Case Number: 2202339/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**

BETWEEN:

Mr R Sanguiliano

Claimant

AND

JCI Capital Ltd (1)
Mr D Pinci (2)
Mr D Clasadonte (3)
Mr M Bernardeschi (4)
Mr G Torzi (5)

Respondents

ON: **11 April and 8 July 2022**
Appearances:
For the Claimant: **Mr L Davidson, counsel**
For 1st and 5th Respondents: **Ms N Hausdorff, counsel**
For 2nd, 3rd & 4th Respondents: **No appearance**

RESERVED JUDGMENT ON REMEDY

The Judgment of the Tribunal is that the respondents shall pay to the claimant the sum of **£255,103.28.**

REASONS

1. Judgment was given orally on 8 July 2022 on the sums awarded under periods 1, 2 and 3 including mitigation of loss, injury to feelings and aggravated damages. Due to lack of time, judgment was reserved on the issue of any uplift for unreasonable failure to comply with the ACAS Code and on the submissions as to joint and several liability and as to the final calculation of the award. The sum for pension loss was agreed and there was an agreed conversion rate from euros to pounds sterling.

2. By a Rule 21 Judgment dated 14 December 2021 the claims for automatically unfair dismissal and for notice pay and unlawful deductions

from wages succeeded, save for the claim for the cost of a flight in the sum of £102.99.

3. The first and fifth respondents were present at the hearing in December 2021 but did not have leave to participate until liability had been decided and representations were made relating to this remedy hearing. The second, third and fourth respondents made no appearance.

4. At a case management hearing on 14 December 2021 I gave leave to the first and fifth respondents to participate in this remedy hearing. The reasons for this are set out in the Case Management Order of that date.

5. This hearing was postponed from 22/23 March 2022 on the respondents' application because of late service of papers by the claimant. It was further postponed from 4 and 5 April 2022 to 11 April 2022 due to ill health on the part of the Judge.

6. As two days were needed, it was not possible to complete the hearing on 11 April 2022 and we had to adjourn part heard to the first date upon which all parties were available. The remedy hearing concluded on 8 July 2022.

This remote hearing

7. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

8. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net.

9. The parties and public were able to hear what the tribunal heard and see the claimant as a witness as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

10. The participants were told that was an offence to record the proceedings.

11. The tribunal ensured that the claimant, as the only witness, had access to the relevant written materials. I was satisfied that the claimant was not being coached or assisted by any unseen third party while giving his evidence.

Witness outside the jurisdiction

12. The claimant, the only witness in this case, was in Italy joining by CVP. At the liability hearing the claimant produced confirmation from the Consulate General of Italy that they had no objection to him giving evidence remotely in proceedings in the Courts of England and Wales. The claimant gave his remedy evidence on day 1 of this hearing, prior to the publication of

the Presidential Guidance on the Taking of Evidence by Video or Telephone from Persons Located Abroad dated 27 April 2022

The issues for this remedy hearing

13. The issues for this remedy hearing were set out in the Case Management Order of 14 December 2021 and further clarified by the parties in email correspondence of 8 April 2022 follows:

    (i) What is the profit share to which the claimant is entitled? This was further clarified to including the correct basis for assessing the claimant's entitlement to profit share from May to August 2019, the period to termination on 18 January 2020 and the basis for calculation of profit share post dismissal from 18 January 2020 to 21 April 2021.
    (ii) What should be awarded for injury to feelings arising from the detriments?
    (iii) Should there be an award for aggravated damages?
    (iv) Has the claimant properly mitigated his loss?
    (v) Should there be an award of 2.5% to reflect the delay in the claimant receiving payment? This was withdrawn on day 2 of the remedy hearing.
    (vi) Should there be an uplift of 25% to reflect unreasonable failure to comply with the ACAS Code on Disciplinary and Grievance Procedures?
    (vii) What regard, if any, should be given to tax implications?

14. References below to "the respondents are to the first and fifth respondents, save in relation to joint and several liability where the differential is made between R1 and R5 and the other three respondents.

Documents and statements

15. There was a remedy bundle from the claimant of 618 pages. Just over 300 pages of this bundle were copies of the claimant's job applications.

16. There was a schedule of loss from the claimant and a counter schedule from the respondents.

17. The tribunal heard evidence on remedy from the claimant.

18. Where documents appeared in the bundle in Italian, even with a translation, unless it was an agreed translation, I told the parties I could not take it into account unless there was a court approved translation.

19. The tribunal had written submissions from the parties to which counsel spoke. All submissions were fully considered together with any authorities referred to, whether or not expressly referred to below.

Sums claimed in Euros

20. The sums claimed were expressed in Euros. I told the parties that the award would be made in pounds sterling and asked them to agree an exchange rate to be applied. The parties agreed a pound/euro exchange rate of **£1.20.**

Findings of fact on remedy

21. The claimant's period of service with the first respondent was from 2 September 2019 to 18 January 2020. He did not have 2 years' service. He was employed as a portfolio manager in the UK. He had previously been employed by the first respondent in Milan between 2 May 2019 and 1 September 2019 but it was not contended that there was continuity of service. The claimant is a chartered accountant and the equivalent of a chartered financial analyst in Italy.

The contractual provisions

22. The claimant had a UK contract of employment from 2 September 2019 which was in the liability bundle page at 106. This contract was written in English.

23. Clause 4.1, headed "*Remuneration",* said that the employee "*shall be paid 70% of the gross profits generated from the wealth management department and profit related to the global Equity fund, both deducted of any rebate due to introduction of clients. The remuneration shall be paid monthly and will include tax and national insurance deductions. The employee is not entitled to receive payment in respect of hours worked in excess of the employer's normal working hours."*

24. Clause 4.3 provided for employer pension contributions at 2% of gross salary.

25. The claimant seeks a profit share to cover three periods: 1 May 2019 to 30 August 2019, before he joined the UK company; from 1 September 2019 to 29 November 2019 his period of employment before going on to garden leave and the period to the date of termination to 18 January 2020. He also claimed post termination losses.

26. It was a finding of fact made at the Rule 21 hearing that the claimant was paid the gross sum of £1,423.07 per month for September, October and November 2019 (payslips as pages 278-280). He was paid £197.04 in December 2019, described as salary (page 281) and in January 2020 he was paid salary of £1,423 and holiday pay of £394.08 (page 282).

27. The claimant's P45 showed his pay to his leaving date of 18 January 2020 as £7,706.47.

28. It was a finding of fact at the Rule 21 hearing that on termination, the claimant only received basic salary based on the nominal monthly salary

that had originally been agreed.

The profit share

29. The claimant's succeeded in his case that he was not paid his profit share which he says accrued monthly and was payable three monthly to align with the clients' quarterly payments of management and performance fees.

30. There are three periods in question for the claim for profit share. They were:

    a. 1 May 2019 – 30 August 2019 (pre-employment under the UK contract);
    b. 1 September 2019 – 29 November 2019 (during employment and before garden leave) and 1 December 2019 – 18 January 2020 (during garden leave). These two periods were dealt with together.
    c. The post-employment period. It was agreed that there was a final cut-off date of 21 April 2021 being the date upon which R1 lost its authorisation to carry out regulated activities. The claimant did not seek any stigma damages or future loss after that date.

Period 1 - 1 May 2019 – 30 August 2019 pre-employment under the UK contract

31. In respect of the first period I made a finding of fact at the hearing on 14 December 2021 that there was a binding verbal agreement made in mid-August 2019 with R2, R3 and R5 just before he made the move to London for the claimant's profit share under clause 4.1 of his contract of employment retrospectively for the period 1 May to 30 August 2019. The claimant is entitled to his profit share. To the extent that R1 and R5 initially sought to deny liability for this, they were not in a position to do so. The finding was that under the agreement reached the claimant was to receive 50% of the profit share for this 4 month period.

32. For this first period and the second period and for the purposes of narrowing the issues the claimant was prepared to agree profit share in terms of the invoices sent to clients reflecting management fees, performance fees and execution fees.

33. The 50% figure based on the invoices of the overall profit share for period 1 was agreed between the parties at a total of €66,051.67.

34. The finding at liability stage was as follows – taken from my notes of delivering an oral judgment on 14 December 2021 as neither side had requested written reasons:

    "The claimant relied upon a verbal agreement made in mid-August 2019 with R2, R3 and R5 just before he made the move to London. The verbal agreement relied upon was that the profit share provisions in his UK contract of employment would apply retrospectively in respect of

performance from May 2019 to August 2019, if he agreed to waive his entitlement to certain payments due under Italian law on the termination of his Italian employment contract. The Italian contract gave the claimant a salary of €85,000 plus a bonus of 50% of the performance and management fees on his accounts (his statement paragraph 13). The claimant also agreed not to draw a fixed salary in the UK but to received pay entirely based on profits generated. The claimant believed that he was asked to do this because he was a significant expense to the Italian business and this agreement created a better financial impression for R1 when it was trying to fundraise. I find on the claimant's evidence that such an agreement was reached and it was a binding agreement."

35. The respondents said that there was a lack of particulars as to the details of the verbal agreement. What the respondents say is that 50% of the profit share for the four month period 1 May to 30 August 2019 and it related to 50% of business from new clients and the claimant on his own evidence agreed that he did not introduce any new clients. The respondents' argument was that the claimant should receive zero. They said that the tribunal should refer back to the Italian contract which was 50% on new clients. At no point was the tribunal ever provided with an English version of the Italian contract. The parties were told that the tribunal would not take account of any document in Italian unless it was an agreed translation or there was a Court approved translation.

36. The respondents said in submissions: "*While R1 and R5 do not seek to go behind the Tribunal's determination at liability stage, the content of the Italian contract is significant, as is the waiver signed by the claimant."*

37. In the decision at liability stage I made no mention of a limitation on the profit share to the introduction of new clients. I was unable to reference an Italian contract when there was no translation. The respondents also relied upon the Waiver Agreement (remedy bundle, translated version, page 457) being waiver of his rights under his Italian contract of employment when he took up employment in the UK.

38. My finding was that there was a verbal agreement and there was no reference to it being limited to new clients. The respondents' secondary position was that the claimant's salary of €14,541.00 should be deducted from the profit share.

39. The claimant said that the respondents sought to go behind the liability findings, it was 50% of the profit share. The waiver did not deal with the calculation of the profit share.

Finding on period 1

40. The finding at liability stage was for a profit share. The sums due under the verbal agreement made provision for a calculation of profit share, without any limitation to the introduction of new clients or to any other

deductions. It was not subject to the deduction of the claimant's salary of €14,541.00 or anything else. The respondents, on my finding, were seeking to reopen the liability finding, to read terms into the verbal agreement, to seek limit the claimant's entitlement to profit share to zero.

41. The finding was for a verbal agreement for a 50% profit share without reference to any deductions. The claimant is entitled for this period to be paid the sum of **€66,051.67.**

Period 2 – 1 September 2019 – 29 November 2019 during employment and to 18 January 2020 during garden leave to termination

42. The second period covers the claimant's profit share during employment and during garden leave. The contractual entitlement is to "*70% of the gross profits generated from the wealth management department and profit related to the global Equity fund"* as per clause 4.1 of his contract set out above. The respondents say that this is what their invoices deal with.

43. For expediency the claimant accepted the respondents' calculations in the Counter Schedule of Loss in the remedy bundle at page 449. The claimant did not accept that the approach for the year 2020 was applicable to the post-employment period. The claimant also accepted that his salary of €9,091.11 should be deducted from this sum of €103,447.24. There was a period of 18 days included in that time period because his termination date was 18 January 2020. The claimant chose for expediency not to dispute those 18 days for the purposes of period 2. The claimant was content to use the data provided for 2019 because it featured the performance fees in the invoices and was pro-rated for the claimant's period of employment so he was prepared to adopt those figures.

44. The parties agreed that the sum payable to the claimant for period 2 was **€94,356.13.**

Pension contributions

45. The claimant did not receive any employer pension contributions during his employment with R1 and sought this at 3% on his losses. Since 6 April 2019 the minimum amount of the employer contribution has been 3%. Employers may decide what elements of pay are used to calculate pension contributions.

46. The parties agreed that the sum payable to the claimant for loss of pension contribution was **€4,812.23.**

Period 3 – post employment starting on 18 January 2020
The approach to the calculations
The claimant's approach

47. It was agreed that there was a final cut-off date of 21 April 2021 being the date upon which R1 lost its authorisation to carry out regulated activities.

The claimant did not seek any stigma damages or future loss after that date.

48. There was a dispute as to the method of calculation as to what the claimant would have earned post-employment. The claimant said that he is a competent fund manager which can be shown from his 2019 fees which showed an upward trajectory and that same approach should be used for 2020.

49. The strategies he would have employed were set out in an email dated 25 April 2020 to a company called MilkWood Capital, a financial services company (page 617). Furthermore the claimant said his projections were conservative and his performance would have excelled. There was no account for performance fees in the respondents' figures, as opposed to management fees which were on a smaller percentage. The claimant "*makes his money*" on performance fees at 70%.

50. The claimant submitted it was necessary to bear in mind that he was not present at R1 in 2020/2021 to manage the funds and his protected disclosures all related to the mismanagement of funds for the benefit of the respondents rather than for the benefit of the funds. The claimant said that if he had remained in employment, he would have performed much better. This would have been based on the performance to the date of termination and he submitted that there was no reason to believe that his performance would have dropped off. There was also an absence of performance fees for 2020.

51. The total profit from 2019 was €372,451,25. If 2020 was a carbon copy of 2019, it was submitted we could take this figure as the profit generated for the year and apply the 70% profit share. The claimant said a modest increase should be applied to reflect the fact that good performance increases the actual funds under management so there would be a higher starting point. This increases the management fee and the performance fee. Adding 10% for 2020 is €37,000 takes it from €372,000 to around €400,000. Thus the claimant submitted that 70% should be applied to €400,000 to arrive at a fee of €280,000.

52. There is a further period from January to 21 April 2021, when R1 lost its regulatory status. The claimant said that to the €400,000 figure for 2020 there should be added a 5% increase to €420,000 and divide the percentage at 25% to reflect a quarter of 1 year from January to April. This is €420,000 divided by 4 = €105,000 x 70% = €73,500.

53. The claimant sought a total of €353,500 for the period 18 January 2020 to 21 April 2021 being €280,000 + €73,500.

54. The 70% profit share for 2020 was, on the respondent's figures, €103,447.24 for 140 days from September 2019 to 18 January 2020. Therefore if that figure was €103,447.24 for a third of a year, €353,500 for 1.25 years was said to be entirely reasonable.

The approach to the calculations
The respondents' approach

55. The respondents said that 2020 was not a carbon copy of 2019 because of the pandemic. The tribunal had a choice between the claimant's hypothetical approach to increases, versus the actual performance set out in the invoices for that third period of 18 January 2020 to 21 April 2021 and summarised in the Counter Schedule of Loss. The invoices (bundle pages 76-105) demonstrated the profit of R1 from January 2020 to 31 December 2020 including both global equity and wealth management, came to €132,068.86 on which the profit share of 70% was €92,448.02. The figures were also shown in the Counter Schedule of Loss at pages 450-451 of the bundle, although one of the figures required some correction.

56. The respondents said that in any event, that even if the tribunal were to extend that into 2021, these were the appropriate figures to use. In a situation where at the beginning of 2020 the markets suffered a substantial impact, the figures bore very little resemblance to what might have been expected.

57. The respondents said that the claimant was "*not the only factor in the mix"* and his figures were based only on his assertion. The respondents said that the tribunal should rely on the actual figures for 2020. The respondents rejected the notion that they were not managing the funds properly and the claimant did not take his disclosures any further in terms of reporting the matters elsewhere.

58. The respondents said that if the claimant had the skills to create the continued upward performance for which he contended, this was inconsistent with being unable to find work up to the date of this hearing. The tribunal had nothing to show that the funds would have performed any differently than they did. The actual figures were before the tribunal.

The claimant's reply

59. The claimant said that the difficulty was that there were no "*real*" figures for 2020 because the claimant was not there. The way in which compensation was structured was a reflection of the importance of the person performing the functions, given the high percentage of 70%. They pay a premium for the person in the market place making the decisions on their behalf. The claimant said that the pandemic was not the answer for the respondents and there should have been an equal return for 2020/2021.

Findings on the post-employment period to 21 April 2021

60. The tribunal was not provided with any evidence as to the performance of the financial markets in 2020 or early 2021. The claimant, as an expert in

the field, could have told the tribunal how the markets performed and submitted that he could be expected to have received profit share in accordance with market performance or slightly above, based on his skills. What he did was to ask the tribunal to base his likely performance on the 2019 figures.

61. There is no finding of fact that the respondents were not managing the funds correctly. Findings were made as to the disclosures made by the claimant and what those disclosures tended to show and the causation of detriments and dismissal, but this tribunal has not made findings as to incorrect management of funds.

62. The tribunal had nothing other than the claimant's assertion to show that the funds would have performed any differently than they did. The actual figures were before the tribunal. The claimant said that the respondents could have provided evidence as to how the markets performed; the respondents said they did not need to when the tribunal had their actual figures for the period in question.

63. I find that the claimant's arguments as to the performance of the funds had he remained in employment, were highly speculative, asking the tribunal to regard 2020 and early 2021 as a carbon copy of 2019. I find that it is too speculative to ask the tribunal to regard past performance as the correct barometer of future performance, in an area as uncertain as financial markets.

64. Assessment of future loss is a more rough and ready matter and a more broad brush approach than actual loss. It is not a balance of probabilities test but an assessment of relevant chances. In the circumstances where there are actual figures and nothing but the claimant's assertion to contradict those figures, I take the actual figures and apply a figure of 10% to the profit share to reflect the skills that the claimant would have brought to bear. This approach means taking the respondents' profit figure, calculating the 70% and then adding 10% to that figure.

65. The figure for period 3 was calculated and agreed between the parties at €101,693.02 as set out in a letter to the tribunal dated 7 July 2022. This was subject to the mitigation argument below.

Future loss and mitigation - 18 January 2020 to 21 April 2021

66. The first respondent ceased trading on 21 April 2021 and the parties agreed that this was the cut off point for future loss. The findings as to the loss of profit for the period 18 January 2020 to 21 April 2021 above, was subject to findings on mitigation of loss.

67. I find on his evidence that the claimant began to look for work once his period of garden leave ended on 18 January 2020. He said that he found he had to explain to prospective employers why he was with the first respondent for only a few months and that he had brought proceedings

against them so he was "*often seen as a problem employee*".

68. As he no longer had a job and an income he decided to return to Italy. He returned in February 2020. He made reference to no longer having a permanent work visa post-Brexit, but this did not come into effect until 1 January 2021.

69. The claimant said that due to having to return to Italy, he had to "*give up"* a position as Fund Manager at Per4m Asset Management Ltd in Chelsea with a minimum yearly salary of £100,000 plus performance fees and bonus. He said he "*lost this position*" because the company did not wish to finalise a contract with him due to the pending proceedings with R1 and they wanted the proceedings to be concluded prior to him commencing employment. He said that as he was unable to take the role, he introduced a friend in his place.

70. There was an absence of any evidence to support this. There was no correspondence from Per4m Asset Management. There was no evidence of the job offer or withdrawal of job offer or anything to indicate the reasons for this, despite the claimant saying in evidence that he "*had people who could testify to this and emails*". If there were such emails, he failed to produce them on this highly significant point.

71. The claimant said that he applied for State benefits in Italy, he said "*I tried but they denied it*". He said in oral evidence that he had not disclosed any documentation related to his claim for benefits in Italy, but that he had such documentation.

72. The claimant said he had been applying for positions "*every week*" and hoped to be able to secure employment "*after the Remedy Hearing*". He asserted that he was "*hindered by these proceedings*" and was hoping to find a new position as soon as possible after the conclusion of the remedy hearing.

73. The claimant said he had applied for approximately 100 roles, some being refused at the outset and others proceeded to interview. There were extensive emails in the bundle showing rejections of numerous job applications.

74. I asked how many interviews the claimant had attended. He said in 2020 he attended about 5 and about one every two months in 2021, so about 5 or 6 that year. These were interviews by video call or phone call or meetings. I was not taken to any rejection letters or emails following any interviews.

75. I heard lengthy submissions from the parties about the question of references. Mr Davidson for the claimant took the tribunal to sections 59 and 60 of the Financial Services and Markets Act 2000 as to the requirement for the regulator's approval, being the Financial Conduct Authority (FCA) for a person who was to perform regulated functions. The

tribunal was also taken to the FCA Handbook in relation to references and to Annex 1 in section 22 which provided a template for regulatory references including question G which said: *"Are we aware of any other information that we reasonably consider to be relevant to your assessment of whether the individual is fit and proper?"* The claimant relied on there being a pending disciplinary issue at the date of his dismissal and that this cast a cloud over his job search.

76. I had no evidence that showed that references were ever taken up in relation to the claimant. He had not disclosed evidence showing the reasons for his rejection after any interview and he disclosed no documents from Per4m Asset Management. In the absence of any evidence that he was rejected because of any reference, I find that he was not rejected because of any reference given by any of the respondents. My finding is supported by the fact that the claimant said he had emails from Per4m Asset Management but he had not disclosed them. If they supported his case, I find that he would have included them in the bundle.

77. The claimant accepted that there was no documentary evidence showing the reason why he did not secure any of the jobs for which he was interviewed.

78. There is no doubt and I find that the claimant made a large number of on-line job searches for roles in the UK during the period from January 2020 to April 2021. There is no evidence to show why he was unsuccessful at any of the interviews he told the tribunal he attended. He said there were about 5 in 2020 and that he attended about 5 or 6 in 2021. On a balance of probabilities I find that this would amount to about 2 interviews in the period from January to April 2021. This amounts to about 7 interviews in the period in question for which no documentary evidence was produced.

79. There were submissions on both sides as to the failure on the part of the claimant to disclose Italian tax returns. The claimant says there were no tax returns because he had no income. The respondents suggest that the claimant was in fact working in Italy during the period in question. In the absence of any information as to the requirements for filing tax returns in Italy, I am unable to find that the claimant had any obligation to file a tax return when he asserts that he had no income.

80. The respondents said that Italian media reports showed that the claimant was working as a Head of Portfolio for an Italian brokerage firm. They also said that the claimant's LinkedIn profile did not show that he was looking for work. The claimant said that the Italian media reports were incorrect and I paid little regard to them. As to LinkedIn, the claimant said he wanted to maintain a certain amount of privacy. As he was actively job searching on line, I find that the failure to advertise himself on LinkedIn is not fatal to his arguments that he was seeking to mitigate.

81. There was no evidence of the claimant seeking work in Italy. This is where he was living from February 2020 and where, on his own evidence, he

worked prior to joining the first respondent. The job search documentation was entirely confined to searches for work in the UK.

82. The claimant has worked in financial markets since 1997. He is a chartered accountant and the equivalent of a chartered financial analyst in Italy. He previously worked in financial services in Italy, including working for the first respondent in Milan from May to September 2019. Particularly as he knew he would no longer have a permanent work visa post-Brexit, this made it all the more important to step up his search for work in Italy.

83. Whilst the claimant made job applications in the UK I find that he has failed to show that he took all reasonable steps to mitigate his loss by failing to look for work in his country of residence when he is qualified and experienced in working in financial services in that country and knew that his visa situation in the UK was about to change.

84. The respondent submits that the tribunal should limit the period of loss to February 2020 when the clamant returned to Italy. I do not accept that submission because I find that the claimant needed time to search for a suitable role in Italy. At the point of his return it was an early and serious stage in the pandemic. He also needed time to adjust to the move back from London to Italy.

85. I find that the claimant is qualified and experienced in the financial services sector in Italy and that he failed to take all reasonable steps to mitigate his loss by seeking work in Italy. The claimant submits that as the evidence in terms of the respondent's invoices showed that the markets were declining, this should also apply to the claimant in terms of his search for work. I agree that it may have taken some time for the claimant to secure a job, but at the same time he is clearly experienced and qualified and he showed this by securing a role at Per4m Asset Management in early 2020.

86. As I have said above, future loss is always a more rough and ready approach and is an assessment of relevant chances. Given the matters set out above, I find that the claimant ought reasonably to have been able to mitigate his loss after a period of six months from his return to Italy. As I do not have the precise date of his return, I gave him the benefit of the doubt that it was at the end of February so that the six month period runs to the end of August 2020 so that his period of loss should extend to 1 September 2020.

The award for the period 18 January 2020 to 21 April 2021

87. After a break for the parties to work on the calculations the figure for the period from 18 January 2020 to 21 April 2021 after having dealt with the issue of mitigation of loss, the figure was agreed as **€95,074.47.** I was grateful to the parties for their cooperation in calculating this figure.

Injury to feelings and aggravated damages

88. The claimant's evidence was that he endured "*enormous sacrifice*" due to the move to London which was a big life change involving the search for a house and having to return to Italy weekends to see his family. He said this was very hard for him.

89. His evidence was that he had been "*humiliated, offended, threatened and assaulted*". He was asked in cross-examination what he meant by being "*assaulted".* He clarified that he meant verbally but not physically assaulted. He suggested that his life was in danger (statement paragraph 12). This was not something that he ever mentioned at the liability hearing. The respondents submitted that nothing the claimant said at liability stage merited the description he gave in his remedy witness statement.

90. He said that his "*world fell apart*" having lost his job and the house he had rented and this resulted in him losing a three month "*down payment*" although he produced no evidence of this. He described the feeling of his work and professional life being "*destroyed*".

91. The claimant also described "*many doors closed in his face due to the horrible situation created by the actions of [the first respondent]."* He said that these actions caused him to suffer from depression. He also said he has difficulty sleeping and that he took medication. There was no medical evidence to support this so I was unable to make a finding as to any medical effects upon the claimant.

92. The claimant said he had lived with "*enormous mental and financial difficulties.*" He said his savings had disappeared in order to survive and that his legal costs led him to sell his car which has caused him additional stress. There was no evidence to support this. The claimant said that his bank statements for the last two years would show his very difficult financial position, but these statements were not produced.

93. The claimant said that leaving Italy was very damaging to him and if he had stayed in Italy he would have been entitled to assistance from the Italian State with guaranteed monthly salary for 12 months and a minimum wage thereafter. There was no documentary evidence to show his position as to benefits in Italy.

94. The claimant also relied upon the respondents having offered no apology to him and having treated these Tribunal proceedings "*with contempt*" such that their late ET3 was rejected and application for an extension of time was refused. The claimant pointed out that R1 and R5 initially "*[denied] that there has been an injury to the claimant's feelings*".

95. It is right that the respondents initially denied that there has been any injury to the claimant's feelings and they denied that the claimant was entitled to any award (first set of written submissions section 3). In updated submissions they said he had "*significantly exaggerated*" his injury to feelings. The respondents contend for the lower Vento band.

Submissions

96. The claimant submitted that this was a question of fact for the tribunal. The claimant asked the tribunal to take into account the fact that he was in another country, he had changed his life substantially and that he was a "*fish out of water*". There was also the abruptness of the supposed redundancy and trumped up disciplinary charges against someone in a regulated position. The claimant said that he was being punished for doing the right thing and in addition by taking up the employment with the first respondent he had given up his employment protections in Italy.

97. The claimants submission was that this was comfortably a middle band case, and was inherently serious in a regulated context. It was submitted that this was a malicious overreaction and an attempt to sully the claimant's good name when he had done nothing wrong. As such it was submitted that it was a serious and high handed approach.

98. The claimant submitted that following ***Alexander v Home Office 1988 IRLR 190 (CA)*** and ***Shaw*** (below) that this was an appropriate case for aggravated damages. In this regulated sector, where reputation is central to the ability to secure future employment and where there was an unjustified disciplinary investigation launched by the people whom he was accusing of wrongdoing.

99. The claimant's submission was that this justified a middle band award and put this at £25,000 + 10,000 pounds for aggravated damages.

100. The respondents submitted that the claimant had significantly exaggerated his injury to feelings and that his allegations were fanciful with no evidence to back them up.

101. The respondents said there was no evidence to support the alleged level of psychological impact. Two case law examples were cited, at ET level:

> ***Conduit v Rosslyn Hill Unitarian Chapel (East London) (Case No 2208119/2016, 2200305/2018, 3200680/2019)*** (14 February 2020 – unreported) where 7 weeks of discrimination, followed by pressure from the employer to withdraw her claim, exacerbating the claimant's psychological symptoms, resulted in an award of £12,500.
> ***Witt v New Quay Honey Farm Ltd and others (Cardiff) (Case No 1602264/2019*)** (11 February 2021 – unreported) where the claimant was insulted as an '*old woman'* in reply to accusations of discrimination before being dismissed. In the circumstances of this being a single event the lower band was preferred, although the insult would appear to have placed the case in the middle range and the result was an award of £6,000.

102. In the light of those examples respondent submitted that the award should be below £6,000.

103. The respondents submitted that there should be no award for aggravated damages. The tribunal had found against the claimant on the issue of the failure to give an employment reference or a bad employment reference. The claimant's position was inextricably linked with working in a regulatory environment and there was no evidence that he was subjected to any such detriment.

The award for injury to feelings

104. It was hard to see how such a peremptory and sudden dismissal after only about 2.5 months in the job and having gone through the upheaval of moving countries, would not result in injured feelings. The courts have held that whistle blowing awards is analogous to discrimination and there is case law support such as ***Virgo Fidelis*** and ***Roberts v Wilsons Solicitors*** (below) that awards can be made for injury to feelings in a whistleblowing claim.

105. I agreed with the respondents submission that there was a lack of evidence to support some of the claimant's contentions. There was no medical evidence to support the alleged psychological impact upon him, or the consequential financial losses other than loss of earnings from the employment. There was nothing to support his contention that he was denied state benefits in Italy or any documentation to show the sale of his car.

106. This was a one off act rather than a campaign over a period of time. It was nevertheless an act with serious implications as the claimant lost his job for being a whistleblower in the public interest. It was a peremptory dismissal following the upheaval of a move of country resulting in the upheaval of a move back to his country of origin. I find that the claimant's feelings were injured but not to the extent that he asserted, because of the lack of evidence which he could have adduced had he chosen to. I find that he was not threatened or assaulted because there was no evidence of this.

107. I find that this case justifies an award in at the middle to lower end of the middle band. The two case law examples cited by the respondents are not on point with the present case. The claimant was a whistleblower in the public interest and instantly lost his job for doing so. He had the upheaval of a move of country as a result. I make an award of £15,000 for injury to feelings.

108. I decline to make an additional award for aggravated damages because the sum of £15,000 encompasses the circumstances of the dismissal and I have made no finding as to any reputational damage to the claimant. I consider it would amount to double recovery to award aggravated damages and the award of injury to feelings is proportionate to the totality of the upset caused to the claimant.

Uplift for unreasonable failure to follow the ACAS Code

109. The claimant acknowledged that this is a discretionary award and requires a finding of an unreasonable failure on the part of the respondents.

110. The ACAS Code of Practice defines "*grievances"* as *"concerns, problems or complaints that employees raise with their employers"* (Code paragraph 1). This can apply to protected disclosures which the Tribunal found to have been made: see ***Ikejiaku v British Institute of Technology Ltd EAT/0243/19*** at paragraph 48 per Soole J . The claimant said that no regard was had to the claimant's complaint as a grievance and it was not treated as a grievance.

111. The claimant said that the respondents' behaviour was self-evidently contrary to the spirit and the letter of the ACAS Code of Practice on disciplinary and grievance procedures, and unreasonably so. He submitted that there could be no more egregious example of non-compliance with the ACAS Code than penalising the person raising the complaint.

112. The claimant says it was just and equitable to make such an award, taking account of the purpose of the statutory provision. ACAS Codes should be followed and Codes of Conduct should not be unreasonably departed from. It was necessary to look at overlap with the award for injury to feelings but it was submitted that there would be no double counting because it was a flagrant disregard for the Code. The claimant contended for a 25% uplift or slightly lower.

113. The respondents made two points. There was evidence of an invitation to a disciplinary meeting and efforts to rearrange it due to the short notice and a finding of fact at liability stage that he disciplinary hearing took place by telephone on 16 January 2020. It was conducted by R3 with R2 present. This was the first time that the claimant learned the details of the first disciplinary charge.

114. It was confirmed during submissions that the claimant did not rely on the disciplinary section of the Code but the failure to deal with this complaint as a grievance. This was the "*gateway*" through which he sought the uplift namely that he raised a grievance and this was not accepted by the respondents.

115. The respondents submitted that in the event that the Tribunal decided to apply an uplift, in light of there being no upper limit on compensation, the tribunal should note the practice for example, in ***Michalak v Mid-Yorkshire Hospitals NHS Trust ET/1810815/08,*** with regard to the EAT's decision in ***Wardle v Credit Agricole Corporate and Investment Bank 2011 IRLR 604*** to limit an adjustment where large sums are concerned. I was not provided with a copy of the ET's decision in ***Michalak*** but was able to consider ***Wardle***, the Court of Appeal authority. ***Wardle*** concerned the question of an uplift for failure to comply with the since repealed

statutory dismissal and disciplinary procedures which focused on what was just and equitable in terms of an uplift. This is the same consideration under section 207A. ***Wardle*** said that the tribunal should have regard to the size of the award when considering the appropriate uplift.

116. Following ***Ikejiaku*** I find that the claimant's whistleblowing disclosures amounted to a grievance under the ACAS Code, as a concern, problem or complaint the claimant raised with his employer. There are similarities with the present case in that Mr Ikejiaku, who was working as a senior lecturer in business and law complained that he had been told to give a pass mark to students who had been copying from others during tests. He was dismissed the following day and the tribunal found that he was dismissed for making a protected disclosure.

117. I agree with the claimant's submission that no regard was given to his complaint about the instruction to invest client funds in a manner he considered unlawful. The reaction to his complaint was to dismiss him. I find that this did amount to an unreasonable failure to follow the ACAS Code and that an uplift in compensation is just and equitable. In ***Ikejiaku*** the case was remitted for consideration of the amount of the uplift because the ET had considered that it did not apply in the circumstances. At paragraph 16 of ***Ikejiaku*** the EAT quoted the ET judgment which showed that the ET would have awarded an uplift of 25% had they considered they were able to do so, because of "*the Respondent's total failure to follow any procedure and flagrant disregard of basic fairness".*

118. I find that the disregard to the principles of fairness was similar in the present case, which on a first consideration might justify an award at or just below 25%. I have gone on to consider the respondents' submission, in the light of the ***Wardle*** case, that regard must be had to the size of the award in making any uplift. This is a substantial award as set out in the figures below under the heading Conclusions and for this reason the amount of the uplift is limited to 10%.

The claim for an uplift of 2.5% for late receipt

119. The claimant initially made a claim for an uplift of 2.5% for late receipt of compensation. This was withdrawn on day 2 of the remedy hearing on 8 July 2022.

Joint and several award

120. R1 and R5 submitted that while acknowledging the findings at liability hearing, concerning all respondents, the Tribunal should be mindful that while R2, R3 and R4 continued their non-engagement in the proceedings, R1 and R5 participated as fully as they could. It was submitted that this was a notable significant difference in approach, which was said to be "*most unusual*" in circumstances where a joint and severable award would be expected. It was acknowledged that there was a lack of authority on the point but it was submitted that this should not to prevent the Tribunal

from dealing with remedy in a just and equitable manner between all the respondents to reflect the different levels of engagement and respect for the proceedings.

121. R1 and R5 submitted that the tribunal should find that the difference in approach merited a far greater percentage of the award against Rs 2, 3 and 4 because this amounted to a special feature to apportion liability. R1 and R5 submitted that the tribunal was not in receipt of evidence at liability stage to determine the lesser or greater involvement. R1 and R5 accepted that this was a discretionary matter for the tribunal based on what was just and equitable.

122. The claimant said that the question of participation in the proceedings was irrelevant as the respondents are joint tortfeasors and there was no legal basis for apportionment.

123. I agreed with the claimant's submission. Both parties cited ***Sivanandan*** which says at paragraph 58 *"Apportionment could only take place where there was a rational basis for distinguishing between the damage caused by one tortfeasor from another, so that the tortfeasors were liable to the claimant for part only of the damage, which was attributable to each of them".* There is no finding at liability stage distinguishing between the damage caused by one respondent from another. The liability is joint and several and I saw no basis for apportionment and make no such order.

Taxation

124. The claimant's written submission was that he currently has no income, and does not pay income tax. He is not a UK resident or UK taxpayer. It was said in submissions, but not in evidence, that he would pay tax on any award as an Italian taxpayer at a rate of approximately 35% and should not be double-taxed, by suffering a discount in the award and then having to pay tax on that discounted sum.

125. In written submissions it was said that this should be approached in a broad brush, common-sense and reasoned way. It was acknowledged that there was an absence of any evidence on Italian tax law so there was a limit to how precise the Tribunal could be. It was submitted that it would be just and equitable for the claimant to receive the full sum and pay tax on it in Italy.

126. The respondents' submission was that as the claimant is not a UK tax payer, there should be no grossing up of the award (written submission paragraph 17).

127. No oral submissions were made on this issue by either party. I make no adjustment for the claimant's tax position in Italy in the absence of any evidence on the point. The three largest figures awarded were agreed calculations in any event.

The relevant law

128. A compensatory award for unfair dismissal is dealt with in section 123 of the Employment Rights Act 1996 (ERA). It shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss suffered by the claimant in consequence of the dismissal, in so far as that loss is attributable to action taken by the employer. The loss referred is to include any expenses reasonably incurred by the claimant in consequence of dismissal and the loss of any benefit which he might reasonably be expected to have had but for the dismissal.

129. It is to compensate but not to provide a bonus. It covers two main aspects, immediate loss of earnings to the date of the remedy hearing and future loss of earnings. Losses are calculated net.

130. The EAT said in ***Stroud Rugby Football Club v Monkman EAT/0143/13*** that the assessment of future loss is *"a rough and ready matter. It always has been and it always will be."* (judgment paragraph 25). It is not a balance of probabilities test but an assessment of relevant chances - see ***Chief Constable of Northumbria Police v Erichson EAT/0027/15*** at paragraph 18.

131. Section 207A (3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) provides that if, in the case of proceedings to which the section applies, it appears to the employment tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant ACAS 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 it 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%. A claim for unfair dismissal is one to which section 207A applies.

132. A complaint of whistleblowing detriment may be presented to the tribunal under section 48(1A) Employment Rights Act 1996. Under section 49(1), where the tribunal finds the complaint well founded it may make a declaration to that effect and make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

133. Under section 49(2) the amount of compensation to be awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement to which the complaint relates and any loss which is attributable to the act, or failure to act, which infringed the complainant's rights. Under section 49(3) the loss shall be taken to include any expenses reasonably incurred in consequence of the act, or failure to act and loss of any benefit which he might reasonably have been expected to have but for the act, or failure to act.

134. The duty to mitigate loss applies – section 49(4) ERA. The burden of proving a failure to mitigate lies with the respondents. They must show

any failure was unreasonable. The tribunal must consider what steps the claimant should have taken to mitigate his loss, whether it was unreasonable for him to have failed to take any such steps and if so, the date from which alternative income would have been received.

135. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunals must remind themselves of the value in everyday life of the award by reference purchasing power or earnings.

136. There are three bands for award for injury to feelings following ***Vento Chief Constable of West Yorkshire Police 2003 IRLR 102 CA*** and uprated in ***Da'Bell v NSPCC 2010 IRLR 19 EAT*.**

137. Employment Tribunal Presidential Guidance is issued on the ***Vento*** bands and updated from time to time. In respect of claims presented on or after 6 April 2020, the Vento bands are as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000. These bands take account of the 10% ***Simmons v Castle*** uplift. The ET1 in this case was presented on 17 April 2020.

138. Aggravated damages are compensatory and not punitive. They can be awarded where the act is done in an exceptionally upsetting way – ***Commissioner of the Police of the Metropolis v Shaw EAT 0125/11*** when the conduct is "*high-handed, malicious, insulting or oppressive*". It can be awarded where the discriminatory conduct is based on prejudice or animosity or which is spiteful or vindictive. It can be awarded if the conduct at the trial is unnecessarily oppressive, failing to apologise or failing to treat the complaint with the requisite seriousness.

139. At the same time tribunals must be aware of the risk of double recovery and consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the claimant. Aggravated damages should usually be formulated as a subheading of injury to feelings. On the current case law the sum of £20,000 is considered to be the top of the bracket for aggravated damages.

140. In ***Shaw*** at paragraph 29 having reviewed the current authorities Underhill P as he then was said "*The large majority of awards were in the range £5,000–£7,500".* Shaw was decided in 2011. In ***Shaw*** itself, the award was reduced from £20,000 to £7,500.

141. The claimant agreed that the tribunal does not have the power to award interest under the Employment Rights Act 1996 as it would in a discrimination claim under *Employment Tribunals (Interest on Awards in*

Discrimination Cases) Regulations 1996.

142. Where there is more than one discriminator the usual award is that each such respondent is jointly and severally liable - see ***London Borough of Hackney v Sivanandan CA*, *2013 IRLR 408*.**

143. While the above cases relate to discrimination under the Equality Act 2010, the EAT has held that whistleblowing detriment remedy should be approached on the same basis: see ***Virgo Fidelis Senior School v Boyle 2004 IRLR 268*** in which the EAT said that subjecting a whistleblower to a detriment is a form of discrimination and ***Roberts v Wilsons Solicitors LLP 2018 ICR 1092 (CA)***. The ***Virgo*** case confirms that an award for aggravated damages may also be made in a public interest disclosure claim and is not subsumed by the ***Vento*** guidelines.

Conclusions

144. The award to the claimant is as follows. The sums found under periods 1, 2 and 3 were €66,051.67; €94,356.13 and €95,074.47 respectively. The figure for period 3 reflects the findings as to mitigation of loss. The sum for pension loss was agreed at €4,812.23. The total of these sums is €260,294.50. To this is applied the agreed conversion rate of £1.20 to produce a sterling sum of **£216,912.08.**

145. Added to this is the award for injury to feelings in the sum of £15,000 making a total of **£231,912.08**.

146. Added to this is the 10% uplift for failure to follow the ACAS Code, which produces a final total of **£255,103.28.** The five respondents are jointly and severally liable for this award.

147. There is no award for interest and no adjustment made for tax. The figures for periods 1, 2 and 3 were agreed calculations. There is no separate award for aggravated damages.

148. I was grateful to both counsel for their helpful submissions and to the solicitors for their input during the hearing on some of the calculations.

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Employment Judge Elliott
Date: 11 July 2022

Judgment sent to the parties and entered in the Register on: 11/07/2022

For the Tribunal