvers did not object to, subject to some further comments of her own.

98. Broadly speaking, the issue is whether the appropriate table is that which applies to people with or without a disability. In the claimant's case, the relevant disability is said to be her hearing impairment.

99. Paragraphs 68-70 of the relevant guidance specify what those compiling the tables mean by "disability". This is founded on the concept of disability as understood under the Disability Discrimination Act 1995 rather than the Equality Act 2010. At para 70 the guidance cites the former Disability Discrimination Act guidance in relation to hearing, which suggests that a person should be considered to be disabled if they are "*not able to hear without the use of a hearing aid, the inability to understand speech under normal conditions or over the telephone*".

100. Mr Kendall draws our attention particularly to para 90 of the guidance notes, which say "*it is important to consider how the degree of residual disability may have a different effect on residual earnings depending upon its relevance to the claimant's likely field of work*" and "*disability is the better predictor of employment prospects than the impairment itself and close regard must be given to the effects of the claimant's impairment on his or her future intended occupation*".

101. It has never been part of the claimant's tribunal claim that she is a disabled person or was subject to disability discrimination. At most, she has at various points suggested that some difficulties with colleagues were caused by her hearing impairment, rather than any conscious decisions or actions on her part.

102. On the evidence we have heard we do not consider that we can conclude on the balance of probabilities that the claimant was disabled either for the purposes of assessing what she would have earned had she remained with the respondent or what she will earn in the projected future role we have outlined above. In neither case do we consider it appropriate or necessarily to consider her to be a disabled person by virtue of her hearing impairment. At most that may cause occasional difficulties, but on the limited evidence we have heard it does not amount to a disability as understood under the Disability Discrimination Act as it does not have a substantial adverse impact on her normal day-to-day activities, nor do we consider that it would have had an effect on her ongoing employment with the respondent or in any future role. The Ogden tables are to be applied in relation to both her loss of earnings and her projected future earnings on the basis that she is not a disabled person.

103. During the course of the hearing a question arose as to whether the Ogden tables were in fact applicable to this claim, given our findings of fact. That point is dealt with below.

The claimant's bonus in her final year of employment

104. During her employment the claimant had the benefit of a bonus scheme which paid up to 25% of her salary. This was paid according to assessment against "revenue", "contribution", "FT rankings", "citizenship and working with others" and "objectives", each of which carried individual weightings. In the claimant's case these were, respectively, 10%, 20%, 20%, 30% and 20%, each of which were scored out of 5.

105. The respondent's case on how much the claimant would have been paid by way of a bonus for FY2017/18 if she had not been employed is set out in a table annexed to Dr Murray's statement. For revenue and contribution, her results are taken from those of her former colleague Chantel Moore, at 3/5 and 3/5. For FT rankings it was 2.5/5 on the basis that the ranking remained 'flat'. Citizenship and working with others was rated at 2/5 bearing in mind the complaints that had been made. Objectives were rated at 2/5, with the overall outcome that the claimant would, on the respondent's case, have achieved 48% of her targeted bonus.

106. The claimant contended that her citizenship and working with others rating should have been 3/5, as this was based on the values feedback process which had largely been completed by the time the complaints were made against her, did not mention the complaints and was based on the views of people who were not those who had raised the complaints against her. She said that she would have raised a grievance if her score for citizenship had been diminished on the basis of matters not arising in the values feedback process. In her oral evidence she initially challenged the respondent's scoring for "revenue" on the basis that but for the difficulties with the Malaysian government the revenue achieved would be sufficiently high to achieve a 3.5/5 rating, but she later accepted Ms Danvers's comment that the revenue target had to be assessed by reference to the actual revenue achieved rather than what might have been achieved, in which case 3/5 was, she accepted, a "reasonable" score.

107. In answer to Mr Kendall's questions, Dr Murray said that the claimant's assessment of 3/5 for citizenship, based on the values feedback was, "*a reasonable argument*".

108. In the light of the oral evidence and concessions made by both sides during the course of cross-examination we take it that the correct approach to this is to adopt the figures contended for by the respondent but to increase the score attributable to citizenship by 1/5 to 3/5. Since citizenship was weighted 30% that would mean an increase of the percentage of targeted bonus earned by the claimant from 48% to 54%.

The basic award for unfair dismissal

109. The parties agree that the appropriate basic award for unfair dismissal is **£1,016**.

The compensatory award for unfair dismissal: loss of statutory rights

110. The parties agree that the appropriate award for loss of statutory rights is **£500**. Aside from this, the unfair dismissal compensatory award is entirely encompassed by the award of compensation for the unlawful detriment of dismissal.

Further matters arising on 15-16 July 2021

111. On 15 July 2021 the parties asked for clarification on a number of points. On three specific matters we heard submissions from the parties and gave further decisions, as follows:

Pension rate

112. The period for ten years from April 2022 during which we said the claimant would rebuild her career back to its previous level became referred to during the hearing as the "escalator" period.

113. In our oral judgment, we had said that at the end of that period the claimant would be "*earning the same package as she did with the first respondent*". Our intention in framing things that way was to work according to the cash value of the overall benefits package that the claimant had enjoyed at the first respondent, rather than breaking it down into individual elements. That approach seemed most suitable to us to account for the diverse range of benefits other than salary that may go to make up the claimant's total remuneration package during this period, including some benefits typically available in the private sector (such private healthcare, or (although not referred to at the hearing) stock options) and some only available in the public sector (such as the USS pension scheme applicable to university and associated staff).

114. However, our starting point of £60,000 for this escalator period was described only as her "earning" £60,000, which gave rise to a question of whether any pension benefit on top of that would be at the 3% rate said to be typical of the private sector, or 23.7% as may apply under the USS.

115. Having heard submissions from the parties, we said that 3% pension contributions should be added to that £60,000, rather than 23.7%. That was because our assessment of £60,000 was essentially an acceptance of the claimant's position as to what she might do in restarting her career. Her witness statement says (and we accept) that this would not be within the university sector.

Dates for the 10% reductions

116. We were asked by the parties to give a precise date for the two 10% reductions we had identified. In the case of the first reduction we had given no particular

date, and in the case of the second reduction we had identified this as occurring in April 2021, but without giving a date in April 2021.

117. The first 10% reduction arose from the possibility of the claimant resigning during a lawful process arising from the allegations against her. Those allegations would have had to be answered by her, but would have been presented to her in a proper form and earlier than they in fact were. Mr Kendall argued that this would put any resignation into 2019, but this appeared to be on the unlikely basis that the claimant would remain to the end of a process that vindicated her and then resigned. What we had in mind was the point in the process at which the claimant would have been under maximum stress that may then have caused her to resign. It seems to us that this would have been at a much earlier point, and most likely shortly after she was formally notified of the allegations. The best date we can put on that is that it would have been (had a correct process been followed) at around the same time she actually resigned. This was 6 November 2018, and that is the date at which the first 10% reduction should apply.

118. The second 10% reduction primarily although not exclusively concerns the prospects of the claimant being made redundant as a result of the Covid-19 pandemic. We have previously identified this as applying in April 2021, but without giving a precise date in April 2021. We note that April 2021 would have been more than a year into the Covid-19 pandemic. With that in mind, it seems to us that although we have said the respondent would take some time to implement any redundancies, it is more likely to occur in the earlier part of April than the later part of April. We find the correct date for this is 1 April 2021. Conveniently, that keeps it in line with the date that will later be used for the "escalator" calculations.

The use of Ogden tables

119. We had, at the invitation of the parties, assessed whether it was the disabled or non-disabled version of the Ogden tables that should apply in the claimant's case. However, it was the claimant's case that the Ogden tables did not apply in the light of our findings of fact, and particularly as we had declined to make an award of career-long loss. Mr Kendall's argument was effectively that our findings of fact had encompassed the contingencies that would otherwise have been dealt with by the Ogden tables.

120. On reviewing the introduction to the Ogden tables we see that tables are designed to assist those concerned with assessing lump sum damages for future losses in personal injury and fatal accident cases and they have two parts, the first concerning mortality and the second being that which takes account of contingencies other than mortality. Our finding in respect of the second 10% reduction was to encompass the risk of any involuntary termination of the claimant's employment in the period during which we are assessing her loss of earnings - that is, the 10-year period of the "escalator". On that basis our finding of the 10% reduction already encompasses the contingencies that would otherwise be dealt with by the Ogden tables, and we find that the Ogden tables have no application to this case, given our findings of fact.

Uplift

121. We found in our liability decision that the respondents had unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. We continued:

> *"A number of cases, most recently Banerjee v Royal Bank of Canada UKEAT/0189/19, decided after submissions in this case, have emphasised that the tribunal ought not to set a percentage uplift figure under s207A without taking account of the overall figure that may result from such an uplift. We are not in a position to do that at this stage of proceedings and will need to hear argument from the parties on this at any subsequent remedy hearing. We note, however, that our provisional view (subject to arguments as to the overall amount of compensation and any further points the parties may raise at the remedy hearing) is that this was a serious failure of the kind that brings into contemplation an uplift of up to the maximum 25% permitted."*

122. By mid-day on 16 July 2021 the parties had come to a figure of around £800,000 (subject to grossing up) for the claimant's compensation. This gave us a basis on which to hear arguments as to the appropriate uplift.

123. Mr Kendall urged us to follow-through on the suggestion in our liability judgment of a 25% uplift, saying that in this case there had been a "*most serious failure*" to follow the ACAS Code of Practice, as set out in our liability judgment. He acknowledged that this would result in an uplift in excess of the maximum award of injury to feelings, but said that this was appropriate given the consequences of the respondents' failings and also that this could not be considered to be a "*purely procedural failing*".

124. Ms Danvers said that in making an uplift we should be thinking in terms of an ordinary unfair dismissal award rather than the entire losses flowing from the detriments. There had been no failures in relation to grievances, and the only failures had been in relation to disciplinary proceedings. She said that any uplift for failure to comply with the Code of Practice was inevitably to be characterised as a "*procedural failing*" since substantive failings had already been compensated by the substantial award that was likely to be made. The amount sought by the claimant would be equivalent to an award for personal injury of the utmost severity. The uplift should be no more than 1%, which would be appropriate for the additional element of a failure to comply with the ACAS Code of Practice. The substantive losses suffered by the claimant would be adequately compensated for by the other elements of compensation to be awarded to her.

125. As previously indicated in our liability decision, we consider the breach of the ACAS Code of Practice in this case to be very serious. At the heart of the claimant's claim, and the damage that has been caused to her, is a conscious decision by the second respondent and Ms Francis not to comply with the ACAS Code of Practice in respect of the allegations that had been made against the claimant. The "*nature and gravity of the breach*" is of the utmost seriousness.

As indicated in our liability decision, but for the question of proportionality we would be minded to make a full 25% uplift.

126. We heed Elias LJ's caution that the resulting awards should not be disproportionate. However, we remain of the view that a substantial uplift is the only appropriate way of reflecting the scope of the respondents' failure to comply with the ACAS Code of Practice. We have determined that in these circumstances the appropriate uplift is 10%. We acknowledge that this will result in an uplift of over the maximum award for injured feelings, and note Elias LJ's caution as to how this may be viewed by members of the public. However:

    (i) His indication acknowledges that there may be "*very exceptional circumstances*" in which the public would not take that view. We consider that those very exceptional circumstances exist in this case.

    (ii) We do not understand him to be laying down any rule of law that an uplift can never exceed the maximum payable for injured feelings. Instead, he is cautioning that tribunals should bear in mind possible public perception of such awards. We have done so in this case but nevertheless still consider that a 10% uplift is necessary in order to reflect the nature and gravity of the breach in this case.

    (iii) We do not consider the respondents' failures in this case to be "*purely procedural failings*", and note that in Wardle Elias LJ was addressing the former statutory dispute resolution procedures (which may more aptly be described as purely procedural, and which gave rise to uplifts of up to 50%) rather than the ACAS Code of Practice.

E. RECONSIDERATION

Our decision to reconsider

127. On giving our oral reasons, Ms Danvers immediately made an application for reconsideration of one element of the decision. Mr Kendall indicated that the claimant may also make an application for reconsideration, but said that any such application would be made following receipt of the written reasons for the decision.

128. Ms Danvers's application was for us to reconsider our decision in respect of how the second respondent would have responded to the allegations made against the claimant, if his behaviour had not been influenced by any protected disclosures. She said that (i) by referring to Dr Glover's conclusions we had addressed what the first respondent would have done and not what the second respondent would have done, and (ii) that our reference to Timis was misplaced and based on a misunderstanding of that case.

129. Having heard Ms Danvers's application, we accept both that our analysis of this point by reference to what the first respondent would have done, and our understanding of Timis (as set out in para 63), were wrong and needed to be reconsidered.

The outcome of the reconsideration

130. There was a broad measure of agreement between Ms Danvers and Mr Kendall that our original approach was incorrect. However, they differed on the question of what outcome of any reconsideration should be. Ms Danvers's submission was that the proper decision was that the second respondent's response would have been the same even in the absence of any protected disclosures, thus severely limiting the claimant's compensation. Mr Kendall said that although originally made on an incorrect basis, our decision was ultimately sound and should remain in place following a reconsideration.

131. The question we have to determine is, per Chagger:

> "*what would have occurred had there been no* [unlawful detriments]*. That required consideration of the question whether* [the detriments] *might have occurred even if* [the protected disclosures had not materially influenced the second respondent's actions]."

132. Ms Danvers puts it this way in her written submissions:

> *"the Tribunal is obliged to consider what would have happened not if there had been no detriment, but if there had been no unlawful detriment. In other words, would Dr White have acted in the same way in any event absent any material influence from the protected disclosures."*

133. Mr Kendall's first response to this was that if the tribunal was to consider this, it would need evidence and that would require the second respondent to be recalled to give evidence, which had not occurred. Mr Kendall acknowledged that this could be considered a somewhat artificial exercise, but said that it was necessary if the respondents were to argue the case in this way. In response Ms Danvers said that these points had all been addressed in the second respondent's evidence for the liability hearing.

134. It is clear that if we are to find that there would have been detriments in any event we must do so on the basis of evidence. Recalling the second respondent to say that he would have acted in the same way regardless of any protected disclosures would have an air of artificiality, particularly when it was always the second respondent's case that he had not been influenced by the protected disclosures, but in the absence of that the parties were left to argue the point by reference to the findings in our liability decision. That was not an easy task particularly as the findings in our liability decision were made by reference to the particular burdens of proof that applied to the different elements of the claim.

135. Ms Danvers pointed out that we had not found Dr White to be consciously motivated by the protected disclosures. She said we had inferred that he was materially influenced by them, while at the same time finding that the principal reason for his decision that the claimant's employment had to end was the allegations that had been made against her, rather than the protected disclosures. She said that these allegations would have been made in any event (as there was no finding that the colleagues who made these allegations had been influenced by the protected disclosures). She said that it followed from

those points that the second respondent would have acted in the same way irrespective of any protected disclosures or, failing that, there should be a substantial percentage reduction in compensation to account for the chance that the second respondent would have acted in the same way.

136. For the claimant, Mr Kendall said that our decision on this point was correct, despite the errors that have led us to conclude that it should be reconsidered. He said that the reconsideration should lead to the same outcome. He said that cases such as Chaggar arose out of redundancy situations where there was almost always going to be a chance that the redundancy would have occurred in any event, but that was not the nature of this case. As regards the allegations against the claimant, he referred us to our findings on the first detriment at paras 220-225 of the liability decision, which he said were a complete answer to the question. The second respondent had not carried out a "*full informal or formal investigation*" but instead had "*gather*[ed] *only negative material about* [the claimant]". He said that in considering what would have occurred but for the influence of the protected disclosures we had to proceed on the basis that there would have been a fair procedure, with the whole purpose of discrimination (or whistleblowing) law being that liability should attach where the discrimination (or whistleblowing detriment) plays a part in the actions of the employer.

137. We accept Mr Kendall's submission that the proper starting point for our consideration is the first detriment. What that detriment is is dealt with at para 191 onwards of our liability judgment.

138. We found that "*after the initial complaint … the purpose of* [the second respondent] *speaking to the others was to hear the criticisms they had to make of the claimant*" (para 193) and that he was "*looking for negative comments about the claimant's behaviours*". That approach was materially influenced by the claimant's protected disclosures. It "*set on course a chain of events leading to the claimant's eventual dismissal*" (para 222). "*Dr White used this material to form his own concluded view that the claimant's employment had to be terminated*" (para 225), and, by the time of the 6 September meeting he "*had already reached his conclusion that the claimant's employment would end*".

139. We have to decide what would have occurred in relation to the first detriment if the protected disclosures had had no material influence on the second respondent's actions. The closest the liability decision comes to addressing this is at para 222, although that describes what "*the most obvious action*" would have been rather than what the second respondent would in fact have done.

140. To accept the respondents' arguments that the second respondent would (or may have) acted the same way in gathering only criticism of the claimant requires us to find that he would (or may) have acted in some way other than "*the most obvious*" way. We do not see any basis on which we could do so. We made no findings, that, for instance, the second respondent was particularly sensitive to the allegations he was hearing, or prone to overreaction simply because of the nature of the allegations that were made. There is nothing to account for the first detriment other than the claimant's protected disclosures.

141. As set out above, the consequence of the first detriment was that the second respondent jumped to an early conclusion that the claimant's employment should be ended, and it is that that lead to her eventual (constructive) dismissal. There is nothing to account for the first detriment other than the claimant's protected disclosures, nor is there anything to suggest that the second respondent was (apart from any question of protected disclosures) particularly prone or inclined to coming to rash or hasty conclusions about employment matters.

142. While her protected disclosures were not the only or principal reason for her (constructive) dismissal we see nothing in our liability judgment or the evidence more generally from which we could properly conclude that the claimant would (or may have been) constructively dismissed by the actions of the second respondent irrespective of the influence of any protected disclosures. Accordingly, while we reconsider our decision on this point, that reconsideration does not change our conclusion that there should be no deduction from compensation attributable to the risk that she may have been (constructively) dismissed in these circumstances irrespective of the influence of her protected disclosures.

F. CALCULATIONS

143. We are grateful to the parties, and particularly Ms Danvers, for undertaking the task of converting our decision into financial terms.

144. At the conclusion of the hearing on 16 July 2021 we stated the compensation due to the claimant as being £1,595,970.25, of which £1,566 was due from the first respondent only and £1,594,404.25 was due from the first and second respondent. This was based on the parties' agreement as to the relevant figures at the time.

145. Almost immediately after the hearing, Ms Danvers sent an email containing a correction to these figures (to which Mr Kendall agreed), on the basis that there had been an error in the grossing-up calculation. The revised figures are agreed between the parties as being:

- £1,556 compensation due from the first respondent only, and

- £1,498,040.62 compensation due from the first and second respondent.

146. Those revised figures are the ones we have incorporated in this judgment.

147. The parties have a full spreadsheet (stretching to almost 700 rows) setting out the full calculation. For the purposes of these reasons we incorporate the summary only, as follows:

SUMMARY	
Basic Award (unfair dismissal)	**£1,016.00**
Financial loss	

Dismissal to April 2021	£259,780.17
April 2021 - April 2022	£90,562.82
April 2022 - April 2023	£71,846.46
April 2023 - April 2024	£64,091.41
April 2024 - April 2025	£56,579.88
April 2025 - April 2026	£48,946.59
April 2026 - April 2027	£41,322.37
April 2027 - April 2028	£35,110.51
April 2028 - April 2029	£29,300.64
April 2029 - April 2030	£22,489.02
April 2030 - April 2031	£14,855.73
April 2031 - April 2032	£6,949.40
Sub-total	**£741,834.99**
Loss of statutory rights	**£500.00**
Bonus 17/18	**£18,900.00**
Injury to feelings award	**£23,000.00**
Aggravated damages award	**£0.00**
Acas uplift (on all elements apart from basic award)	**£78,423.50**
Total award (subject to grossing up)	**£863,674.49**
GROSSING UP CALCULATION	
Amount subject to grossing up	£863,674.49
Tax free (ITF and 30k)	£53,000.00
Basic rate	20%
Start of basic rate	£53,000.00
End of basic rate	£90,700.00
Amount taxed at basic rate	£37,700.00
Tax paid at basic rate	£7,540.00
Higher rate	40%
Start of higher rate	£90,701.00
End of higher rate	£203,000.00
Amount taxed at higher rate	£112,299.00
Tax paid at higher rate	£44,919.60
Additional rate	45%
Start of additional rate	£203,001.00
End of additional rate	£1,499,606.62
Amount taxed at additional rate	£1,296,605.62
Tax paid at additional rate	£583,472.53
Total tax	£635,932.13
Net award	£863,674.49

Total after grossing up	**£1,499,606.62**
R1 only	-£1,566.00
Joint and several	£1,498,040.62

G. POSTSCRIPT

148. On 23 July 2021 the tribunal received an email from the claimant's solicitors saying:

> *"We would be grateful for clarification on the date of the judgment for the purposes of calculating when the award is payable.*
>
> *It is the Claimant's understanding that judgment was given orally on Friday 16 July and that written reasons would be given after the chambers meeting on 5 August 2021. The award should therefore be payable by 30 July 2021.*
>
> *The Respondents are of the view that the Tribunal stated during the hearing on Friday that the judgment will be promulgated after the Tribunal has met in chambers on 5 August 2021.*
>
> *We would be grateful for clarification on the above point."*

149. As the claimant's solicitors say, oral judgment was given on 16 July 2021, with these written reasons to follow. As appears above, however, the amount in this written judgment is not that same as that announced orally on 16 July 2021. This change has come about with the agreement of both parties.

Employment Judge Anstis
Date: 6 August 2021

Sent to the parties on: .....

.....
For the Tribunals Office

Public access to employment tribunal decisions:
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.