EMPLOYMENT TRIBUNALS

Claimant: **Mrs C. Daly**

Respondent: **BA Cityflyer Ltd**

Heard at: **East London Hearing Centre**

On: **25 May 2021 and**
16 June 2021 (in chambers)

Before: **Employment Judge Massarella**
Members: **Ms T. Jansen**
Mr L. O'Callaghan

Appearances
For the Claimant: Mr P. Powlesland (Counsel)
For the Respondent: Mr B. Randle (Counsel)

RESERVED JUDGMENT

The Tribunal awards the Claimant total compensation for unlawful discrimination in the amount of £38,741,55, consisting of the following:

1. **an award for injury to feelings of £10,000;**
2. **interest on that sum in the amount of £3,088;**
3. **an award for loss of earnings and pension loss of £15,815.37, consisting of:**
    - 3.1. **Period 1: £2,444;**
    - 3.2. **Period 2: £3,773.87;**
    - 3.3. **Period 3: £712.84;**
    - 3.4. **Period 4: £3,986.34;**
    - 3.5. **Period 5: £4,898.32.**
4. **interest on Periods 1-3, and part of Period 4, in the amount of £1,532.71;**

5. an award of £7,194 to reflect the cost of buying her new business

6. interest on that sum in the amount of £1,111.47.

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Background

1. By a judgment sent to the parties on 28 December 2020, the Tribunal made the following findings and conclusions:

    1.1. the Claimant was keen to return to work on a flexible pattern (para 50 onwards), and pursued the point to appeal (para 67 onwards);

    1.2. she investigated childcare before returning from maternity leave in August 26, and found that it was too expensive and that 'affordable, alternative childcare arrangements would not have been available, if the Claimant worked the flexible shift pattern required by the Respondent, full-time' (para 46);

    1.3. we found that, had a trial period along the lines of the Claimant's proposal been agreed, she would have returned to work, and would then have taken a second period of maternity leave (para 82);

    1.4. the Claimant knew that she could have made another flexible working request in 2018, but did not do so because she did not think the outcome would be any different (paragraph 75);

    1.5. she did not apply under the phased return scheme, which the Respondent introduced, because it did not provide for set days, and only applied for six months (paragraph 78);

    1.6. although she was pregnant in around April 2018, she did not know this until late May (paragraph 83);

    1.7. the Claimant invested in a training franchise in April 2018, about a month before she resigned (paragraph 79).

The hearing

2. We heard evidence from the Claimant. The Respondent called no witnesses.

3. We had a bundle of 88 pages, to which the Respondent made late additions, relevant to mitigation. The Respondent did not submit a counter-schedule of loss, as it had been ordered to do. It appears to have proceeded on the assumption that there was no potential loss of earnings claim because there was no finding of constructive dismissal. For reasons we set out below, that was incorrect. Even if the Respondent was right, it did not absolve them from complying with the Tribunal's order.

4. Mr Randle (Counsel for the Respondent) did his best to make good the omission by producing a skeleton argument, in which he made submissions relevant to loss of earnings, including mitigation and loss of chance. We permitted him to make those arguments, and to submit the additional documents: it was in the interests of justice to do so and we considered that the Claimant would be able to answer questions about the new documents, which were relatively few in number.

5. We observe that there was also a significant omission in the way that the Claimant's case had been approached: no credit had been given for childcare costs, which the Claimant would have incurred, had the discrimination not occurred.

The law

Compensation for acts of discrimination

6. Compensation for discrimination is assessed on tortious principles (ss.119(2) and s.124(6) Equality Act 2010 ('EqA')). The aim is to put the Claimant in the position, so far as is reasonable, that she would have been in, had the tort not occurred (*Ministry of Defence v Wheeler* [1998] IRLR 23). The sum is not determined by what the Tribunal considers just and equitable in the circumstances, as would be the case in an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422).

The *Chagger* principle

7. In assessing compensation for discriminatory acts, we must ask what would have occurred had there been no unlawful discrimination. For example, in a dismissal case, if there were a chance that the employment would have terminated in any event, had there been no discrimination, then that must be factored into the calculation of loss (*Chagger v Abbey National PLC and another* [2010] IRLR 47).

8. The Tribunal can determine the award on the basis on a loss of chance basis (*Wheeler*). Where the chance of a future event is very high, or very low, it is permissible to treat the chance as 100% or 0%, as appropriate (*Timothy James Consulting Ltd v Wilton*, UKEAT/0082/14/DXA).

Mitigation

9. It is a fundamental principle that any Claimant will be expected to mitigate the losses she suffers, as a result of an unlawful act, by giving credit, for example for earnings in a new job (mitigation in fact); and that the Tribunal will not make an award to cover losses that could reasonably have been avoided (mitigation in law).

10. In *Cooper Contracting Ltd v Lindsey* UKEAT/0184/15, Langstaff J reviewed the authorities on mitigation. The following principles emerge.

    10.1. The burden of proof is on the wrongdoer; a Claimant does not have to prove that she has mitigated loss; it is not a broad assessment on which the burden of proof is neutral.

10.2. What has to be proved is that the Claimant acted unreasonably; she does not have to show that what she did was reasonable.

10.3. It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

10.4. The Tribunal is not to apply too demanding a standard to the victim; after all, she is the victim of a wrong. She is not to be put on trial as if the losses were her fault when the central cause is the act of the wrongdoer.

10.5. In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

Injury to feelings

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

12. In *Vento* the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **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. … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **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.**
>
> **There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'**

13. The bands were increased by the 2017 Presidential Guidance on awards for injury to feelings for cases issues on or after 11 September 2017 (this case was presented on 20 December 2017):

13.1. lower band: £800 to £8,400;

13.2. middle band: £8,400 to £25,200;

13.3. top band: £25,200 to £42,000.

14. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation: society has condemned discrimination, and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches (*Prison Service v Johnson* [1997] IRLR 162, EAT at [27]).

15. The focus of the Tribunal's assessment must be on the impact of the discrimination on the individual concerned; unlawful discrimination affects different individuals differently (*Essa v Lang* [2004] IRLR 313).

16. A *Polkey*-type reduction should not be applied to an award for injury to feelings (*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615).

17. Awards for injury to feelings unrelated to termination of employment are tax-free, as are awards related to the termination of employment prior to 6 April 2018 (*Moorthy v HMRC* [2018] EWCA Civ. 847).

Interest

18. The Tribunal must consider whether to award interest on the sums awarded without the need for any application by a party, but an award of interest is not mandatory: reg 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[1]

19. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[2] The interest rate now to be applied is 8%.

20. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs). For all other sums interest is awarded from the mid-point of the date of the act of discrimination complained of and the date of calculation (reg 6(1)(b)).

21. Recoupment does not apply to compensation for discrimination.

Findings and conclusions

22. We reject the Respondent's argument that the Claimant is not entitled to loss of earnings post-termination, because her claim of constructive dismissal failed, and is only entitled to an award for injury to feelings. We must consider what would have occurred, but for the discrimination. We have already made a finding in our liability judgment (which has not been challenged on appeal) that she would have returned to work for the Respondent after the end of her first

[1] SI 1006/2803
[2] SI 1996/2803

period of maternity leave. We deal below with the Respondent's argument that she might not have returned to work after the second period of maternity leave, because her childcare costs would have been prohibitive.

The Claimant's net salary and the Respondent's pension contributions

23. The parties agreed that the Claimant's net monthly salary in the 2016/2017 tax year (at 100%) was £2,173.85.

24. Mr Powlesland (Counsel for the Claimant) asked us to take account of the salary increases the Claimant would have received, had she remained in employment. His position was that the core figure should be increased by 3% annually, then reduced by 25% to reflect the fact that she would have come back on 75% hours, producing a net monthly figure of £1,679.30.

25. The Respondent's initial position was that no increases should be applied at all. Mr Randle later confirmed, on instructions, that pay rises usually occur in April; an increase of 2.5% was applied in April 2018; 2.5% in April 2019; no increase was awarded in April 2020.

26. We find, on the balance of probabilities, that the Claimant's net monthly salary would have been increased by 2.5% in April 2018 from £2,173.85 to £2,228.20, which, reduced by 75%, produces a figure of £1,671.15. It then would have been increased in April 2019 by 2.5% from £2,228.20 to £2,283.90, which, reduced by 75%, produces a figure of £1,712.92. We accept that, in April 2020, by which time the Covid-19 pandemic had begun, with its negative impact on the airline industry, there would have been no increase. We heard no evidence of any proposed salary increases thereafter.

27. The parties agreed that we should calculate pension loss at the employer contribution rate of 5% of gross pay. The figures they provided had been calculated by reference to net pay. The correct figures are as follows:

    27.1. gross annual up to April 2018 was £33,289.57;

    27.2. £2774.13 monthly gross x 5% = £138.71;

    27.3. applying a 75% reduction = £104.03;

    27.4. from April 2018 (reflecting a 2.5% salary increase) = £106.63;

    27.5. from April 2019 (reflecting a 2.5% salary increase) = £109.30.

The Claimant's attempts to mitigate her losses

28. When the Claimant's request for flexible working was refused, she turned her mind to alternatives. Her sister told her about a franchise called Daisy First Aid which provided paediatric first aid training to parents and others, such as nursery or school teachers, who worked with children.

29. The Claimant's witness statement for the remedy hearing was vague as to when she invested in the Daisy First Aid Ltd franchise. However, in the remedy bundle, the Tribunal saw a document which confirmed that she had made the investment (and therefore the commitment) on 21 February 2018, when an

invoice was issued to her. By this time her flexible working request had been refused. The cost of purchase was £7,194.

30. Before Covid she was working about fifteen hours a week on the franchise doing six or seven two-hour sessions a week plus administrative duties. She did some work in the school holidays. As a result of Covid the business had to continue online and she ran classes on Zoom. The number of classes fell to one or two a month. Her income greatly reduced.

31. The Respondent argued that the Claimant had unreasonably failed to mitigate her loss. It included in the bundle evidence of vacancies as at the date of the remedy hearing, but none from the relevant time.

The relevance of childcare costs

32. The Claimant must give credit for childcare costs which she did not incur because she did not return to work after her first period of maternity leave.

33. The end of the Claimant's second period of maternity leave would have been in August 2019. It was suggested for the first time in closing submissions by Mr Powlesland that the Claimant would have taken a period of three months' unpaid leave after her period of ordinary maternity leave (thereby reducing childcare costs). We reject that suggestion: the Claimant led no evidence to that effect; it emerged only in instructions texted to Counsel during oral submissions.

34. We reminded ourselves that, at the liability hearing, the Claimant was clear that she did not have a support network of family and friends to help with childcare (see para 46 of the liability judgment). It was for this reason, in part, that she needed a structured, and predictable, flexible working arrangement. The Claimant's evidence shifted slightly at the remedy hearing: she suggested that she might need fewer hours' childcare, because she might receive some informal assistance. We preferred her original evidence.

35. The Claimant's unchallenged evidence, which we accept, was that, provided she was given fixed working days in line with her flexible working request, she would have been able to secure childcare on a daily rate basis with the nursery, Tots to Teens Childcare Ltd.

36. Had the Claimant remained in employment, she would have received 30 hours' free government-funded childcare from the start of the school year after each of her two children were three years old. Her first child was three on 9 July 2020; her second child will be three on 17 December 2021.

37. As for the amount of childcare the Claimant would have required, and its cost, we considered that both parties adopted extreme positions. We concluded that the truth lay between those positions, and we found as follows.

    37.1. Childcare would only have been needed for 40 weeks in the year because of the 12 weeks of school holidays the Claimant's husband was entitled to as a teacher.

    37.2. We do not accept the Respondent's submission that the Claimant's husband would have had to drop their children off at 7 a.m. (which would have meant leaving home at 6.30 a.m.). Nor do we accept the Claimant's

evidence that her husband would have been able to collect their child from nursery at 4 p.m. (for a busy head of year in a secondary school that seems to us unlikely). On the balance of probabilities, we find that the length of a day's childcare would have been 7.30 a.m. to 5.30 p.m., i.e. ten hours a day.

37.3. We accept the Claimant's evidence that she would not have had to pay for meals because she would have provided packed lunches.

37.4. For her first child the daily cost would have been £55 (10 hours x £5.50 an hour).

37.5. The nursery charged a reduced rate for the second child. The daily rate would have been £45 (£4.50 x £10). In total £100 a day.

37.6. Very different figures were advanced by the parties as to how many days per month the Claimant would have required childcare: the Respondent's final position was seventeen, the Claimant's thirteen. We are not in a position to make a definitive finding as to how many days the Claimant would have been rostered: there are too many variables. We have concluded that the fairest approach is to take a position midway between those of the parties: we proceed on the basis that she would have required childcare for fifteen days per month, which is 3.45 days per week (15 days x 12 months, divided by 52.14 weeks).

38. Thus, at the point when the Claimant had to decide whether to return to work in August 2019, the cost of childcare would have been £100 per day x 3.45 days x 40 weeks = £13,800 annually. Her net monthly salary in 2019/2020 was £1,712.92 (at 75%) = £20,555 per annum.

<u>What is the loss in respect of each period</u>

39. We have calculated losses by reference to six distinct periods. These are based on the periods used by the Claimant in her schedule, although we had to adjust them, as there were anomalies in the Claimant's calculations, in particular where specific dates within months were not identified.

40. In relation to each period, we must also decide whether the Claimant failed to mitigate her loss and, in relation to Period 3 onwards, whether there is a chance that the Claimant's employment would have ended, had there been no discrimination.

Period 1: 8 July 2018 to 8 December 2018

41. We found at the liability hearing that, absent any discrimination, the Claimant would have returned to work after her first period of maternity leave (on 8 July 2018). We have no doubt that she would have remained in the Respondent's employment until she began her second period of maternity leave, if for no other reason than to secure an entitlement to maternity pay. We find that leave would have begun on 8 December 2018, on the assumption that the Claimant would have stopped work shortly before giving birth.

42. The loss is calculated as follows.

42.1. The Claimant's net monthly pay would have been £1,671.15 (see above).

42.2. 5 months x £1671.15 = £8,355.75.

42.3. The Claimant's pension loss is £106.63 x 5 months = £533.15

42.4. The Claimant gives credit for earnings from her business of (£2,270.40).

42.5. Her childcare costs for one child would have been £55 a day x 3.45 days per week x 22 weeks = (£4,174.50).

42.6. The loss (salary plus pension, minus other income and cost of childcare saved) is £2,444.

43. We are not satisfied that the Respondent has discharged the burden on it to show that the Claimant failed unreasonably to mitigate her loss: it led no evidence of jobs that were available at that period; moreover, we are satisfied that the Claimant acted reasonably by setting up a new business which at the time seemed to have scope for growth and would also allow her to work flexibly.

Period 2: 9 December 2018 to 31 August 2019

44. This relates to the Claimant's second period of maternity leave of 37.86 weeks. The Claimant gave no end-date in August 2019; we have calculated to the end of the month.

44.1. The Claimant was entitled to 6 weeks x 90% x (£1,671.15 monthly, which is £384.61 weekly) = £2,076.89.

44.2. 31.96 weeks stat mat pay x £148.68 (the Claimant's unchallenged rate) = £4,751.81.

44.3. The Claimant's pension loss is (4 months x 106.63 = £426.52) + (4.5 months x £109.30 = £491.85) = £918.37.

44.4. The Claimant gives credit for earnings of £454.08 per calendar month x 8.75 months = (£3,973.20).

44.5. The loss is £3,773.87.

45. Questions of mitigation and chance of termination do not arise in Period 2.

Period 3: 1 September 2019 to 31 August 2020

46. If the Claimant had returned to work after her second period of maternity leave on 1 September 2019. She would have been paying childcare costs for both children.

46.1. The net monthly pay throughout this period would have been £1712.92 x 12 months = £20,555.04.

46.2. Pension loss is £109.30 x 12 months = £1,311.60.

46.3. The Claimant gives credit for earnings of £454.08 per month x 12 = (£5,448.96).

46.4. The Claimant gives credit for a government payment she received during lockdown of (£1,192).

46.5. The childcare costs would have been 40 weeks (taking into account the 12 weeks for which childcare is not required) x 3.45 days per week x £100 per day for both children = (£13,800).

46.6. The loss, subject to reductions, is £1,425.68.

47. We do not consider that the Claimant unreasonably failed to mitigate her loss during this period: she was in the process of building a promising business when the Covid-19 pandemic struck. This was the worst possible time to look for alternative work. Any vacancies which arose would have been the subject of intense competition, and the Claimant's requirements in terms of flexibility was likely to be a further barrier. In the circumstances, her earnings, although modest, were not unreasonable.

48. At this point, however, the *Chagger* question must be considered: what is the chance that the Claimant would not have returned to work after her second period of maternity leave because of the prohibitive costs of childcare? As might be expected the parties adopted diametrically opposed positions: Mr Powlesland said 15-20%; Mr Randle 90-100%.

49. There are indicators both ways.

50. On the one hand, we note that the Claimant's take-home pay would have been greatly reduced by the increased childcare costs for two children. While not extinguishing it to the extent argued for by the Respondent, nonetheless they would have accounted for just over two thirds of her take-home pay.

51. On the other hand, we had regard to the fact that the Claimant's role within the Respondent was a long-term career for her. There was potential for progression, if she could weather the period (roughly a year) when her disposable income would be restricted because of childcare costs. Thereafter, her first child would have been entitled to free childcare. Remaining with the Respondent would have brought with it other benefits, such as sick pay, paid holiday, pension provision and even further maternity provision. It was a profession for which she was well-suited and which she very much enjoyed. She also had nursery provision in place.

52. We also note that in her schedule of loss the basis of her claim for future loss up to 2023 is that only then will her youngest child start attending school 'and the Claimant will be in a position to try and secure a job that was equivalent to the rate of pay and status of the job she had before the act of discrimination complained of'. We consider that it is implicit in this that the reason why she has not, and will not, try and secure a new job before that point is that, in her current circumstances, she prefers to be at home with her children until they both are in school. In our judgment, there is a very significant chance that she would have made the same choice, had the discrimination not occurred.

53. This is necessarily a highly speculative exercise. Doing the best we can on limited evidence, we have concluded that there was a 50% chance that she would not return to work after the birth of her second child.

53.1. Consequently, compensation awarded for this period is reduced by 50% to £712.84.

Period 4: 1 September 2020 to 31 August 2021

54. From 1 September 2020, the Claimant's first child became entitled to free nursery care, but the Claimant would still have had to pay childcare costs for her second child. We have assumed that the children would have attended the same nursery, and that the nursery would have charged for the second child at the lower daily rate of £45.

54.1. The net monthly salary in this period would have been £1,712.92 x 12 months = £20,555.04.

54.2. Pension loss is £109.30 x 12 months = £1,311.60.

54.3. The Claimant gives credit for a government payment of (£2,235).

54.4. The Claimant gives credit for earnings of (£5,448.96).

54.5. The childcare costs would have been 40 weeks x 3.45 days per week x £45 per day for the second child = (£6,210).

54.6. The loss, subject to further reduction, is £7,972.68.

55. The figure for earnings received is a notional figure, as the Claimant did not have accounts for this period. In fact, her evidence suggested to us that her earnings will turn out to be considerably less than this figure. This surprised the Tribunal: the nature of her own business is such that it ought to have been possible to combine it with some other work, bringing in an additional income, yet she took no steps to increase the scope of her working life during this period, the latter part of which post-dates the last lockdown. We think she is right to give credit in this amount for this period; we are satisfied that she ought reasonably to have been able to earn at this level, even in the unusual circumstances of the pandemic.

56. Further, we apply the 50% reduction in relation to the *Chagger* issue.

56.1. Consequently, we award £3,986.34 in respect of this period (£7,972.68 x 50%).

Period 5: 1 September 2021 to 31 August 2022

57. From January 2022 the Claimant's second child will be getting free nursery, and there will be no childcare costs from that point onwards.

57.1. The net monthly salary throughout this period would have been £1,712.92 x 12 months = £20,555.04.

57.2. Pension loss is £109.30 x 12 months = £1,311.60.

57.3. Childcare costs will be incurred for 4 of the twelve months: £6,210 divided by 3 = (£2,070).

57.4. The loss, subject to reductions, is £19,796.64.

58. The Claimant's schedule gives credit in the same amount for earnings expected to be received during this period as in the previous year, with no indication of potential growth. The Claimant's position in her schedule was that she would not be in a position to try and secure equivalent work to that which she performed for the Respondent until September 2023, when her youngest child starts school. She thought it would take two years from then to find such a role.

59. We have concluded that the Claimant has elected to take no steps to increase the extent of her work, with a view to earning an equivalent income. That is a matter for her but, in doing so, we are satisfied that she is unreasonably failing to mitigate her losses, given her case that she would have returned to work with the Respondent, had there been flexibility. In reaching that conclusion we take judicial notice of the fact that the economy has begun to grow again, and job prospects to improve since the end of the last lockdown. The Claimant is an experienced professional, with a broad skillset. Mr Randle was able to identify vacancies, including customer service roles which had the potential for some flexibility, and which the Claimant accepted might be suitable. On the other hand, we continue to factor in the competitive nature of the jobs market, which must affect her chances of securing them.

60. Doing the best we can on the evidence, we are satisfied that the Claimant will be acting unreasonably if she earns less than £10,000 in Period 5, or approximately half her salary with the Respondent.

    60.1. Consequently, losses in Period 5 are reduced to £9,796.64 because of the failure to mitigate.

    60.2. Applying the 50% *Chagger* reduction, we award £4,898.32.

61. As for the period from September 2022 onwards, we are satisfied that the Claimant will be able to find work equivalent in salary to that which she earned with the Respondent, and we make no award thereafter.

<u>The cost to the Claimant of setting up her business</u>

62. The Claimant is also entitled to recover the cost of buying the business, which was £7,194: the absence of adequate flexible working arrangements meant that she needed an alternative source of income. Her decision to invest in the franchise was a reasonable one.

<u>Injury to feelings</u>

63. As for injury to feelings, we accept that the Claimant was very upset and disappointed when her flexible request was refused, although we observe that, given that her own evidence was that she knew that the general approach of the Respondent was to refuse such requests and she had herself done so (in a managerial capacity) in the past, we consider it is likely that it did not come as a great surprise to her. Nonetheless she felt aggrieved by the way she was treated. She had put forward a cogent case for flexible working and had been willing to compromise. She felt very frustrated when that case was rejected. She was all the more upset because she knew that, as a consequence of the refusal of flexible working, she would not be able to continue working for the Respondent, and would have to give up a career which she valued greatly and

which had ample scope for career development. We accept that she felt she had no choice but to resign; her decision was a reasonable response in the circumstances. It was a very stressful decision, which upset her greatly.

64. Mr Powlesland argued for an award of injury to feelings of £12,000, which is towards the lower end of the middle *Vento* band. Mr Randle argued for an award of £6,000, which is firmly in the lower band, on the basis that this was a one-off act. He referred us to a comparator case which, although not binding on us, we took into account.

65. We reject Mr Randle's submission. It was a single decision, but a serious one, which the Claimant immediately knew would have long-term consequences for her career. The degree of upset, frustration and stress which she experienced means that this cannot reasonably be characterised as a 'less serious case'. We are satisfied that the award belongs in the middle band, but towards the lower end of that band, largely because the Claimant showed considerable resilience and turned her mind constructively to seeking alternative work. On the other hand, we consider £12,000 too high. We have concluded that an award of £10,000 is appropriate in this case.

Interest

66. The Tribunal has decided to award interest in accordance with the usual principles. We have considered whether a serious injustice would be done to the Respondent by our calculation of interest including the period of delay caused by Covid-19 and/or because the Judgment Act rate of 8% no longer reflects financial reality. The Respondents did not submit that we should alter our approach from the normal calculation of interest in this case. We have concluded that the delay has been one of the uncertainties of litigation, for which the Claimant should not be penalised. For these reasons we award interest at the rate of 8% for the period set out in the Regulations.

67. With regard to the financial loss of £15,815.37, the midpoint from the date of the discriminatory act (8 August 2017) and the date of calculation (16 June 2021) is 13 July 2019. The period between that date and the date of calculation is 1.93 705 days. We award interest only in relation to financial loss in Periods 1-3 (subtotal = £6,930.71) and the three-quarters of Period 4, which falls before the date of calculation (£2,989.75), total financial loss = £9,920.46.

68. Simple interest at 8% is £1,532.71 (705 days ÷ 365 x 8% = 15.45% x £9,920.46).

69. As for the cost of buying the business, simple interest is £1,111.47 (705 days ÷ 365 x 8% = 15.45% x £7,194).

70. With regard to injury to feelings, simple interest on £10,000 at a rate of 8% from 8 August 2017 to 16 June 2021 (a period of 1,409 days) is £3,088 (1,409 days ÷ 365 x 8% = 30.88% x £10,000).

Grossing up

71. Because the award for injury to feelings is tax-free (the termination having taken place before 6 April 2018), and the first £30,000 of the remainder of the award is tax-free, there is no requirement for the award to be grossed up in this case.

Employment Judge Massarella
Date: 13 September 2021