Case Number: 2207084/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr V Zabelin	**v**	**(1) SPI Spirits (UK) Limited** **(2) Mr Y Shefler** **(3) Ms N Sidorenco**

Heard at: London Central **On**: 17 March 2022
In chambers: 18 March 2022

Before: Employment Judge Lewis
Mr J Ballard
Mr S Pearlman

Representation

For the claimant: Mr N Roberts, Counsel

For the 1st – 2nd respondents: Mr R Leiper, QC

RESERVED DECISION ON REMEDY AND COSTS

JUDGMENT

1. The award against the 1st and 2nd respondents, jointly and severally, for whistleblowing detriments is **£1,626,452.07.**

2. The award against the 1st respondent for automatic unfair dismissal is **£3,589.09** (total £1,630,041.16 less the £1,626,452.07 for financial loss arising from the detriments). No separate award is made for ordinary unfair dismissal under s98(4).

3. In respect of the claimant's first costs application, the 2nd respondent is ordered to pay the claimant £3000 costs.

4. No order for costs is made on the claimant's second costs application.

REASONS

1. By a reserved decision on liability sent to the parties on 1 December 2021, the tribunal found that:

1.1. The claimant was unfairly dismissed by the 1st respondent contrary to section 98(4) of the Employment Rights Act 1996.

1.2. The principal reason for the claimant's disclosure was that he had made protected disclosures. His dismissal by the 1st respondent was therefore automatically unfair.

1.3. Because he made protected disclosures, the claimant was subjected to a detriment by the 1st respondent, ie the 2nd respondent's conduct on 8 June 2020.

1.4. The claimant was subjected to the following detriments by the 2nd respondent because he made protected disclosures:

1.4.1. The 2nd respondent's conduct on 8 June 2020.

1.4.2. His dismissal.

2. The claims against the 3rd respondent were not upheld.

3. The issues on remedy were agreed to be as follows:

3.1. What basic award should be awarded for unfair dismissal. The parties agreed this should be £1,614.

3.2. What award should be made for loss of statutory rights. The parties agreed this should be £300.

3.3. For what period should the claimant be awarded loss of salary? The parties agreed the rate should be £180,000 p.a. net. The claimant claims loss for a two year period from 8 July 2020.

3.4. For what period should the claimant be awarded loss of pension. The parties agreed the rate of £5,400 net p.a.

3.5. As part of the above, the tribunal will decide the question of mitigation.

3.6. What award should be made for loss of bonus in the calendar years 2019 – 2022? The claimant claims he would have received his full bonus (£180,000 p.a. net) for 2019 – 2021 and pro rata for 2022.

3.7. What award should be made for injury to feelings?

3.8. Should any award of compensation be adjusted for:

3.8.1. The 1st respondent's unreasonable failure to comply with the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures?

3.8.2. The likelihood that the claimant would have been dismissed and/or the loss would have been sustained in any event because of a structural reorganisation of the business in 2020?

4. Should the compensatory award be capped to the claimant's service agreement at the sum of £270,000?

5. To what extent does the award need to be grossed up? The parties agreed the formula.

6. The claimant made his 'first' costs application against the 2nd respondent only, and his second costs application jointly against the 1st and 2nd respondents.

Procedure

7. The 3rd respondent took no part in the remedies hearing as no findings had been upheld against her.

8. The tribunal had two witness statements from the claimant, one from Mr Caldwell, and heard evidence from each of them. The Luxembourg authorities had no objection to Mr Caldwell, as a British witness residing in Luxembourg, giving evidence directly from his personal device, There was an 'additional bundle' for the remedies hearing, reference to the main trial bundle from the liability hearing, and each Counsel provided an opening skeleton.

9. An unexpectedly large amount of factual and legal argument took place during the time scheduled for the hearing. Following the hearing, the tribunal invited the parties to make written submissions on some matters which had not been addressed, ie whether the ACAS uplift applied to individual respondents and whether it is necessary for a grievance to be put in writing. Each side exchanged submissions, and the respondents made some further comments thereafter on the claimant's submissions. Unfortunately this led to some delay in finalising the decision which had otherwise been reached.

Fact findings

Job search

10. The claimant's net salary with the respondent was £180,000 p.a. and it was agreed this figure would be used as the rate of his salary loss. It was also agreed that the rate of loss of pension was £5,400 p.a.. The dispute was as to whether the claimant had sufficiently mitigated his loss.

11. The claimant was dismissed with immediate effect and out of the blue on 8 June 2020. He did not immediately take steps to find a new job. This was because he needed some time to work out his position, take legal advice and regroup. The dismissal was out of the blue, and in the middle of the pandemic, and came as a considerable shock to him.

12. The claimant was on holiday in Italy for a month from 3 August 2019. He wanted to bring his daughters to see his grandparents, who they had been unable to see for a year because of the pandemic.

13. Before he went on holiday, the claimant engaged a career coach (Mr Alexander of Appleby Associates) on a paid basis to help him design an efficient programme and focused marketing message to help him obtain a new job, including updating his CV, updating his LinkedIn profile and designing approach letters. The claimant already knew Mr Alexander, who had helped him before.

14. The claimant first contacted Mr Alexander on 28 July 2020 and suggested they meet in early September, as he would be away most of the summer. Meanwhile he would update and send his CV and LinkedIn profile. They met in September 2020 and worked on the support programme for a few months. The claimant did not want to send out half-prepared CVs before he had his message fully prepared. Mr Alexander is a career coach – he does not actually help people find job vacancies.

15. The claimant had a zoom call with Mr Humbert of Burlington Search Ltd on 15 September 2020. On 15 October 2020, the claimant contacted Mr Green a recruiter at Agreus, and organised a meeting for 21 October 2020. On 16 October 2020, he contacted Mr Dubbin at Cripp Sears and Mr Kochukov at Heidrik Struggles.

16. Also on 16 October 2020, the claimant sent his updated CV to Mr Avdeev at Egon Zehnder, which is a very large executive search / recruitment consultant. The claimant had known Mr Avdeev for many years and the latter had helped him in the past.

17. The claimant applied for 8 positions in October – December 2020. He also provided his CV to SP Hiring Inc. From January 2021 – September 2021, the claimant applied for roughly a further 36 positions. These were listed in the Schedule in the claimant's first witness statement and we do not repeat them all here, but they included positions such as Mergers and Acquisitions Director; Managing Investment Director; Chief Investment Officer etc. The claimant applied for positions in various sectors. There was no suggestion that these were not positions which the claimant was equipped to undertake.

18. In September and October 2021, the claimant was offered the position of Managing Director of a UK-based tech start up, following a series of meetings with the majority shareholder and his business partner. There was a detailed discussion regarding timing, responsibility and compensation, but this was put on hold pending a new round of financing.

19. In October 2021, the claimant was approached for an advisory role with a new alcohol portfolio company. He agreed heads of terms and discussions are ongoing, but the contract and remuneration were subject to the company successfully raising funds, which was scheduled to take place in the second quarter of 2022.

20. In January 2022, the claimant was made an official offer to become CEO of a large UK registered mining company listed on the AIM stock exchange. The initial approach was in October 2021, but as a public company, the due diligence process could not be completed until the liability judgment was issued in the present claim. As at the date of the remedy hearing, the claimant was negotiating the terms of his offer. This had been delayed because the company was in the process of creating a share incentive scheme. The company's share price fell as the majority of its mining interests are in Russia, but the claimant had been told the offer was still on the table and that they were working on the documents.

21. As well as the above efforts, in order to raise his profile with family offices and ultra-high-net-worth individuals, the claimant attended a number of wealth management and M&A / Investment conferences and events. These were hosted by Global Office Community, Alea Family Office Group, Paradigm Talks, LGT Vestra Wealth Management, London Technology Club, Stonehage Fleming and Wholesale Investor.

22. The claimant also joined various family office, investment and career platforms such as 361firm.com, globalfamilyofficecommunity.com, tpgleadership.com, bluesteps.com, gatedtalent.com, ivyexec.com.

23. The claimant also attended webinars to enhance his skills, eg with Gated Talent.

24. The claimant worked on networking by sending messages to contacts in the business community and to head-hunters with whom he had previously worked and directly approaching potential employers and business partners.

25. The claimant says his efforts at networking were hindered during the pandemic because of travel restrictions between countries and because in relation to businesses owned by high-net-worth-individuals or in family offices, personal physical contact and raising visibility is particularly important. We accept this evidence. Although many meetings have come to be held on-line during the pandemic, this mode of communication is less suited to building new contacts and establishing personal rapport.

26. We also accept the claimant's evidence that jobs with equivalent remuneration and status are not as common as lower paid jobs.

27. The claimant was also worried about whether he would get a favourable personal reference from Mr Schefler. Prior to recruiting the claimant, Mr Schefler had secured references from various sources before deciding even to meet him.

28. Mr Caldwell suggested that the claimant should in normal circumstances have been able to get a new job paying £200,000 - £225,000 in six months from dismissal, and up to nine months from dismissal given the pandemic. Mr Caldwell could not say when the claimant might regain his previous pay levels. He purported to support his conclusions by providing uncontextualised quotations from a few undisclosed documents to the effect that the market was buoyant. He was unable to expand under cross-examination. He alleged that he had the experience to make this judgment, but his job is Chief Finance Officer, and he asked others to do the research for him. He was unable to identify a single vacancy that the claimant should have applied for or any further career coach the claimant should have approached or other agency which he should have signed up to.

Bonus

29. The claimant had an annual discretionary bonus paid by the 1st respondent of up to 100% of his annual salary. The 2nd respondent made the decision as to the level of bonus which the claimant should receive. His bonus was mainly decided by performance the previous year. Unfortunately we had no evidence from the 2nd respondent to assist us in deciding upon his criteria for judging performance or his intentions regarding the claimant's bonus. We therefore looked at what happened in the past.

30. For 2017, the claimant had worked about 10 months and was paid a bonus of £150,000 net, essentially pro rata the full amount. For 2018, the claimant was paid the full bonus of £180,000 net. In one of their routine phone calls in around June 2018, the claimant asked Mr Schefler about his 2017 bonus, which had not yet been paid. Mr Schefler agreed to give a bonus of £150,000. The claimant asked him how he arrived at the figure. Mr Schefler just said he thought it was the right number and did not think the claimant had earned any more. On 13 May 2019, the claimant was told he would receive the full bonus (for 2018). Mr Schefler told him a few days later that he had decided to give the claimant a full bonus, 'well done for last year'.

31. In his meeting with Mr Oliynik and Ms Fatkullina on 5 June 2020, the claimant asked what the proposal was in relation to his 2019 bonus as he had had a very productive year. Ms Fatkullina said Mr Schefler might want to speak to him directly about that.

32. Ms Fatkullina went on to say that for 2020 and thereafter, SPI would change the way bonuses were awarded so that an employee would only be paid for something 'extra' rather than simply rewarding good performance. This was reiterated by Mr Schefler in his telephone call with the claimant on 8 June 2020. Regarding the 2019 bonus, he asked the claimant to put together a list of projects/deals that he had been involved in during 2019 so that he could make a decision on the amount.

33. The claimant had had an even more productive year in 2019 than in 2018 and was expecting to be awarded a full bonus again.

34. In 2017, the claimant reviewed around 50 potential opportunities resulting in nine acquisition offers, but only one deal in which he was involved closed, and only one other project progressed to a very advanced stage. In 2018, the claimant reviewed a similar number of potential opportunities with a similar number of offers issued, but only two deals closed in which he was involved, and a handful of projects reached a very advanced stage, including the refinancing of Mr Schefler's private jet.

35. In 2019, the claimant closed three M&A deals (the acquisition of Bodega Melipal; Mountain Spirits and Indie Brands) and pushed two further deals through to a very advanced stage (Wilderness Trail and Bass Phillip). He also assisted the negotiations with Villa One and finalised the refinancing of Mr Schefler's private jet.

36. Prior to his dismissal in 2020, the claimant continued to be involved in M&A projects on which he still reported directly to Mr Schefler, eg Lucas Bols, Tenute di Toscana and others. He had also been instructed by Mr Schefler to collaborate with Mr Esposito on potential acquisition of US targets eg Kentucky Peerless Distilling Co.

37. Mr Caldwell gave evidence generally downplaying the claimant's role in these various projects. The general tenor was that other people were more involved than the claimant and/or that the acquisition was not particularly valuable. We could not give much weight to this evidence because very little was first-hand. Generally it was based on 'having reviewed documentation' or 'having spoken to other people involved in the deal' (sometimes named, sometimes not, and in any event, with no specifics of what they were asked or what they said, let alone the ability to test it). By contrast, the claimant was able to speak in detail from his first-hand knowledge and we have generally accepted his evidence as to what he worked on.

38. No documents were disclosed which would have shown the extent of the claimant's involvement and leadership in the various deals. We did not hear first-hand evidence on this from Mr Schefler, the person who would know. As we said, instead we heard vague and second-hand evidence from Mr Caldwell who had not even met the claimant during his employment. Moreover, we did not find Mr Caldwell a credible witness for a number of other reasons. His evidence was clearly partisan, as indeed we found at the liability hearing. He sought to downplay the claimant's role in nearly every single project If we were to believe Mr Caldwell, it would be very hard to understand why the claimant should have been paid such a high salary and bonuses by Mr Schefler.

39. Mr Caldwell described at length the general bonus scheme which he said was applied in the Stoli Group, but he admitted that the claimant's arrangement was unique in that no one else had a potential bonus equal to 100% of their salary.

40. Mr Caldwell produced various tables showing the number of bonuses paid as a percentage of headcount in 2018, 2019 and 2020 for the Stoli Group and for the ABG Group, and the bonus amounts paid as a percentage of target in each of those years. The tables, if taken a face value, showed a year on year reduction.

41. We did not find the bonus tables particularly helpful for two reasons. First, that they were created for the purpose of the litigation, and underlying documents and explanatory information were not provided despite the claimant's requests. Second, these applied to employees across the business at every level, whereas the claimant had a unique arrangement with Mr Schefler.

42. Mr Caldwell said that the claimant sat within the Stoli bonus scheme, even though he carried out work across the business, because employees need to sit within some scheme and the claimant worked on wines acquisition. The claimant denied there was a bonus scheme and that he sat within it. We were never shown any written bonus scheme and, as we have said, it is clear that the claimant was a high-level employee working closely with Mr Schefler and who had a separate arrangement with him.

Law

43. Under s123 the amount of the compensatory award for unfair dismissal shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

44. The leading authority on mitigation is Cooper Contracting Ltd v Lindsey UKEAT 0184/15. The principles set out in the claimant's skeleton argument on remedy were not disputed by the respondents.

45. Compensation for whistleblowing detriment must also be just and equitable in all the circumstances having regard to the infringement and any loss.

ACAS uplift

46. The ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) is issued under s199 TULCRA 1992 and provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace.

47. Under s207A(2): If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

48. The disciplinary part of the ACAS Code '…is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee' (Holmes v Qinetiq Ltd [2016] IRLR 664).

49. A protected disclosure can never in itself be a ground for disciplinary action, ie a ground for an allegation involving the culpability of the employee. Depending on the facts, a whistleblowing disclosure can amount to a grievance within the terms of the ACAS Code, ie 'concerns, problems or complaints that employees raise with their employers' (Ikejiaku v British Institute of Technology UKEAT/0243/19). In that case, the protected disclosure was made in an email raising complaints about being told to pass students who had been copying.

50. Paragraph 1 of the ACAS Code states that 'Grievances are concerns, problems or complaints that employees raise with their employers'. The Code envisages, amongst other examples, that the grievance may concern a complaint that the employer is not honouring the employee's contract (see paragraph 35).

51. Paragraph 32 of the ACAS Code states 'If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.' Paragraph 33 onwards sets out the steps which an employer should take on receiving a grievance. The natural reading of the section is that the steps apply only after informal attempts at resolving a grievance have failed and after the employee has raised a formal grievance in writing.

52. Paragraoh 33 says that 'Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received'. The Code then goes on to set out recommended procedure.

53. One issue which was not discussed during the remedy hearing was whether the Code applies to grievances which have only been raised orally. The parties were asked subsequently to provide written submissions on this matter. The claimant argued that informal grievances are within the Code and that if an employee who raises a grievance orally is summarily dismissed, and is therefore deprived of the opportunity to put that in writing, 'that is a point that counts against the employer rather than the employee'. This appears to fall short of a clear statement that the employer would then be in breach of the grievance procedure in the Code. The claimant argued that in any event, the claimant did put his concerns in writing in his email of 4 January 2020.

The respondents argued that the Code makes no provision for how an informal process should be handled and that it does not apply until the grievance is made formal by being put in writing. The respondents say that the 4 June 2020 email is irrelevant because it did not set out relevant concerns. The tribunal claim did not 'relate' to the matters set out in that email. Alternatively, the respondents say, even if the Code does apply to grievances which have not yet been put in writing, given that the claimant did not put his specific whistleblowing concerns in writing, it was not unreasonable for the respondents not to take steps in line with the Code.

54. In a case where the underlying award is of a significant amount, the tribunal needs to take into account the absolute value of a percentage uplift as a relevant consideration (Acetrip Ltd v Dogra UKEAT/0238/18). However, there must still be cases in which the top of the range 25% is applied, otherwise the range set by Parliament is not being respected. The discretion given to the employment tribunal by the statute is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift, which will be such as the employment tribunal considers 'just and equitable' up to the limit of 'no more than 25%'. While the top of the range should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional (Sir Benjamin Slade and another v Biggs and others [2022] IRLR 216).

Does the ACAS uplift apply to awards against individual respondents for subjecting workers to a detriment?

55. This matter was not addressed during the remedy hearing and we asked the parties subsequently to provide written submissions. The claimant argues that it does apply and cite the conclusions of Simler P, as she then was, in the EAT in Timis v Osipov [2017] UKEAT/0229/16 at paras 166-167. This conclusion was not disturbed when other aspects of the decision were appealed.

56. Section 207A(1) of TULCRA 1998 applies the uplift to jurisdictions listed in Schedule A2 of TULCRA 1992. That Schedule refers, inter alia, to section 48 of the Employment Rights Act 1996 (detriment in employment). In turn, section 48(1A) covers subjecting a worker to a detriment because he has made a protected disclosure.

57. The respondents argue that section 207A talks about 'where the *employer* has failed to comply with the Code' (our italics). However, Simler P states 'where an individual respondent is responsible for a failure to follow a relevant procedure it follows that he or she falls within s207A TULCRA and an award of compensation made against them is liable to the uplift provided for under s207A(2) TULCRA.'

Injury to feelings

58. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were suggested in the case of Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102, CA in the context of discrimination claims:

1. The top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.
2. The middle band should be used for serious cases, which do not merit an award in the highest band.
3. Awards for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.

59. For claims presented on or after 6 April 2020, the Presidential guidelines set the Vento bands as follows: A lower band of £900 - £9000 (less serious cases), a middle band of £9000 - £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 - £45,000 (the most serious cases). These figures include the Simmons v Castle uplift on general damages.

Costs

60. The power to award costs is set out in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Under rule 76(1) a tribunal may make a costs order, and shall consider whether to do so, where it considers that (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.

61. Under rule 76(2), a tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

62. In exercising its discretion to award costs, the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. However, its discretion is not limited to those costs that are caused by or attributable to the unreasonable conduct. The unreasonable conduct is a precondition of the existence of the power to order costs and is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order, but that is not the same as requiring a party to prove that specific unreasonable conduct caused particular costs to be incurred (McPherson v BNP Paribas [2004] EWCA Civ 569).

63. The judgment in McPherson was never intended to rewrite rule 40, or to add a gloss to it, either by disregarding questions of causation or by requiring the tribunal to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as ‘nature’ ‘gravity’ and ‘effect’. The relevant thrust of that judgment was to reject as erroneous a submission to the court

that, in deciding whether to make a costs order, the tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission the court had not intended to imply that causation is irrelevant. (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA).

64. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA - the case concerned a costs application against a claimant).

Conclusions

Issues 3.3 – 3.5: Mitigation

65. The claimant made considerable efforts to find new employment. He contacted a career coach in late July 2020, which was a sensible first step. Although he took his children to see their grandparents over the summer, he set steps in motion with the coach before he went and picked them up again actively in early September. We do not find the lack of any other major activity before September 2020 to be unreasonable. The claimant was dismissed very abruptly and out of the blue. It was a considerable shock to him. He had to regroup. He had to take legal advice and prepare to take proceedings. The company was not responsive to him. The world had been severely hit by Covid restrictions. There is no evidence that he missed any particular opportunity because of this small delay.

66. From September 2020 onwards, he was extremely active in looking for work. He made a large number of applications as well as networking, attending webinars to increase his skills and signing up with agencies. We see nothing unreasonable in his approach.

67. We saw no basis for Mr Caldwell's suggestion that he should have been able to obtain new employment by nine months, albeit at a considerably reduced salary (£220,000 - £225,000 plus 100% bonus). This was in the middle of a pandemic which affected business and travel across international borders, which hampered possible opportunities and networking. This was also problematic in creating opportunities with family offices and high net-worth individuals where personal physical contact is important. In addition, the claimant had the difficulty of having been dismissed, with no indication he would get a good reference, and when his tribunal claim had not yet been decided.

68. Further, Mr Caldwell did not identify a single vacancy, either at the level of the claimant's previous pay and status, or at the lower level of pay which he suggests, or indeed otherwise, which the claimant should have applied for but

did not. Nor did he identify any agency he should have signed up for or career coach he should have approached.

69. The parties agreed that the loss of earnings and pension is calculated from 8 July 2020 because the claimant was paid up to that point.

70. We consider it appropriate to award compensation for loss of earnings, pension and bonus (the latter amount addressed below) for the period 8 July 2020 to 9 February 2022 inclusive (1 year 31 weeks). The tribunal's decision on liability was sent out to the parties on 1 December 2021. By that time, as far as business was concerned, Covid restrictions were being increasingly relaxed on travel. The claimant also had an offer in January 2022. Taking this date, we then allowed a few weeks for any negotiation to be concluded and for the claimant to start work. We were not given enough detail to know whether the claimant's start date was held up by his salary demands, but it appears that he was negotiating. In stopping at 9 February 2022, we further take into account that we have allowed the claimant's full loss up to that date.

71. We have also taken into account, on the other hand, in awarding loss for as long as we do, that the respondents gave no date when the £220,000 - £225,000 + bonus which they estimated the claimant could have obtained in 9 months, might get back up to his former pay level.

Issue 3.6: Bonus 2019 - 2022

72. Although we are not in a position to evaluate the claimant's role in every project for 2019, we accept his evidence that overall he achieved even more than in the previous years when he had received a full bonus (or pro rata in year 1). Mr Caldwell attempted to downplay his role to the extent that we wondered why the claimant would have been paid so generously if his role was as minor as Mr Caldwell suggested. As we have said, we had little confidence in Mr Caldwell's evidence about how much the claimant had done for a number of reasons. Mr Caldwell had never met the claimant at the time. He said he relied on documents which were unspecified and undisclosed and on having spoken to people, who were only collectively named. Furthermore, we did not hear from the person who actually took decisions about the claimant's bonus, Mr Schefler.

73. We have also explained why we do not find it particularly helpful to look at the general pattern of bonus payments and tables, given that the claimant had a unique arrangement with Mr Schefler.

74. In his witness statement, Mr Caldwell admitted he did not know the level of bonus which Mr Schefler would have recommended for 2019 'if any'.

75. We do not believe that Mr Schefler ever applied systematic criteria to assessing what bonus he would award the claimant. That was not his style of operating generally, which was based on personal relationships and lack of documentation. It is also not our impression from the way he conveyed what

bonus he would give the claimant in 2017 and 2018 (he 'thought it was the right number' and 'well done for last year').

76. From the way Mr Schefler worked, we find that his bonus decisions were based on general impression and, essentially, whether someone was in his favour or not. He clearly liked the claimant right up to the whistleblowing at the end, and was happy to award him the full bonus because he was satisfied with the claimant's contribution. We think it was nothing more sophisticated than that. Indeed at one stage he had used him to work on personal matters ie refinancing his private jet, which is indicative of the close working relationship.

77. We therefore find that on the balance of probabilities, had the claimant not fallen out of favour because of his lawful whistleblowing and had he not been dismissed, he would have been awarded a full bonus for 2019, when he performed broadly as well as he had done in previous years.

78. For 2020, the position had changed because of the pandemic. We think that would have affected the claimant's bonus to some extent, even if he was still in favour. Although the claimant had a unique bonus arrangement, we accept the pandemic was likely to have impacted company's finances. We find on the balance of probabilities that the claimant would have received a bonus, but it would have been reduced by 30%. We believe that Mr Schefler would have shaved something off, but not to the extent of alienating the claimant. We arrive at that figure because it is in line with the 30% salary cuts which Mr Schefler originally introduced across the board. We are not saying this was the same thing, but just that it was the kind of figure Mr Schefler was thinking of.

79. We believe that Mr Schefler would also have reduced he claimant's bonus by 30% in 2021 because of the continuing effect of the pandemic. We believe that by 2022, matters would have been largely restored to normal from a business viewpoint and that the claimant would have received his full bonus again.

Issue 3.7: Injury to feelings

80. The parties accepted that injury to feelings is payable for the whistleblowing detriments. The dispute concerned how much should be awarded. In closing submissions, the respondents suggested a range of £5000 - £9000 inclusive of the uplift on general damages. The claimant argued for £27,000.

81. The claimant found it very stressful to lose his job and income, particularly during the Covid pandemic which was already a stressful time. The claimant was aware that his experience was very specialised and he anticipated it being difficult to find new employment. It had also been a shock to be treated with such disregard by Mr Schefler, with whom he had had a close working relationship. He had believed they had mutual respect, so such an abrupt dismissal shocked him and made him feel his efforts had not been valued. He

had worked very hard to build professional working relationships in the previous three years and he had anticipated remaining with the company for some while.

82. His dismissal and Mr Schefler's decision did cause injury to feelings which should be recognised. On the other hand, this is not a case where there was mistreatment over a period of time. It was a one-off incident, although a serious one, because it entailed dismissal. Nor is it a case where there was evidence of any deeper personal emotional impact. We therefore consider an appropriate sum to award for injury to feelings is £9000, being on the border of the lower and middle Vento bands.

Issue 3.8.1: The respondents' unreasonable failure to comply with the ACAS Code

83. The claimant sought an uplift for not following the Code in relation to the dismissal, which he initially framed as under the disciplinary part of the Code. When we drew the representatives' attention to Ikejiaku v British Institute of Technology Ltd UKEAT/0243/19, Mr Roberts argued that alternatively an uplift should be made on grounds that his grievance had not been appropriately addressed and had led to dismissal. For the respondents, Mr Leiper opposed an uplift on either ground.

84. We do not believe that the disciplinary part of the Code applies. We address the reason for dismissal at paragraph 110 – 112 of our liability judgment. The respondents denied that the claimant was ever dismissed. Therefore they did not put forward a reason for dismissal. They did not seek to invoke a disciplinary procedure against the claimant. Even if the respondents had argued that the reason for dismissal was that the claimant would not accept cuts to his pay and changes to his bonus, this could not have been a ground for disciplinary action. It would not have entailed culpable conduct. Therefore the disciplinary part of the ACAS Code did not apply.

85. We find that the grievance procedure in the Code did apply. In his email dated 4 June 2020, the claimant raised 'concerns, problems and complaints'. He was complaining specifically about the proposed cut to his own pay. He said such measures were 'a two-way street that require both parties to agree'. He said it was 'extremely disturbing' that an open-ended extension was required. He talked about no one having given him any concession in relation to his request to take up a non-executive position on a third party board just a month previously.

86. In response to that written grievance, the respondents held an initial meeting on 5 June 2020. Using the shorthand from Mr Roberts' submissions on liability and adopted at paragraph 113 of our liability decision, the claimant made the following disclosures to Mr Oliynik and Ms Fatkullina at the meeting on 5 June 2020: disclosures regarding the claimant's pay; regarding his 2020 bonus; regarding staff welfare; and regarding Covid pretence. These disclosures were the subject of the tribunal claim.

87. It is true that only the disclosures relating to the claimant's own pay and bonus had been put in writing, but that is sufficient. In any event, it is not uncommon for an employee's grievances to expand once a grievance meeting is held. It cannot sensibly be suggested that an employee should have to put each new complaint raised at a grievance meeting in writing in order to have the grievance dealt with properly.

88. Indeed, even if the 4 June 2020 email had not contained anything which met the definition of a protected disclosure, it did raise grievances. The grievances led to a grievance meeting. At the grievance meeting, the claimant raised closely related concerns. The closely related concerns were the subject of his claim. This would be of sufficient proximity to fall within s207A in any event.

89. We therefore find that the ACAS grievance procedure should have been followed. It was not. We consider it just and equitable to make an uplift in our award of compensation. Putting it most bluntly, the direct result of the claimant raising his grievances was that he was dismissed. Although a meeting was held on 5 June 2020, this was not with anyone who had the power to make a decision.

90. The Code says that following the formal meeting, the decision should be communicated to the employee without unreasonable delay, and the employee should be informed that they can appeal. None of this happened. Instead, Mr Schefler's telephoned the claimant on 8 June 2020 and rather than any proper discussion or any decision, Mr Schefler cut off the claimant and dismissed him.

91. The respondents were therefore in significant breach of their duty to investigate grievances properly under the ACAS Code. The consequence of their failure to do so was serious – the claimant was abruptly sacked. We do take into account that there was the initial 5 June 2020 meeting with the claimant, but there was no decision communicated, and as soon as the real decision-maker became involved, the claimant was peremptorily dismissed. Our starting point would therefore be an uplift of 20%.

92. We then considered whether the uplift overlaps with our award for injury to feelings. It does not. That award focused on different matters including the hurt caused by Mr Schefler's disregard for their previous working relationship,.

93. Once we have calculated the overall value of the compensatory award, we will consider whether the 20% uplift is still just and equitable and proportionate.

94. Finally, we considered whether the uplift should be awarded against the 2nd respondent as an individual, as well as against the 1st respondent as the employer. We refer to the parties' submissions on this in the section on law above. In our view, the 2nd respondent was the person responsible for failing to follow the procedure in the Code. Indeed the 2nd respondent is barely

distinguishable from the 1st respondent which he owns. Therefore, following the EAT in Timis, we are able to apply an uplift to the award we made against him and we do so.

95. In the alternative to the above, we considered what uplift we would have awarded had we thought that the disciplinary part of the ACAS Code applied. We would have made the same level of uplift for essentially the same reasons. The claimant raised concerns. He was dismissed as a result with no proper process. The reason the uplift would again have been 20% rather than 25% was because there was some very limited effort at discussion.

Issue 3.8.2: Likelihood that the claimant would have been dismissed in any event because of the structural reorganisation in 2020

96. The respondents argued that they would have been having redundancy discussions with the claimant during the second half of 2020. Mr Caldwell stated that there is no longer a dedicated M&A role in the business and that there was no M&A activity in 2020 due to the impact of the pandemic.

97. We found the evidence on this extremely vague. Mr Caldwell in his witness statement simply said 'we would have been having redundancy discussions with him during the second half of 2020'. There was no discussion with claimant about any possibility of redundancy during his employment, even at the end. The claimant was involved in M&A projects in the first half of 2020 until he was dismissed abruptly on 8 June 2020 for reasons which were nothing to do with redundancy. Mr Schefler and Ms Fatkullina on his behalf were flagging up to the claimant likely changes to his bonus calculation for the year 2020 and into the future. In their last telephone conversation, Mr Schefler asked the claimant to start thinking about his 2021 KPIs.

98. The other point we note, is that this defence was not mentioned at any point prior to the exchange of witness statements for the remedies hearing. It was not in the ET3 or amended ET3 or stated during the liability hearing.

99. Mr Caldwell's argument that the claimant would have been made redundant did not appear to be on the basis that SPI Spirits (UK) Limited was being wound up. In any event, on that point, we find that, had the claimant not been dismissed, he would have been located in another of the group's companies and would continue to have worked in the same way for the 2nd respondent. Ms Sidorenco was moved to Cellar Trends Ltd (now known as Amber Beverage UK Limited) with effect from 1 September 2020. Ms Fatkullina was also transferred from the 1st respondent to Amber Beverage UK Limited in October 2020, although her duties did not change as a result. Indeed Mr Oliynik said it had been decided that the remaining employees of the 1st respondent could eventually be transferred to another UK-based subsidiary. In any event, the claimant effectively worked personally for the 2nd respondent and his duties were across the group.

100. We therefore find there is no chance that the claimant would have been made redundant or dismissed because of the structural reorganisation in 2020.

Issue 4: Capping because of the service agreement

101. The respondents argue that any award to the claimant must be capped at the net amount of £270,000. This is based on clause 3(c) of the Confidentiality and Non-competition Agreement and clause 7(e) of the Employment Agreement.

102. The respondents argue that there is an explicit contractual agreement to this effect and / or that it is not just and equitable under the legislative provisions to award more than £270,000.

103. The respondents argued that the tribunal should take into account that at the time of entering the agreements, the claimant was legally trained, had worked as a lawyer, was negotiating a senior position and had lawyers to advise him. He had negotiated a substantial lump sum on termination and the corollary of that was the cap. The respondents say that they would not suggest, for example, that a bus driver who had agreed a cap below the statutory cap should be bound by such an agreement.

104. The respondents did not seek to argue in the alternative that we should reduce our intended award – should it exceed £270,000 – by £270,000.

105. Clause 7(e) of the claimant's Employment Agreement states:

> In the event that the Company terminates this Agreement after 12 months from the Effective Date other than pursuant to 7(d), the Employee shall be entitled to compensation as described in and subject to clause 3(c) of the Confidentiality and Non-Competition Agreement entered into between the Employee and the Company. For the avoidance of doubt, no other amounts shall be payable to the Employee upon such termination whether pursuant to contract (including, but not limited to, in relation to any notice period), statute or otherwise other than pursuant and subject to such clause 3(c) of the Confidentiality and Non-Competition Agreement.

106. Clause 3(c) of the Confidentiality and Non-competition Agreement says:

> In the event the Company terminates the Employment Agreement after 12 months from the Effective Date other than pursuant to 7(d) of the Employment Agreement, the Employee shall be entitled to a payment in the net amount of GBP 270,000 (which, for the avoidance of doubt, is inclusive of any amounts payable under English law and, provided that, such amount will be reduced by the amount of any other payments made (except for salary payments for any period worked by the Employee at the written request of the Company post notice of termination) or claimed which arise out of or in connection with such termination if any). This

amount shall be payable on the date of termination of the Employment Agreement and this Agreement.

107. We do not apply any cap of £270,000. First of all, we take into account section 203 of the Employment Rights Act 1996 which states that any provision in an agreement (whether a contract of employment or not) is void in so far as it purports (a) to exclude or limit the operation of any provision of this Act' (with exceptions which do not apply in this case). We consider that the clauses referred to by the respondents do seek to limit the operation of the compensation provision because it limits the tribunal's ability to decide what should be awarded and/or what should be considered 'just and equitable'.

108. Alternatively, we would say it is in any event just and equitable to cap compensation at £270,000. Parliament has decided that for whistleblowing cases, there should be no cap on compensation. We have calculated the loss arising. The respondents do not ask us to consider setting off any sum of £270,000 which in any event has not yet been paid.

109. Based on the above conclusions, our calculation of compensation is as follows:

Calculation (1) unfair dismissal (against 1st respondent)

Net annual basic salary was agreed at £180,000.
Net weekly basic salary was agreed at £3,461.54

Basic award for unfair dismissal = £1,614 (agreed figure).

Compensatory award for unfair dismissal

Loss of statutory rights = £300 (agreed figure).

Loss of basic salary from 8 July 2020 up to 9 February 2022 inclusive = 1 year 31 weeks [£180,000 + (£3461.54 x 31 = £107,307.74)] = £287,307.74

Loss of pension from 8 July 2020 to 9 February 2022 = inclusive = 1 year 31 weeks
The agreed loss rate was £5,400 net p.a.
31 weeks = £5,400 divided by 52 x 31 = £3,219.23 + £5,400 = £8,619.23

Loss of bonus =
£180,000 for 2019;
£126,000 for 2020; (70% of £180,000 = £126,000)
£126,000 for 2021; (70% of £180,000 = £126,000)
£19,780.23 pro rata (1 January 2022 – 9 February 2022 inclusive = 5 weeks 5 days.
(£3461.54 x 5 weeks = £17,307.70; £3461.54 divided by 7, times 5 = £2,472.52 for 5 days)

Injury to feelings = £9000

Compensatory award subtotal
£300 + £287,307.74 + £8,619.23 + £180,000 + £126,000 + £126,000 + £19,780.23 + £9000 = £757,007.20

20% ACAS uplift on compensatory award = £ 151,401.44

Sub-total compensatory award = £757,007.20 + £151,401.44 = £908,408.64

Further consideration of the ACAS uplift

110. We now revisit the 20% uplift for breach of the ACAS Code to apply a final sense-check. We are conscious that £151,401.44 is a very large figure to award for what is superficially a procedural breach. However, we consider that the award is appropriate. The respondents' behaviour was egregious. In response to the claimant raising whistleblowing concerns about swingeing cuts on the pretext of Covid and at a time of vulnerability for staff, he was simply dismissed. Aside from a meaningless conversation with Mr Oliynik and Ms Fatkullina, who were not the decision-makers, the claimant was dismissed mid-telephone conversation with no forewarning. There was no substantively fair reason for dismissing the claimant. Indeed, the respondents went on to deny he had been dismissed and to deny that the person who dismissed him had power to do so.

111. The claimant was a high earner with a high bonus. In a case like this, it is inevitable that applying the appropriately arrived at ACAS percentage leads to a large sum. Parliament did not set any cap on uplifts. It simply set percentages. We have taken the overall figure into consideration as a factor regarding what is just and equitable. However, having applied our minds to whether the sum is disproportionate, we do not think that in the context of the type of employment, job, and nature of the breach, that it is. We are conscious that the award is far larger than our award for injury to feelings. The latter involved different considerations. In this particular instance, we do not feel that makes the uplift figure less appropriate. We think it is just and equitable in all the circumstances to award this sum.

Issue 5: Grossing up of unfair dismissal award

The method of grossing up was agreed by the parties. Applying that:

The net compensation figure was £908,408.64 + £1,614 (basic award) = £910,022.64

£910,022.64 less the £30,000 tax free = £880,022.64

Divided by 0.55 (to reflect the 45% tax rate) = £1,600,041.16

Adding the £30,000 back in = £1,630,041.16

There is no upper limit on the compensatory award for a whistleblowing dismissal. The award for automatic unfair dismissal is therefore **£1,630,041.16**

No separate award needs to be made for ordinary unfair dismissal.

The award made for whistleblowing detriments (below) is £1,626,452.07. This element is duplicated in the automatic unfair dismissal award. The only extra element payable for the automatic unfair dismissal is therefore the basic award and the award for loss of statutory rights, the latter with an ACAS uplift, and both grossed up. The balance due purely for the automatic unfair dismissal is therefore £1,630,041.16 less £1,626,452.07 ie **£3,589.09**.

Calculation (2): whistleblowing detriments

The loss resulting from the detriments is the loss of earnings, loss of pension, loss of bonus and injury to feelings as described above. The calculation is as follows:

Loss of basic salary from 8 July 2020 up to 9 February 2022 inclusive = 1 year 31 weeks [£180,000 + (£3461.54 x 31 = £107,307.74)] = £287,307.74

Loss of pension from 8 July 2020 to 9 February 2022 = inclusive = 1 year 31 weeks
The agreed loss rate was £5,400 net p.a.
31 weeks = £5,400 divided by 52 x 31 = £3,219.23 + £5,400 = £8,619.23

Loss of bonus =
£180,000 for 2019;
£126,000 for 2020; (70% of £180,000 = £126,000)
£126,000 for 2021; (70% of £180,000 = £126,000)
£19,780.23 pro rata (1 January 2022 – 9 February 2022 inclusive = 5 weeks 5 days.
(£3461.54 x 5 weeks = £17,307.70; £3461.54 divided by 7, times 5 = £2,472.52 for 5 days)

Injury to feelings = £9000

Compensatory award subtotal

£287,307.74 + £8,619.23 + £180,000 + £126,000 + £126,000 + £19,780.23 + £9000 = £756,707.20

20% ACAS uplift on compensatory award = £151,341.44

Sub-total compensatory award = £756,707.20 + £151,341.44 = £908,048.64

Grossed up:
£908,048.64 less £30,000 = £878,048.64

Divided by 0.55 = £ 1,596,452.07
Adding the £30,000 back in = £1,626,452.07

Award for detriment against 1st and 2nd respondents: **£1,626,452.07**

Issue 6: Costs: application, facts and conclusions

112. We were provided with very little oral argument regarding the costs applications and were referred in broad brush terms to the written documents.

First application (against the 2nd respondent)

113. The claimant applied for the costs of the preliminary hearing before EJ Burns dealing with jurisdiction. He said his actual costs were £23,345.50 + VAT, but he confined his application to £20,000. This covered preparation and attendance. The costs application was made under Sch 1 rule 76 to recover the unnecessary costs incurred by the claimant as a result of the 2nd respondent's unreasonable conduct.

114. The unreasonable conduct was said to be (i) making the application in the first place to strike out the claim for jurisdictional reasons; (ii) refusing to provide ordered information in pursuance of the application; (iii) withholding disclosure and witness evidence to give a deliberately misleading picture; failing to notify the 2nd respondent's non-attendance at the hearing on 3 June 2021 until the 11th hour. The main emphasis of the costs application was on the disclosure aspect.

115. We do not make any finding that the raising of the jurisdictional defence was in itself unreasonable. It had some technical aspects. The matter of jurisdiction was contested in the tribunal; the claimant had the burden of proof; and the tribunal made its findings on the balance of probabilities.

116. However, EJ Burns, was clearly unhappy about the nature and reliability of the 2nd respondent's disclosure. At paragraph 17 he states, 'the claimant's solicitors were naturally dissatisfied with the very scanty disclosure by the 2nd respondent and so wrote lengthy letters to his solicitors on 11 and 28 May 2021…' Despite that, the 2nd respondent had not provided disclosure relevant to the residence and domicile issue. His disclosure and witness statement left unanswered questions. In addition, paragraph 20 of the preliminary hearing judgment says that the claimant had had to try to dig up details about the 2nd respondent from the internet. The evidence which the clamant did dig out was important.

117. As EJ Burns pointed out, the fact that the claimant had the burden of proof did not dissolve the 2nd respondent from his disclosure obligations which EJ Burns found 'he has discharged in a poor and unsatisfactory manner'.

118. This was unreasonable conduct and it resulted in the claimant incurring additional costs, chasing up disclosure and researching other sources of information. We cannot precisely quantify the amount of extra work. But we think it just and equitable to award £3000. Inadequate disclosure is a serious matter which in principle goes to the heart of a fair hearing. In the event, the claimant succeeded at the preliminary hearing.

119. We have not awarded full costs as requested. We were not satisfied that all the preparation work related to the particular preliminary issue. We also bore in mind that the burden of proof regarding jurisdiction was the claimant's. As we say, we were not satisfied that a significant amount of extra work was caused by the shortfall in or misleading disclosure. Regarding the 2nd respondent's last minute non-attendance, it is up to the parties whether they attend and which witnesses they want to call. The last minute non-attendance of the 2nd respondent was discourteous, but it was not shown to us that the claimant incurred any additional costs as a result.

Second application (against both respondents)

120. The claimant's second costs application was against both respondents and it was made for the costs of the entire case (except those covered by the first application). The application was on grounds that the respondents were unreasonable in relation to disclosure, the 2nd respondent's non-attendance, and the respondents' approach to interpreters.

121. The 2nd respondent was again discourteous by not attending the liability hearing at the last minute. He did not satisfy us that there was a genuine medical reason for non-attendance. He was not required to attend the hearing, but doubtless he could have told everyone in advance that he had no intention of coming. However, we were not told of any costs incurred by the claimant as a result of the 2nd respondent's non-attendance.

122. What transpired regarding interpreters is described at paragraph 5 of the liability judgment. However, we do not see that this is any basis for awarding costs. The failure to ask the tribunal for an interpreter in advance may have been the result of a failure to know how tribunals operate in respect of interpreters. Maybe the respondents were not listening to what the claimant's solicitors told them about this. But we cannot go as far as saying it was unreasonable conduct as opposed to inefficiency. The unreasonable element was, once the tribunal made the matter clear, allowing the tribunal to book an interpreter when Mr Schefler did not in fact appear as a witness and probably had little intention of doing so. However, this was a waste of money for the tribunal system, not for the claimant. We cannot see that the claimant was affected at all.

123. Finally as regards disclosure, it is true that the tribunal has been concerned throughout regarding the general lack of disclosure. Some of this was within the realm of the usual arguments between parties about whether everything relevant has been disclosed. It was also clear that the respondents

tended to put less in writing than other businesses might choose to do. However, some documents may have been withheld, or were extracted only with difficulty. On the other hand, unlike with the first costs application, the claimant did not show us how this caused him any extra costs, directly or indirectly. While we do not need to be shown a precise causal link, it is a relevant factor whether the unreasonable conduct causes extra costs and what effect it had. In this, we bear in mind that litigation between represented parties frequently generates long letters, written disagreements, attempts to put pressure on the other side and arguments about the adequacy of disclosure. The respondents' approach may have caused the claimant anxiety, frustration, and even outrage, but that is not unusual in litigation and would have been present in this case in any event. We cannot see what effect it had beyond that.

124. Therefore, although we find that the 1st and 2nd respondents were unreasonable in their general conduct of the case including their approach to interpreters, the last minute failure to give oral evidence, and not giving proper disclosure, we do not consider any of this led to notable extra costs for the claimant or had any other notable effects. Looking at the matter in the round, we do exercise our discretion to order costs.

Employment Judge Lewis: 24th June 2022

Sent to the parties on: 24/06/2022.

For the Tribunals Office