



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112634/2015

Held in Glasgow on 25, 26 & 27 February 2019

Members Meeting 26 March 2019

5 Employment Judge: Ms Claire McManus
Members: Mr McAllister
Mr Kerr

10 Mr Zaffir Hakim

Claimant
Represented by:-
Mr Haria

15 The Scottish Trades Union Congress

Respondent
Represented by:-
Mr R Stubbs
(Counsel)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:-

- 20
- In respect of the claimant's successful claims of unfair dismissal under section 98 of the Employment Rights Act 1996 of and victimisation under section 27 of the Equality Act 2010, as set out in the Judgment of this Employment Tribunal dated 18 November 2016, the claimant is awarded the total sum of £16,680.05 (SIXTEEN THOUSAND SIX HUNDRED AND EIGHTY POUNDS AND FIVE PENCE) in respect of
25 compensation, being comprised of a total compensatory award of £12,880.05 (itself being comprised of an award in respect of financial loss of £10,733.37 and interest on this award accrued to the date of promulgation of £2,146.68) and an award in respect of injury to
30 feelings of £3,800.
 - The Tribunal makes the following recommendation under s124(2)(c) Equality Act 2010:-

E.T. Z4(WR)

'That the respondent review their internal policies and procedures in respect of consultation on potential redundancy in the event of expiry of an employee's fixed term contract.'

REASONS

5 Background

1. This Remedy Hearing follows the Judgment of this Employment Tribunal in respect of this case, dated 18 November 2016 (which was upheld on appeal to the EAT). That Judgment is referred to herein as 'this Tribunal's prior Judgment'. The purpose of this Hearing was to determine the extent of the claimant's remedy in respect of his successful claims against for the respondent of unfair dismissal and victimisation. The Findings in Fact from this Tribunal's Judgment of 18 November 2016 are relevant to this Remedy Hearing. The Tribunal came to their decision in discussions on the conclusion of the Remedy Hearing on 27 February 2019, and in a further, shorter, Members Meeting conducted by telephone on 26 March 2019.
2. Orders were issued on the parties on 31 January 2019 for the purpose of seeking clarity prior to the hearing on the remedy sought by the claimant and the respondent's position in respect of that. In response, a schedule of loss was provided on behalf of the claimant and commented on by the respondent's representative, prior to the hearing.
3. In preliminary discussions the claimant's representative confirmed that the remedy sought by the claimant was compensation.
4. Evidence was heard from the claimant, and, for the respondent, from Sylvia O'Grady and Stephen Boyd, each of whom had been involved in the appointment process in respect of two separate vacancies within the respondent's organisation at the time of the claimant's dismissal. Reference was made to a Bundle of Documents, paginated consecutively with numbers 1 - 212.

Issues

5. The issues for the Tribunal to determine were:-

(1) What financial compensation is the claimant entitled to, taking into account the provisions of s122 and s123 of the Employment Rights Act 1996, particularly with regard to :-

- (i) The appropriate period of loss
- (ii) Any reduction on the application of Pol key
- (iii) Any reduction for contribution
- (iv) Any reduction in respect of any failure by the claimant to mitigate his loss.
- (v) Any award for injury to feelings

(2) Is it appropriate for any recommendation(s) to be made by the Tribunal, and if so, in what terms?

Findings in Fact

6. The Tribunal makes the following additional findings in fact in respect of this case:-

- (a) Prior to the date when the claimant was notified that the application for continued funding of the OWER project had been unsuccessful (19 March 2015), the claimant was aware of the vacancies which were then available within or linked to the respondent's organisation, including vacancies in the positions of Director of Scottish Union Learning, Scottish Union Learning Funding and Policy Officer and Policy Assistant (Woman and Work Project) ('the Woman and Work post') . Prior to the date of termination of the claimant's employment with the respondent (31 March 2015), the claimant considered the suitability of those vacancies for him. Prior to the date of termination of the claimant's employment with the respondent, the claimant decided not to apply for any of the vacancies which were then available within the respondent's organisation, and to instead look for employment external to the respondent's organisation. Factors in the claimant's decision to not apply for any of these vacancies were:- the claimant's view on the suitability of these vacancies for him, with

5 regard to his own view on his skills, experience and areas of interest; the fact that the vacancies had not been discussed with him as part of a redundancy consultation; the fact that he had not been asked to apply for any of these vacancies; his view that there was not a genuine
10 redundancy situation affecting him; the timing of the ending of the OWER project; the date on which the claimant was told of his redundancy (19 March 2015) and the relatively short period between that date and the closing date for applications for the Women and Work post (26 March 2015); the claimant's view that the respondent was seeking to utilise the ending of funding of the OWER project as a reason to terminate his employment: his relationship with Grahame Smith; the fact that he had no representative with him in the meetings which were relied upon by the respondent as redundancy consultation meetings; his position that gender inequality was not an area which he
15 had a '*passion*' for; his considerations over where his '*next move would be*¹'; his consideration on looking for a post external to the respondent's organisation; the salary level of the vacant posts; the claimant's anxiety in respect of the situation.

(b) At the time of the termination of his employment, the claimant had
20 experience and skills relevant to the Woman and Work role, including his work carried out for the respondent on seminars and conferences in 2014 and 2015 (e.g. as shown in documents at 107, 109 and 124). That included the work carried out by the claimant in attendance at a seminar on his last day at work for the respondent. Taking into account
25 the claimant's experience in trade union activity, at the time of the termination of this employment with the respondent, the claimant met the Person Specification for the Woman and Work position (170). The Women and Work post was for a fixed term of one year and funding for that position was not continued after 31 March 2016. The person
30 appointed to that role by the respondent was an external candidate at the time of appointment. That person was more suitable for that position than the claimant.

- 5 (c) Scottish Union Learning is part of the STUC but is a project developed to be linked to the respondent's organisation. Scottish Union Learning has its own Board, which reports to the STUC General Council. In 2010, the claimant unsuccessfully applied for a Development Officer position within Scottish Union Learning.
- 10 (d) At the time of the termination of his employment with the respondent, the claimant's skills and experience did not meet the essential terms of the Person Specification for the role of Director of Scottish Union Learning (168). At the time of the termination of his employment with the respondent, the claimant's skills and experience did not meet the essential terms of the Person Specification for the role of Scottish Union Learning Funding and Policy Officer (173). A role of Policy Officer is different to a role as Development Officer. At the time of the termination of the claimant's employment with the respondent Sylvia O'Grady was employed by the respondent as Life Long Learning Manager for Scottish Union Learning. That position became the position of Director of Scottish Union Learning. Sylvia O'Grady was in that position until May 2015. She was on the interview panel for the recruitment of the Scottish Union Learning Funding and Policy Officer role. Funding for that role has continued on a yearly basis since 2015. Sylvia O'Grady's view on the claimant's CV at 162 - 164 is that the claimant would not meet the person specification at 173 because of his lack of experience in procurement procedures and in dealing with finances at a level similar to the learning fund in that role, which was in the region of £600,000 and that he would not have been appointed to that role, had he applied for it. The individual who had been working as Administrative Assistant in the section of Scottish Union Learning which dealt with funding was appointed to the Scottish Union Learning Funding and Policy Officer role in 2015.
- 25
- 30 (e) Stephen Boyd was employed as STUC Assistant Secretary, with an Economic and Industrial Policy Brief, from October 2003 until he left the organisation in 2016. Stephen Boyd was part of the interview panel for recruitment of the vacant Woman and Work position (advert

at 169, person specification at 170). This was a part-time position funded by the Scottish Government intended to provide a dedicated resource to help pursue a work stream arising from the STUC / Scottish Government Women and Work Conference in 2012. The intention was to build a more complete picture of women's position in the labour market at the time, and what would improve that position. The respondent received between 60 and 70 applications for the role which were at a high standard. Twelve candidates were interviewed over two days. Each candidate invited for interview was asked to give a presentation on women in the Scottish labour market. Each candidate was then asked questions to test their knowledge against the duties of the post. The interview panel was looking to assess the applicant's ability to work with different sources of information. The interview panel was looking for strong analytical skills and ability to distil complex data to a lay audience. The successful candidate's application is at 203 - 211. That candidate was appointed because she demonstrated a very strong understanding of the position of women in the labour market, on the basis of information sources, and she was able to articulate the issues in a very clear and concise manner, but with great enthusiasm and passion. That Woman and Work post was intended to be a short term post. That post ceased to exist when funding came to an end after the initial one year funding period (i.e. on 31 March 2016). Stephen Boyd's view on the claimant's CV at 162 - 164, and based on him having worked close to the claimant within the STUC, is that he would have been surprised if the claimant had performed well at interview, relative to the standard of the other candidates.

- (f) Big Lottery funding provided to the respondent from 30 June 2015 was allocated only in respect of the positions then worked by Alan White and Kirsten McTeague, with no additional funding of 20% of the Project Manager role in respect of coordinating the OWER and EMWR projects. After 31 March 2015, there was no requirement for a Project Manager to coordinate the OWER and EMWR projects. There had

5 been an underspend from the Big Lottery in January 2015, which was dealt with in the new budget. After 31 March 2015, any funding from the Big Lottery to the respondent in addition to their funding of the two positions in the EMWR project would have required to have been requested from the Big Lottery.

10 (g) The content of the application for continued funding of the OWER project was a factor in the ending of funding of the OWER project. The funding application submitted by the claimant sought an additional £10,000 funding for a bid where Helen Martin had decided that aspects had to be taken out because they should have been completed previously. The claimant submitted that funding application without authorisation.

15 (h) The claimant was unemployed from the date of termination of his employment by the respondent on 31 March 2015 until 7 December 2015. He was employed from 8 December 2015 until 31 January 2016 by Webhelp. That position is of a different nature to the other jobs which the claimant has applied for since the termination of his employment by the respondent. That position was suggested to the claimant by the Job Centre, who directed him to apply for the position, on which application the claimant was successfully appointed. The claimant's total net earnings in that employment were £2,232.87. That job was in a call centre environment, working 12 hour shift shifts, which the claimant found difficult. Because of those difficulties, the claimant attended his GP. The extract from the claimant's GP medical records, at document page number 165, show that the first time the claimant consulted his GP in respect of a stress related problem was on 1 February 2016. The comment in respect of this entry is:- *'taking previous employer to tribunal re dismissal, feels job he was in was exhausting him and could not accommodate request to reduce hours slightly.'* The reference to the job which the claimant at that time felt was exhausting him is a reference to the claimant's employment with Webhelp. The claimant has had no diagnosis of any stress related condition arising out of his employment with the respondent or its

20

25

30

termination, or at all. The claimant has not attended or been offered any treatment for any stress related condition, including any talking therapies such as counselling.

5 (i) The claimant was employed with SAMH from 24 April 2017 until 31 October 2017. That role was in a position which the claimant considered to be suitable to his skills, abilities and experience. The claimant's employment with SAMH ended on 31/10/17 because at the end of the claimant's probation period with SAMH, his employment was not continued. The claimant's probation period of employment
10 with SAMH was unsuccessful because of the claimant's underperformance in the role. The claimant's total net earnings from that employment were £13,439.59.

15 (j) In the 48 month period from the time of termination of the claimant's employment with the respondent, the claimant has made a total of 35 job applications (as shown at 104 - 106). That includes the successful application to Webhelp. The claimant did not consider that job to be suitable for him. He found it to be unreasonable that he was required to work long hours for a salary which was significantly less than the salary he had during his employment with the respondent. The
20 claimant has not applied for any jobs of a similar nature since. Other than that job, to which he was directed to apply by the Job Centre, the claimant has limited his search for employment to jobs which he considers relate to his skills and experience working in respect of equality issues. The claimant's applications have been primarily for
25 full time jobs at a salary of £34-£35,000. The claimant's view is that he would require a minimum salary of £20-£25,000 to allow him to pay his mortgage and expenses. He has limited his search for employment to positions with at least that level of salary. In the 12 months from the termination of his employment with the respondent, the claimant made
30 12 job applications. The claimant made 3 job applications in 2017. The claimant made 12 job applications in 2018. The claimant made 3 job applications in the first two months of 2019. The claimant limits his job applications to those jobs which he considers he meets the criteria

for, because of his skills, ability and experience. The claimant has had a high level of interviews in respect of the job applications he has made. He has not been successful in his job applications, other than his applications to Webhelp and SAMH. The claimant has not considered any re-training opportunities since the termination of his employment with the respondent. The claimant has not undertaken any volunteering roles within the termination of his employment with the respondent. The claimant does not wish to relocate from Glasgow unless it would be for an 'equalities related' position. The claimant has placed limitations on his search for employment in consideration of what he considers to be a reasonable commute from his present home. The claimant has significant mortgage arrears as a result of the period he has been unemployed. The claimant did not apply for the position of Learning and Development Officer shown in the SIjobs advert at 134 - 136 because he considered that he does not meet the essential criteria of being CIPD qualified and having a high level of digital skills. The claimant has not been a member of a final salary pension scheme since the termination of his employment by the respondent.

20 Submissions

7. Both parties' representatives made substantial submissions, with the respondent's representative speaking to written skeleton submissions. There was no substantial disagreement on the relevant substantive law.
8. In essence, the claimant's representative sought to justify the quantification of the claimant's claim (which it was understood had been prepared by another representative at the stage of the appeal of the prior Judgment to the EAT), although it was recognised that the termination of the claimant's employment with SAMH may be significant. The claimant's representative relied upon Cooper Contracting Ltd V Lindsey UKEAT /0184/15/JQJ, Cowen -v Rentokil Initial Facility Services (UK) Ltd T/A Initial Transport Services UK/EAT /0473/07/DA and the Joint Presidential Guidance 'Employment Tribunals: Principles for Compensating Pension Loss'.

9. The respondent's representative's position was that it is very much regrets the unfair dismissal of the claimant, but that the value of the claimant's claim was 'grossly inflated' by the claimant, the sum sought being said by the respondent's representative to be 'unusually huge and unjustified'. It was the respondent's position that the claimant would very probably have been dismissed fairly had a fair procedure been followed, that the claimant contributed to his dismissal, that it would be just and equitable to reduce any award, and that the claimant has failed to properly mitigate his losses. Reliance was placed on the authorities set out below.
10. Both parties' representatives had helpfully set out at 95 to 96 in the Joint Bundle their respective positions on the quantification of the claimant's financial losses. This showed the claimant's quantification of his claim as a total of £460,022.76, and respondent's quantification as £10,091.31, although both parties revised their positions on their quantification at the stage of submissions. At the stage of submissions, the respondent's representative's position was that there should be a Polkey reduction of 100% applied. The Tribunal considered the parties' submissions and dealt with the points made as set out in this decision. The figures in respect of the claimant's total net earnings from the employment the claimant has secured since the termination of his employment with the respondent were agreed between the parties.

Relevant Law

11. The compensatory award is calculated under s123 of the Employment Rights Act 1996 ('ERA'). The correct approach to compensatory award calculation is based on Digital Equipment Co Ltd -v- Clements (No 2) [1998] IRLR 134 CA. Per Lady Smith in Optimum Group Services pic -v- Muir [2013] IRLR 339, '*Considerations of justice and equity arise only when determining what, of the loss actually suffered, should be awarded in compensation. Such considerations may, for instance operate so as to limit the award.... if.... A novus actus interveniens occurs or if the claimant himself caused or contributed to his own dismissal (a matter which the Tribunal is, in terms of s123(6) ERA, specifically directed to consider when fixing the award) or to exclude a head of loss which is too remote; the object of an award under*

s123(1) is to compensate, not to award a bonus....The task for the Tribunal is to compensate in respect of loss, not to award a sum which exceeds the loss actually suffered. '

- 5 12. In Hill -v- Governing Body of Tay Primary School [2013] IRLR 274 EAT, LJ Langstaff provided guidance on how an Employment Tribunal should approach a Polkey reduction. The consideration is what would have happened had the respondent consulted with the claimant properly about the redundancy, and particularly had the respondent actively raised the potential alternative employment opportunities with the claimant. The approach is from
10 the perspective of what would have happened specifically with this employer and this employee.
13. In Vento-v- Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318 the Court of Appeal in England and Wales identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar
15 personal injury. In September 2017, the President of the Employment Tribunals (Scotland) and the President of the Employment Tribunals (England and Wales) provided Joint Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury, following De Souza -v Vinci Construction (UK) Ltd [2017] EWCA Civ 879. That Joint Presidential
20 Guidance, effectively (again) uprated the Vento bands for injury to feelings awards, taking into account the separate development in Simmons -v- Castle [2012] EWCA Civ 1039 and 1288. That Presidential Guidance was that the Vento bands shall be *..a lower band of £800 to £8,400 (less serious cases);
25 a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.*'
14. Paragraph 11 of that Joint Presidential Guidance sets out how an Employment Tribunal may uprate the bands for inflation in respect of claims
30 presented before 11 September 2017.

15. The general position in respect of remedies arising from the claimant's successful victimisation claim is set out in section 124 of the Equality Act 2010, including :-

5 (1) *this section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*

(2) *The Tribunal may -*

 (a) *make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*

10 (b) *order the respondent to pay compensation to the complainant;*

 (c) *make an appropriate recommendation.*

15 (3) *An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate -....'*

Comments on Evidence

16. In its prior Judgment, this Tribunal '...did not find either Grahame Smith or the claimant to be entirely credible and reliable witnesses' (para 16), with further
20 comment on their relative credibility at para 20. In his evidence at this Remedy Hearing, the claimant was straightforward in his answering of questions, and did not seek to avoid them. The claimant's position remained that he did not consider there to have been a genuine redundancy situation which had affected his position with the respondent. The Tribunal took this
25 into account. The claimant was frank in his evidence on the limitations which the claimant has himself put on the type of jobs he was applying for. The claimant appeared not to accept that circumstances for some may mean that a change or alteration in career direction is necessary. He recognised in examination in chief that '*jobs in my field are few and far between*' .

17. At this Remedy Hearing the claimant was asked questions in cross examination on his consideration of the vacancies available within the respondent's organisation at the time of his dismissal. The claimant's evidence on that at this Remedy Hearing went beyond his position as noted in the prior Judgment. The claimant's evidence at this Remedy Hearing was that he knew about the vacancies which were available, that he had considered them and he had decided not to apply for any of them, and decided instead to look for employment external to the respondent's organisation. The claimant's position changed in respect of his stated level of involvement in issues relevant to the 'Women and Work' post, changing from 'heavily' to 'some'. The claimant's evidence in cross examination as to why he did not apply for the Woman and Work post was *7 was looking to match up the salary I had. It was at a lower grade.*
18. It was notable that at the Remedy Hearing, the claimant accepted that some action would have required to have been taken by the respondent, and some agreement would have had to have been obtained from Big Lottery, for funding to have been obtained from Big Lottery beyond 31 March 2015, other than the funding then provided by Big Lottery which covered the costs of the posts Mr White and Ms McTighe were in at that time. This related to the issue of the '20% funding' referred to in this Tribunal's prior Judgment. The fact that the some action would have had to be taken by the respondent to obtain funding from the Big Lottery in addition to their funding of these two posts was taken into account in the Tribunal's conclusion that the most likely post which the claimant may have been appointed to was the Women and Work post.
19. The respondent's representative indicated during the Remedy Hearing that Grahame Smith may be called to give evidence, but elected not to do so, and the claimant's representative did not insist on him being called. The Tribunal found Sylvia O'Grady and Stephen Boyd to be straightforward and credible, although of limited relevance to the issues for determination by the Tribunal. Sylvia O'Grady spoke to the appointment process which occurred in respect of the Scottish Union Learning - Funding and Policy Officer post, the claimant's position in cross examination was that he had *'awareness but not extensive knowledge'* of the essential personal specification elements as set

out at 173. The Tribunal took into account the claimant's concessions on his own relevant knowledge and experience. Given Sylvia O'Grady's knowledge of the role, the Tribunal accepted her position that the claimant would not have been appointed in that role because of his lack of experience in procurement procedures and in dealing with finances at a level similar to the learning fund in that role. There was no real focus in the evidence on the Director of Scottish Union Learning vacancy. There was no evidence before the Tribunal for it to conclude that the claimant met the essential requirements of the Person specification for that role, as set out at 168. Stephen Boyd spoke to the appointment process which occurred in respect of the Policy Assistant - Woman and Work Project post ('the Women and Work post'). Stephen Boyd accepted under cross examination that the claimant *'potentially met on paper'* the Person Specification for the woman and work post. Stephen Boyd's focus was on the high quality of the other applicants for the post, and in particular the suitability of the external candidate who was appointed to that role. His position as to why the claimant would not measure up well against the other applicants for the post was that he *'can't recall (the claimant) having demonstrated the level of analytical and presentational skills which the other candidates demonstrated.'* That was not based on any actual presentation by the claimant in respect of that role, because the claimant did not apply for that role. On balance, the Tribunal accepted the claimant's evidence that he did match the Person Specification for the Women and Work post.

20. The claimant admitted in cross examination that his probation period in respect of his employment had failed because of his underperformance in the role. He admitted that he has limited the scope of the jobs he is applying for. When it was put to him in cross examination that it would be expected that his rate of applications for jobs would be more than one a month, his evidence was *'I can only apply for those which match my specification. I only apply for ones I see that match my skills, abilities and experience.'* When he was asked in cross examination why, in circumstances where his house was at risk of repossession, he was not *'applying for everything'*, the claimant's position was *'Every time I have tried to do, I've not been shortlisted. It makes me feel worse if I apply for a job and don't get it.'* His position was that working for

5 'very low pay' and on shift patterns was *'making me not weir* and that he was
'just not able to find a position that matches (his) skills and abilities. ' The
claimant's evidence in relation to re-training and volunteering was that he had
thought about it, but that he was not able to do it because he was *'very*
stressed' and to do a job without being paid for it was *'too difficult for (him) at*
the moment'. The claimant agreed under cross examination that there was
no reason for the Tribunal to apply a pension loss award based on a career -
long loss. The claimant admitted under cross examination that the reason his
employment with SAMH came to an end was nothing to do with the
10 respondent.

Decision

21. It was agreed by the parties that the claimant is not entitled to any unfair
dismissal basic award because he received a statutory redundancy payment
on the termination of his employment by the respondent.
- 15 22. Sections 122 and 123 of the ERA set out the relevant statutory provisions in
respect of calculation of compensatory award. The Tribunal applied s123(1)
ERA in assessing compensation of *'such amount as the tribunal considered*
to be just and equitable in all the circumstances having regard to the loss
sustained by the complainant in consequence of the dismissal insofar as that
20 *loss is attributable to action taken by the employer'*. No uplift under s207A
TULRC Act 1992 applies because the dismissal was for reasons of
redundancy. There was no additional redundancy payment which required to
be considered in terms of s 123(7) ERA.
23. On the application of *Digital Equipment Co Ltd -v Clements (No 2) [1998J*
25 *IRLR 134 CA*, the Tribunal applied the following approach in its assessment
of the financial award:-
- (a) Calculation of the attributable loss sustained (including
pension loss)
 - (b) Consideration of mitigation and adjustment if
30 appropriate.
 - (c) Application of *Polkey -v- Dayton Services Ltd* 1988 ICR

- (d) identification of what is *'just and equitable'* in terms of s123(1).
- (e) Consideration of s123(6) if *'the dismissal was caused or contributed to by any culpable action of the claimant'*
- 5 (f) Grossing up the loss to compensate for any tax that may be payable on the compensation under section 401 income tax, employment and pensions act 2003 (if in excess of £30,000)
- (g) Determination of extent of compensation for injury to
10 feelings.
- (h) Determination of any Recommendation under s124 Equality Act 2010
24. No uplift in terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009 applies to redundancy. It was appropriate to make the
15 award in respect of loss arising from both the successful unfair dismissal award and the successful victimisation claim, as an award in terms of the victimisation claim. Accordingly, neither the statutory cap in ERA 1996 section 124ZA, nor the Recoupment Regulations, applied.
25. The just and equitable compensation was calculated with regard to the
20 claimant's loss arising from the respondent's failures in respect of lack of proper consultation on the redundancy situation, lack of discussion in respect of the available vacancies and the unfair dismissal (those failures having been set out in this Tribunal's prior Judgment).
26. In its assessment of the attributable loss sustained, the Tribunal first
25 considered the appropriate period of loss. The Tribunal considered the significant event which broke the chain of causation to be the termination of the claimant's employment with SAMH, that employment having come to an end on the expiry of the probation period because the claimant had underperformed in his probation period. That was considered to be significant
30 because that job was in the type of role which the claimant has limited his search for employment to, and was considered by the claimant at the time of

him applying to be a match for his skills and experience. The Tribunal accepted the respondent's position that the fact that that employment was not continued beyond the probation period cannot be attributed to the fault of the respondent (indeed that was accepted by the claimant under cross examination). Following Optimum Group Services pic -v- Muir [2013] IRLR 339, the termination of the claimant's employment with SAMH was a '*novus actus interveniens*' which had occurred because the claimant himself caused or contributed to that dismissal, and which was not caused or contributed to by the respondent. The Tribunal considered that in terms of s123(6) ERA. For these reasons, the period of loss applied was from 1/4/2015 until the end of that employment with SAMH on 31/10/17.

27. It was not accepted that the period of pension loss should be assessed as a career long loss i.e. until retirement. It was considered to be just and equitable and in accordance with ss 122 and 123 ERA to calculate pension loss in respect of the same period as was found to be just and equitable in respect of the calculation of wage loss i.e. from 1/4/15 until 31/10/17.

28. The Tribunal then considered the calculation of the just and equitable financial compensation in the determined period of loss. The Tribunal required to determine how that loss should be calculated, in the circumstances as set out in the Findings in Fact made in this Tribunal's prior Judgment. The Tribunal considered its Findings in Fact made at paragraphs 12 (c); (d); (g); (l); (m); (n); (o); (p); (q); (v); (w); (x); (y); (z); (aa); (cc); ; (dd); (ff); (gg); (ii) and (jj) and the conclusions at paragraphs 22; 23; 24; 25; 26; 27; 28; 34; 35; 36; 37; 39; 40; 41; 43; 45 and 53 to be particularly relevant to the calculation of just and equitable compensation, including with regard to the likelihood of the claimant having been dismissed fairly (and without being subject to victimisation), and including the likelihood of his appointment to one of the then available vacancies. The Findings in Fact at paragraphs (o); (p); (s); (x) and (y) and the conclusions at paragraphs 19; 25; were considered to be particularly relevant to the consideration of any element of contribution by the claimant.

29. The calculation of the just and equitable compensation had to be made in recognition of the circumstances where the claimant's position with the

respondent as OWER Development Officer had come to end as a result of a genuine redundancy situation (as set out in this Tribunal's prior Judgment in this case, at paragraph 25). In circumstances where the claimant's previous role did not exist after 31/3/15, it was necessary to consider what would have happened had a proper redundancy consultation exercise been carried out, which would have included discussion on the vacancies which were available in the respondent's organisation at that time. It was appropriate to consider what would have occurred with that actual employee and employer. It was not for the Tribunal to substitute what it would have done with what would have been likely to have occurred with that employer and employee. It was relevant that the claimant knew about the vacancies which were available and that his evidence was that he had considered them and decided not to apply for them. It was noted by the Tribunal that the claimant's decision was taken in the context of there not having been proper consultation with him in respect of the genuine redundancy situation, and there having been no discussion with him about the vacancies which were then available. Those failures on the part of the respondent affected the claimant's perception of the situation, which was that the respondent were using the ending of funding for the OWER project as a reason to dismiss him. The Tribunal did not accept the respondent's representative's position that any discussion with the claimant about the vacancies which were then available would have made no difference at all to the outcome. The Tribunal considered that had there been discussion with the claimant about the vacancies which were then available within the respondent's organisation (even if that was in terms of the respondent's reasons for considering that none of those vacancies were suitable for the claimant), that would have been likely to have had an impact on the claimant's decision not to apply for any of the then available vacancies.

30. It was just and equitable to take into account the likelihood of the claimant applying for and being appointed by the respondent to one of the then available vacancies, had there been no victimisation and had there been discussion with him on those vacancies. It was noted that the respondent in fact appointed an external candidate and that that appointed person may well have been a better match for the role than the claimant, but this was a

5 redundancy situation involving a claimant who had 11 years service. Material factors were that it was accepted that the Women and Work post was on paper one that the claimant met the Person Specification for; that Grahame Smith considered that none of the then available vacancies were suitable for the claimant, that there was no discussion by the respondent with the claimant about the then available vacancies; that the claimant was aware of the vacancies; that the claimant had considered the vacant roles and had decided to choose to look externally for a vacancy; that the Woman and Work post was not full time, and was at a lower salary than the claimant's previous role, and that the claimant's evidence that *'gender inequality is not my area of expertise or my passion'* and *'It was at a lower grade and I was looking to match the salary I had.'*

10 31. The claimant's former OWER post did not exist, due to a genuine redundancy situation. For that reason, it was not just and equitable to calculate the loss based on the salary of the claimant former OWER post. The loss was calculated with regard to the Women and Work post. It was considered to be likely that even if some action had been taken to secure funding from the Big Lottery, and had funding been obtained from them, that would have been likely to have been for no more than the extent of previous Big Lottery funding re the claimant's role i.e. no more than 20% / a one day a week role. It was considered that if a one day a week role had been discussed with the claimant as one of the options, together with the other available vacancies at the time, then, taking into account the claimant's evidence on looking for a job at a salary similar to that he had in the OWER role, it is likely that the vacancy which the claimant would be most likely to have expressed interest in is the Woman and Work post.

25 32. In all the relevant circumstances, the loss was calculated in respect of the period immediately following dismissal with regard to the Women and Work post. If a fair procedure had been followed by the respondent, without victimisation of the claimant, the most likely role which the respondent would have appointed the claimant to would have been the Woman in Work position. The respondent may not have appointed the claimant in that role (or any other). The appointment may have been on a trial basis. That trial may not

30

have been successful, and the claimant may have been then dismissed fairly and without victimisation. In all the circumstances, it was considered to be just and equitable to apply a Polkey reduction to reflect the likelihood of the claimant being appointed in the Women and Work post (for the duration of that post). In all the circumstances it was considered that, on balance, there was a 30% chance of the claimant applying for and being successfully appointed by the respondent to the Women and Work post. In reaching this conclusion, the Tribunal took into account the claimant's evidence on the reasons why he did not apply for any of the vacancies which he knew were available within the respondent organisation prior to the termination of his employment with the respondent. At different times during his evidence that the claimant admitted or denied that he had considered the three roles which were then vacant. The claimant's evidence in cross examination that he hadn't applied for the any of the then vacant positions after the decision in respect of the funding application was known '*... Because of the way I felt. I thought my first port of call was to look externally. On reflection, I could have done things differently. It was sudden. I didn't expect it.*'

33. For these reasons and in all these circumstances, a Polkey reduction of 70% is applied to the calculation of the claimant's losses in the period of loss. It was considered to be just and equitable to apply that deduction to reflect that the claimant's employment with the respondent may not have continued post 31 March 2015, even had there been proper consultation, no unfair dismissal and no victimisation. That deduction takes into account that had there been discussion with the claimant about the vacancies as part of a proper redundancy consultation exercise, that is likely to have affected the claimant's perception that there was not a genuine redundancy situation and that the respondent were in effect using the ending of funding of the OWER project as a reason for ending his employment with the respondent. It was considered that a discussion on the available vacancies as part of a proper redundancy consultation exercise would be likely to have affected the claimant's decision to look externally and not to apply for any of the vacancies.

34. The Joint Bundle for this Remedy Hearing contained the Job Description for the Women and Work post (at 169). That set out that that role was a 28 hour

a week role, with a pro rata annual salary of £30,468. The Job Description for the Scottish Union Learning position (at 171) sets out that that was a 34 hours a week role, with a salary of £36,813. The gross pay for the Women and Work post was then calculated as $(£30.468 / 34 \times 28) = £25,091.29$.
5 Using www.the-salary-calculator.co.uk, that calculates to a net monthly pay, taxed in 2015, of £1679.11.

35. The Women and Work post was for a fixed term of one year and funding for that position was not continued after 31 March 2016. It was the claimant's position that if he had been appointed in the Woman and Work role, then he
10 would have been appointed in the post of Development Officer in the Equality Reps Project, rather than Alan White (findings in fact re. Mr White's appointment to that position being at para. 12 (v) and (gg) of the prior Judgment). There is a finding at paragraph 12(g) of the prior Judgment that
15 'The salary for the Development Officer role on the EMWS project was £5,000 lower than the salary for the Development Officer role on the OWER project.' There was no evidence before the Tribunal on the salary of the Equality Reps Development Officer role. It was appreciated that in calculating loss from 31
20 March 2016, the Tribunal was in the realms of speculation as to what would have occurred at that time. In all the circumstances, taking into account the claimant's position that he would have been appointed to the Equality Reps Development Officer role when it became available, which was before the
25 ending of the funding of the Women and Work post, the Tribunal sought to make an award which was just and equitable and was reflective of the claimant's losses attributable to the respondent. The Tribunal considered it
30 to be just and equitable to then calculate the claimant's loss in the period from 31 March 2016 until 30 October 2017 with regard to the income which the claimant had from the OWER role, and to apply a deduction of 50% in the period from 31 March 2016 to 30 October 2017, to reflect that the claimant may not have been appointed to the Development Officer role rather than Alan
White and that his employment with the respondent may not have continued beyond 31 March 2016.

36. The wage loss element of the compensatory award was then calculated as follows:-

- (i) Net wage loss from 1/4/15 to 31/3/16
 = (£1679.11 x 12) - £2232.87 (total net earnings from Webhelp)
 = £17,916.45
- 5 (ii) Net wage loss from 1/4/16 to 30/10/17
 = (£2018.24 x 19 months) - £13,439.59 (total net earnings from SAMH)
 = £24,906.97
- (iii) Total net wage loss in period of loss
 10 = £49,813.94

37. It was considered to be just and equitable to calculate pension loss with regard to the same period in respect of which wage loss was calculated, i.e. from 31 March 2015 until 30 October 2017, and not on the basis of career loss, until retirement, as was sought by the claimant. No authority was relied upon in respect of the pension loss period being for such a significantly longer period than the period appropriate for financial loss (or at all). It was recognised that the claimant may not secure alternative employment in a position with a similar level of pension to that from which he benefitted while employed with the respondent. In all the circumstances, it was considered to be just and equitable to make the calculation of pension loss and wage loss in respect of the same period of loss. The pension loss calculation set out at 103 was used as the basis for this calculation, having been agreed by both parties to be appropriate. It was considered to be just and equitable to calculate the pension loss on that agreed basis, (at 103), using the actuarial factors and conclusions as set out in the actual report at 99 - 102. It was agreed by the parties' representatives that that basis was appropriate and those figures could be used in the calculation of whatever pension loss period was considered by the Tribunal to be appropriate. It is recognised that this calculation is made with regard to a gross wage of £35,479. While recognising that the claimant had enjoyed the benefit of a final salary pension scheme

15

20

25

30

with the respondent, and the relatively small likelihood of the claimant enjoying a similar scheme in any employment he secures in the future, it was considered to be just and equitable to calculate pension loss with regard to the same period in respect of which wage loss was calculated, i.e. the period from 1/4/15 to 30/10/17. That is a total of 31 months (2.583 years). On the application of that 2.583 period to the agreed method of calculation, the pension loss element of the compensatory award was calculated as follows:-

$$\begin{aligned}
 & \text{(i) Annual loss} = (\pounds 35479 \times 2.583) / 80 = \pounds 1,145.53 \\
 & \text{(ii) Lump Sum Loss} = \pounds 1,145.53 \times 3 = \pounds 3,436.59 \\
 & \text{(iii) Total Pension Loss} = \\
 & \quad (0.85 \times \pounds 1,145.53 \times 29.23) + (\pounds 3,436.59 \times 1.05) \\
 & \quad = \pounds 28,461.27 + \pounds 3,608.42 \\
 & \quad = \pounds 32,069.69
 \end{aligned}$$

38. The claimant's total financial loss for the period of loss was then ($\pounds 49,813.94 + \pounds 32,069.69$) $\pounds 81,883.63$.

39. The next step was to consider mitigation. It was recognised that the Burden of Proof in respect of mitigation issues is on the respondent. The Tribunal considered it to be significant that the claimant has made 35 job applications in 48 months, one of which was made at the insistence of the Job Centre, that the claimant has limited his search for jobs to those relevant to his prior experience and has made no attempt to re-train or gain further experience through volunteer positions. The claimant's evidence was *7 am only applying for a certain salary bracket - £20/25,000 minimum and certain jobs which I deem appropriate for my skills.* Taking into account the number of job applications made by the claimant and the limitations placed by the claimant on his search for employment and his failure to re-train or to seek volunteering opportunities (the latter which may have mitigated the effect on him of being out of work for a lengthy period of time), a reduction of 30% was applied to reflect the claimant's failure to fully mitigate his losses. This deduction equates to ($\pounds 81,883.63 - \pounds 24,565.01$) $\pounds 57,318.62$.

40. For the reasons set out above, a Polkey deduction of 70% was then applied, to reflect the likelihood of the claimant's employment continuing after 31/3/15. This calculated to (£57,318.62 - £40,123.04) £17,195.58. In terms of s123, this is the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to the action taken by the respondent.
41. For the reasons set out above, a 'just and equitable' deduction was then made in terms of s123(1) to reflect that the Woman and Work post came to an end on 31/3/16, when funding for that post ceased. The Tribunal took into account the claimant's position that had his employment with the respondent continued after 31/3/15, then in July 2015, prior to the ending of the Woman and Work post, he would have been appointed to the Equality Reps post rather than Mr White. Taking the likelihood of the claimant being instead appointed to the Equality Reps post into account, a deduction of 50% was then applied to the sum reflective of the period from 1/4/16 until 30/10/17, to further reflect that the claimant may not have continued to be employed by the respondent after 31/3/16. The period from 1/4/16 until 30/10/17 is a period of 19 months. The whole period of loss on which compensation is here calculated is 31 months. That further deduction of 50% applied to (£17,195.58 x 19 / 31) £10,539.23 is a deduction of £5,269.61 .
42. The application of these deductions equates to a financial loss of (£17,195.58 -£5,269.61) £11,925.97.
43. The Tribunal considered whether the claimant had contributed to his dismissal because of the quality of his application for extended funding of the OWER project. The claimant's evidence in respect of this matter in examination in chief at the Remedy Hearing was *'There was nothing wrong with that bid compared to other bids and it was not in a competitive situation.'* When it was put to him in cross examination that the reason the funding did not continue was because of the application the claimant had submitted, the claimant's evidence was *'No. The funding was taken in a different direction. It was not a competitive situation and not as a result of my application.'* When asked in cross examination about the timing of his submission of the application and the level of funding which had been requested by him, the claimant's evidence

was:- *I had been doing so many bids, I felt confident enough to take it to that level and that it was good enough just to be signed off. I had to give the draft to them earlier on other bids, but I had been dealing with this for 10 years so didn't think it needed to go earlier. Some of the questions had been asked before, so it was exactly the same responses.*' The claimant admitted that he had submitted an application, seeking more funding than had been previously sought, without approval. The claimant admitted that he had sought an additional £10,000 funding for a bid where Helen Martin had decided that aspects had to be taken out because they should have been completed previously, and that he submitted that funding application without authorisation. The claimant's evidence was that he acted *'to protect the project and my position in it'** The claimant did not accept that he had put the OWER project at significant risk by doing this.

44. The Tribunal accepted the respondent's representatives' submissions that a factor in the ending of the funding of the OWER Project was the quality of the claimant's application for that funding to continue. This acceptance was based on the Tribunal's acceptance of Sandra Martin's wholly credible and reliable evidence on the quality of the funding application drafted by the claimant and its implications, all as noted in this Tribunal's prior Judgment, in paragraphs set out above, particularly at 12 (o), (p), (s) and (y). The reasons set out by the Scottish Government for not funding the proposal, as set out at paragraph 12(x) were also considered. On the basis of the facts set out at those paragraphs, and the claimant's admissions at the Remedy Hearing, the Tribunal decided that because of the quality, content and timing of the funding application bid drafted by the claimant, there was an element of contribution by the claimant to the decision of the Scottish Government to cease funding of the OWER project. It was considered to be just and equitable in terms of ERA s123(1) to apply a reduction of 10% to the Compensatory Award to reflect that contribution, taking into account all the circumstances of the funding application made by the claimant and the terms of the letter from the Scottish Government informing of the decision to cease funding. It was noted that that letter referred to the application having been considered carefully, but made no qualitative statement on the application which had been made

and specifically set out *'This was largely due to the development of the Fair Work agenda, which is at present in its very early stages, and which may take this type of work in a different direction.'*

45. For these reasons, a reduction of 10% was applied in respect of contribution.
5 This calculates to (£11,925.97 - £1,192.60) £10,733.37.
46. The award is made in respect of the claim under the Equality Act, although the loss arises from the unfair dismissal as well. No award is made in respect of the unfair dismissal, on the application of the principles of there being no double recovery. The Judicial rate of interest of 8% was applied to that sum,
10 from the mid point between the date of dismissal and the date of the award. This equates to annual interest on the sum £10,733.37 of £858.67, for a period of 2.5 years. This equates to total interest of (£858.67 x 2.5) £2,146.68. The total Compensatory Award made is then (£10,733.37 + £2,146.68) £12,880.05. No grossing up of this award is required, because the sum is
15 less than the £30,000 threshold set out in s401 Income Tax (Employment and Pensions) Act 2003.
47. For all these reasons, the Compensatory Award made to the claimant in respect of financial loss is £12,880.05.
48. In assessing the injury to feelings award, the Tribunal took into account the
20 Vento bands, as updated following the Guidance issued by the Presidents of the Employment Tribunals in Scotland and in England and Wales, and the position of the Court of Appeal in Simmons v Castle and in De Souza. At the stage of submissions, it was raised with parties' representatives that as this case was presented before September 2017, the Tribunal should consider
25 issues in respect of the application of the RPI index, and a 'Simmons v Castle uplift'. The respondent's representative helpfully suggested that the updated Vento bands should be used in determining the appropriate level of injury to feeling. This was agreed by the claimant's representative (after an explanation was provided by the Tribunal). On this basis, the updated Vento
30 bands were applied.

49. The Tribunal considered what was the appropriate level of injury to feelings award in respect of the respondent's unlawful acts or failures to act, as set out in its prior Judgment i.e. victimisation, lack of proper redundancy consultation (including discussion on alternative positions) and dismissal. It was not
5 accepted that the injury to feelings award should take into account any issue since the time of the claimant having lodged his first ET1 against the respondent, other than as was found to be unlawful as set out in this Tribunal's prior Judgment.
50. The claimant's dismissal was in March 2015. It was material and considered
10 to be significant that the extract from the claimant's GP records which was relied on in evidence before the Tribunal showed that the first time the claimant attended his GP in respect of a stress related matter was in March 2016. It was material and considered to be significant that the claimant has not been diagnosed with any medical condition caused or contributed by the
15 respondent's unlawful treatment of him. It was noted that the claimant's evidence was that medication he took for other reasons would negatively interact with what may have been prescribed for stress related symptoms. It was material and considered to be significant that the claimant has not been referred for any other treatment of stress related symptoms, such as
20 counselling. No medical report was relied upon by the claimant. Account was taken of the extract from the claimant's medical records which was relied upon by the claimant, and on the claimant's evidence in this regard. It was notable that the claimant's own evidence was that he suffered from stress as a result of his financial situation and his attendance throughout the Employment
25 Tribunal proceedings at the Tribunal. There is no evidence of any medical attendance by the claimant around the time of his dismissal by the respondent. The claimant's position in evidence in chief was that he does 'go regularly' to see his GP. His evidence in examination in chief on how he was feeling was '*Very hurt and unsure what to do. Confused. Anxiety which has lasted to this day. The whole procedure has been very stressful and hurtful. What I have had to suffer financially as a result has compounded that.*' The
30 claimant's admitted in cross examination that he had been advised that it would help if he obtained regular employment. The claimant has not carried

out any volunteer work and has continued to limit his search for employment to jobs in a particular area and at a particular salary level, despite the financial difficulties which being out of work has put him in, particularly with regard to mortgage arrears. It was recognised that the purpose of an injury to feelings award is not punitive.

5

51. There was no evidence to suggest that the claimant's injury to feelings award should be other than within the lower band of Vento. The Tribunal sought to make an award in respect of the claimant's injury to feelings arising from the acts of victimisation, including lack of proper consultation on the redundancy, lack of discussion on alternative positions and dismissal, taking into account when those events occurred. It is recognised that the respondent's unlawful acts have had a significant effect on the claimant. In all the circumstances, an award of £3,800 is made in respect of injury to feelings, being the mid-point of the lower band in Vento, as updated.

10

52. For all these reasons, the total award made to the claimant as remedy in respect of his successful claims of victimisation and unfair dismissal against the respondent is (£12,880.05 + £3,800) £16,680.05.

15

53. There was no evidence before the Tribunal at this Remedy Hearing of any action taken by the Respondent to review their internal policies and procedures in light of this Tribunal's prior Judgment. It is noted that these proceedings commenced before 1 October 2015. The Deregulation Act 2015 (Commencement No 1 and Transitional and Saving Provisions) Order 2015.SI2015/994, Schedule, provides that the amendments made by section 2 of the Deregulation Act 2015 do not affect subsections 124 and 125 of the Equality Act 2010 as they apply to proceedings that are commenced before 1 October 2015. The words 'on the complainant' in square brackets of the amended subsection 124(3) do not then apply to these proceedings. The Tribunal considered it to be appropriate in all the facts and circumstances set out in its prior judgment to make the following recommendation under s124(2)(c) Equality Act 2010:-

20

25

30

'That, within six months of the date of this Judgment, the respondent review their internal policies and procedures in respect of consultation on potential redundancy in the event of expiry of an employee's fixed term contract.'

- 5 54. The Tribunal did not consider it to be appropriate *'for the purpose of obviating or reducing the adverse effect'* (in terms of section 124(3) Equality Act 2010) for the respondent to be required to issue 'a full public apology for the treatment the claimant has suffered', as requested by the claimant's representative. There was no evidence that such a step would have any
10 further effect than the effect of this Tribunal's prior Judgment, in which a finding of unfair dismissal and victimisation in respect of the claimant has been made against the respondent, and recorded in publicly available records.

15 **Employment Judge: C McManus**
Date of Judgment: 28 March 2019
Entered in register: 28 March 2019
and copied to parties

20

25