EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Peter Richards	**v**	M-Solv Limited

Heard at: Cambridge (by CVP) **On:** 23 May 2022

Before: Employment Judge Tynan

Appearances
For the Claimants: Ms G Churchhouse, Counsel
For the Respondent: Mr M Humphreys, Counsel

REMEDY JUDGMENT

1. In calculating the amount of the basic award payable to the Claimant, the Tribunal makes the following reductions to the basic award:

   (a) pursuant to s.122(2) of the Employment Rights Act 1996, an initial reduction of 60% to reflect the conduct of the Claimant before notice of termination of employment was issued to him;

   (b) pursuant to s.122(4) of the Employment Rights Act 1996, a further reduction to Nil to reflect that the Respondent paid the sum of £6,456 to the Claimant on the ground that the dismissal was by reason of redundancy.

2. The amount of the compensatory award shall be calculated on the following basis:

   (a) The Claimant is entitled to claim the sum of £2,080.60 in respect of his costs of establishing himself in business and a further sum of £34.20 for travel expenses in connection with searching for employment;

   (b) Up to and including 30 September 2021, the Claimant's net loss of income and loss of employer pension contributions shall be based upon a gross annual salary of £67,500 for the role of Chief Technologist together with an employer pension contribution in that role of 6%. With effect from 1 October 2021 the Claimant's net loss of income shall be based upon a gross annual salary of £75,000 for the role;

(c) The Tribunal awards the Claimant the sum of £600 by way of compensation for loss of his statutory employment rights (including his statutory notice rights);

(d) The Claimant's loss of income and employer pension contributions shall be reduced by £10,800 and £2,430.97 respectively to reflect payments made by the Respondent in lieu of notice.

(e) The Claimant unreasonably failed to mitigate his losses and had he done so he would have secured alternative employment by 5 July 2021 on a gross annual salary of £62,500, together with a 6% employer contribution to a pension scheme;

(f) Whilst it would not be just and equitable to reduce the amount of the compensatory award pursuant to s.123(1) of the Employment Rights Act 1996 to reflect the Claimant's conduct prior to being issued with notice of termination of employment, it would be just and equitable to limit the Claimant's losses to the period up to and including 31 December 2021;

(g) in accordance with the previous Judgment of the Tribunal on the issue of liability, the Claimant's losses are to be reduced by 60% in the period 2 July to 2 August 2020, and by 66% in the period 3 August 2020 to 31 December 2021.

(h) No reduction is to be made to the compensatory award pursuant to s.123(7) of the Employment Rights Act 1996 since the amount paid by the Respondent to the Claimant by reason of his dismissal for redundancy, namely £6,456, did not exceed the amount of the basic award which would be payable but for s.122(4).

REASONS

1. At the conclusion of a six day Hearing on 29 March 2022, I gave Judgment (the "Liability Judgment") upholding the Claimant's complaint that he had been unfairly dismissed. I further determined that, had the Claimant not been unfairly dismissed, there was a 40% chance that he would have been appointed to the role of Chief Technologist with the Respondent, albeit with a further 15% chance that he would have been dismissed from that position by 2 August 2020.

2. The matter came back before me on 23 May 2022 for a Remedy Hearing at which I had available to me the original Hearing Bundle and Witness Statements. The Claimant deals with Remedy at paragraphs 80 to 94 of his Witness Statement. The parties had agreed an additional Remedy Hearing Bundle comprising of 74 pages including, on behalf of the Respondent, a second Witness Statement for Janet Donovan together with exhibits.

3. Ms Churchhouse and Mr Humphreys had respectively filed a skeleton argument and submissions which I have reconsidered in coming to this Remedy Judgment.

THE BASIC AWARD

4. Mr Humphreys did not state in terms that the amount of the basic award is agreed to be £6,456, as set out in the Claimant's Schedules of Loss, though that is the sum that was paid to the Claimant by way of a statutory redundancy payment on the termination of his employment (page 464 of the main Hearing Bundle) using the same method of calculation. I am satisfied that the starting point for the basic award has been correctly calculated in the Claimant's Schedules of Loss.

5. There is an issue between the parties as to whether and, if so, what reduction should be made to the basic award. It seems to me that the issue may be an academic one since, by virtue of the application of s.122(4) of the Employment Rights Act 1996 ("ERA"), the amount of the basic award will be reduced to nil in any event to reflect that the Claimant received a redundancy payment from the Respondent (the Tribunal having been satisfied that his dismissal was by reason of redundancy).

6. Miss Churchhouse submits that there should be no reduction to the basic award for the reasons set out in paragraphs 22 – 24 of her skeleton argument, namely and in summary that the Claimant's conduct was not culpable and blameworthy, in the alternative that it should be reduced by no more than 10%. Mr Humphreys invites the Tribunal to reduce the basic award to zero, relying in particular upon paragraph 20 of his submissions and having regard to Renewi UK Services Limited v Pamment EA-2021-000584-DA that the basic award may be reduced even though a Claimant was not dismissed for gross misconduct.

7. Section 122(2) of the Employment Rights Act 1996 ("ERA") provides,

> "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

Whilst the focus of the Section is on the conduct of the Claimant, in my judgement what is just and equitable requires that regard should be had to all the relevant circumstances of the case, including as appropriate any conduct of the employer. Clearly, in a twelve year working relationship such as this one, it is not possible or desirable that the Tribunal should embark upon a detailed enquiry as to the parties' respective conduct over the course of their entire relationship. The focus inevitably is on the parties' conduct in the period prior to dismissal. Nevertheless, I made specific findings regarding Dr Rumsby's attitude and conduct towards the Claimant, particularly after the Claimant's wife became pregnant and

following the birth of their child, even if I concluded that the Claimant's periods of family leave were not the reason, or principal reason, he had been dismissed or selected for redundancy. I consider that those findings should weigh in the balance in terms of the overall justice and equity of the matter.

8. I agree with Mr Humphreys that Ms Churchhouse's submission that the Claimant's conduct was not culpable or blameworthy runs entirely contrary to the Liability Judgment. The Claimant's conduct was plainly culpable and blameworthy, as set out at paragraphs 81 – 94 and 123 – 126 of the Reasons. For the avoidance of doubt, insofar as I was critical of the Claimant's efforts to minimise the seriousness of his actions and to belatedly suggest that an interview transcript may be inaccurate, that may have touched upon his credibility but it is not conduct that falls to be considered under s.122(2) ERA. In a case concerning covert recordings, the EAT in Phoenix House Limited 2 v Stockman UKEAT/0058/18/00 recognised the range of circumstances in which any such recording might take place. In this case, I was alive to the range of circumstances in which the Claimant might have gone to the Respondent's premises on 26/27 April 2020 and subsequently accessed colleagues' HR files on 5 May 2020; however, my findings and conclusions were that that the Claimant had accessed and searched Dr Rumsby's private drawer, that colleagues' personal data was processed unlawfully, and that the Claimant's conduct on both occasions was wholly unacceptable and struck at the heart of the relationship of trust. I do not lose sight of the fact that Dr Rumsby showed little or no concern for the Claimant or his family when his daughter was ill in January 2020, behaviour that Ms Churchhouse not unfairly characterised as callous on his part. And of course, the Claimant was treated unfairly by the Respondent in the matter of his redundancy, including by being excluded from consideration for the Chief Technologist role. Having regard to all the circumstances, including that the Claimant engaged in particularly culpable and blameworthy conduct in searching Dr Rumsby's private drawers and accessing his correspondence (even if it was work correspondence), as well as in contravening his colleagues' data privacy rights, I consider that it would be just and equitable to reduce the basic award by 60% pursuant to s.122(2). As I say, it further reduces to nil in any event by virtue of the application of s.122(4).

THE COMPENSATORY AWARD

9. The correct order in which I am required to consider any issues regarding the amount of the compensatory award is to first determine the amount of the Claimant's losses and any compensation for loss of statutory rights, before going on to determine whether, as the Respondent contends, the Claimant failed to mitigate his losses, and only then to consider, in order, any just and equitable reduction pursuant to s.123(1) ERA, any reduction for contributory fault, and any increase or reduction to reflect breach of any applicable ACAS Code, deductions for any excess of the redundancy payment and lastly, application of the statutory cap (see Digital Equipment Co Limited v Clements 2 [1997] ICR237.

a. ***The Claimant's Losses***

10. The first issue that arises is whether the Claimant should be entitled to claim £3,131.54 against the Respondent in respect of his costs of setting himself up in business. The Claimant did not produce any accounts, or draft accounts, in respect of his business. Since December 2020 he has traded through a limited company. One would expect the expenses of establishing the company, including in this case £2,101.88 claimed to have been spent on tools and other infrastructure costs, to be a business expense deductible against tax. It is not entirely clear why they are said to be a personal expense of the Claimant and therefore a matter in respect of which he is to be compensated in these proceedings. He did not shed any further light on the matter in his evidence. Indeed, he did not know whether his declared income from the business of £14,946.09 was in the form of a director's loan, by way of dividend payments or salary. He also could not say whether that sum was gross or net of tax.

11. Whilst the Respondent challenged the amount being claimed by the Claimant, it seems not to raise any objection in principal to the Claimant seeking reimbursement of the costs of establishing himself in business. Doing the best I can on the limited information before me, I proceed on the basis that the costs are therefore claimable as against the Respondent. The Respondent makes the point that there will still be some value in any tools and infrastructure acquired by the Claimant. He did not disagree with Mr Humphreys when it was suggested to him during cross examination that in terms of their value this might be half the cost of their acquisition. In this regard, by the time of the Remedy Hearing the Claimant had been in business for approximately 20 months, albeit the available receipts evidence that the tools and infrastructure were acquired over the company's first year of trading. For accounting purposes, tools and equipment are often written down at between 15 and 33.3% of their value per annum. On that basis, the Respondent has potentially been generous to the Claimant in suggesting that the tools and equipment should be written down by 50% after less than two years and, in some cases, after less than a year. I shall allow £1,050.94 in respect of company tools and infrastructure costs, but otherwise I uphold the further amounts claimed by the Claimant as the costs of establishing himself in business. With the benefit of hindsight, the Claimant might not have spent £720 on branding or £118.30 on registering a company domain, but neither he nor his wife, acting on his behalf, acted unreasonably in incurring either expense. In summary, therefore, the Claimant is to be awarded the sum of £2,080.60 in respect of the costs of establishing himself in business. It does not appear to be disputed that the Claimant additionally incurred travel costs of £34.20 in attending for a job interview.

12. The second issue that arises is whether the Claimant's losses should be calculated on the basis that the communicated and documented salary for the role of Chief Technologist (which I concluded he had a 40% chance of being appointed to) was £75,000 or on the basis that Mr Milne who was

appointed to the role was paid an annual salary of £60,000 for the role until 31 September 2021, the Senior Leadership, I find, having agreed to an ongoing 20% reduction to their salaries through to that date. This was not information that was before the Tribunal at the Liability Hearing and I did not make any findings or reach any judgement on the issue. My Judgment was solely that had the Claimant been afforded a reasonable opportunity to be considered for the Chief Technologist role, there was a 40% chance that he would have been appointed to it. I was not invited to make findings, and Counsel did not make submissions, as to whether the Claimant would have accepted an offer of alternative employment if it had involved a 20% reduction in the salary for the role for a period in excess of a year.

13. In her submissions on this issue, Ms Churchhouse relied upon the Contract of Employment at pages JD2/2 – JD2/13 of the Remedy Hearing Bundle as determinative of the issue. For his part, Mr Humphreys relied upon the fact that Mr Milne, who was appointed to the Chief Technologist role, agreed to a reduction in his salary through to 30 September 2021. They might each be said to have effectively approached the issue on an 'all or nothing' basis, whereas the Tribunal is concerned with matters of chance. For the reasons below, the evidence does not support a finding of a 100% chance of either outcome contended for by them.

14. I agree with Ms Churchhouse that had the Claimant been the successful candidate for the role of Chief Technologist, he too would have received a letter in the same form found at page JD2/1 of the Remedy Hearing Bundle and that the draft Contract of Employment issued to him would have been in identical terms, save that it would, of course, have been amended to reflect his date of commencement of continuous service. However, I believe it would be an error to fail to look beyond the Contract of Employment or to consider the Claimant's and Ms Donovan's respective evidence in arriving at an informed assessment of the Claimant's losses. The Contract of Employment is not the start and end of the matter.

15. In March 2020 the Respondent's Senior Leadership, including the Claimant, agreed to a 20% reduction to their salaries, effective 1 April 2020, the arrangement to be reviewed after three months. I shall deal firstly with the Respondent's evidence on this issue. Ms Donovan manages the Respondent's payroll. I accept her evidence that Mr Milne was paid a salary of £60,000 for the role until 30 September 2021. Correspondence at page 25 of the Remedy Hearing Bundle evidences that he was invited to agree the reduction to his salary continuing on a rolling month by month basis in view of the Respondent's ongoing financial difficulties and uncertain position. I accept Ms Donovan's further evidence that Mr Milne agreed to this and that page 26 of the Bundle evidences Mr Milne did not return to his normal contractual salary until 1 October 2021.

16. The Claimant and Mr Milne's circumstances differed, in so far as Mr Milne was agreeing to an ongoing reduction in his salary from £75,000 to £60,000, whereas the Claimant would have been required to accept a

further reduction in his salary, namely from £90,000 in March 2020 to £72,000 with effect from April 2020, and thereafter to £60,000 with effect from July/August 2020. Ms Donovan had management responsibility for HR and I asked her what her and the company's response would or might have been had the Claimant said he could not agree to a further reduction to his earnings, over and above the salary reduction he had agreed to in March 2020, particularly given his family commitments and that he had said in evidence that he was involved in a house building project which was dependent for ongoing funding upon him having a certain level of earnings. In response, she said they would,

"absolutely have listened to him."

Whilst she referred to the Respondent's difficult cash position and significant overdraft, she did not rule out altogether that the company might have found some way to maintain the Claimant's level of pay as Chief Technologist, though she speculated whether this might have meant losing headcount elsewhere in the business. She certainly believed it would have had to have been discussed and agreed with the Respondent's parent company. As I set out in the Liability Judgment, the parent was bringing considerable pressure to bear and its agreement in the matter cannot be assumed even had the Respondent been supportive of any request by the Claimant to maintain his pay at a given level.

17. The Claimant's evidence on this issue fluctuated somewhat when asked about it by Mr Humphreys, by the Tribunal and then by Ms Churchhouse on re-examination. On re-examination, he said he did not think he would have consented to any variation. However, in her closing submissions, Ms Churchhouse stressed that the Claimant had not said in his evidence that he would have *"walked"* had the Respondent been unwilling to employ him at £75,000 per annum. During cross examination, the Claimant initially said he did not think he would or could have agreed to any further reduction in his earnings, beyond that agreed to in March 2020, given his family's financial pressures. When pressed further by Mr Humphreys, he said he would have considered the reduction albeit it would have been very difficult for him to consider. However, he recognised the incongruity of a situation in which the R & D and Tools Business Unit Directors, who would then have been more senior to him albeit employed on the same base salary, were paid less than he was paid as Chief Technologist. However, he said it was a matter for individual discussion and that each person's response might differ. When Mr Humphreys pointed out that on his case he would have secured an immediate £3,000 salary increase (from his reduced salary of £72,000 as Director of Engineering to £75,000 as Chief Technologist) at a time when the rest of the Senior Leadership had agreed to an ongoing 20% reduction in pay that would be reviewed in July 2020 at the earliest, his response was that this was the Respondent's *"look out"*. In my judgment that does not reflect the likely reality of the situation rather the Claimant's view of the matter through the lens of this litigation.

18. Shittu v South London and Maudsley NHS Foundation Trust EA-2020-000575-RN (in which the EAT referred to its earlier decision in Zebrowski, referred to by Ms Churchhouse in her submissions) confirms that the assessment of loss of earnings compensation, when determining remedy for unfair dismissal, is on the basis of the loss of a chance, rather than a fact finding exercise on the balance of probabilities. In its Judgment, the EAT cited Zebrowski, namely that the statutory language is open textured and that it would be wrong to introduce a complex structure of subsidiary rules that would not assist in the difficult task of accurately and fairly calculating losses. Instead, the Tribunal must consider all the relevant facts and circumstances. As Morrison J observed in MoD v Cannock [1994] ICR918, the correct approach is not to speculate as to what would have happened as if it involved questions of facts to be decided on the balance of probabilities, but rather to assess matters of chance in a broad and sensible manner.

19. This is not a case where the evidence is compelling in either direction, such that I am able to conclude that there was a 100% chance that the Claimant would have accepted continued employment on the basis of a further 20% reduction in his salary or, equally, that any offer of the Chief Technologist role would have been withdrawn by the Respondent had he either stood his ground and insisted upon the terms in the draft Contract of Employment or even just pressed his individual circumstances on the Respondent and made a case to be exempted from the salary reductions that others were being asked to agree to. What is clear to me is that the Respondent would not have countenanced an increase in the Claimant's pay in May 2020 from £72,000 to £75,000 when senior colleagues were experiencing a pay reduction and being asked to agree to this being extended, in the case of the newly appointed R&D and Tools Business Unit Directors taking their salaries down to £60,000. I consider that the Respondent would also have held firm as to the level of the employer pension contribution, namely 6%, even assuming the Claimant had sought to negotiate a higher level of contribution. In my judgement on liability I concluded that the Claimant would not have accepted the role of Operations Manager had it been offered to him, given the reduced status and salary of £60,000 (paragraph 122 of the Reasons). By comparison, any reduction in salary for the Chief Technologist role was intended to be a temporary arrangement, even if in fact it remained in place until 30 September 2021. In my judgement, the fact it was intended as a short term measure would have supported ongoing dialogue between the parties even if they would, inevitably, have pressed home their respective concerns and interests in any such discussions. Having regard to the Respondent's burden in the matter, it has satisfied me that there was a 50% chance that the Claimant would have accepted a 20% reduction in his salary as Chief Technologist ongoing through to 30 September 2021. In my judgement this would have been on the basis of an employer pension contribution of 6% of the reduced base salary in the role, being the pension contribution level specified in the Contract of Employment for the role and which I conclude the Claimant would have agreed to, rather

than the 10.5% contribution the Claimant had enjoyed as Director of Engineering.

20. In summary, the Claimant's loss of earnings, for the purposes of calculating the compensatory award for unfair dismissal, is to be calculated on the basis of a gross annual salary of £67,500 up to and including 30 September 2021, to reflect my assessment as to the chance of him agreeing a reduction in salary. Thereafter, on the basis that the pay reductions came to an end on 30 September 2021, his losses thereafter are to be calculated by reference to the normal salary for the role, namely £75,000 per annum. In the absence of information as to the corresponding net salary amounts, it is not possible for me to finalise the amount of the compensatory award. If the matter cannot be agreed between the parties, I shall determine the matter on the strength of their further written submissions.

b. Loss of Statutory Rights

21. The Claimant seeks six weeks net pay in respect of the loss of his statutory rights. He relies in this regard upon the decision of the Employment Appeal Tribunal in Daley v AE Dorsett (Almar Dolls) Limited [1982] ICR1. The Daley decision was qualified in SH Muffett Limited v Head [1987] ICR1, in which the EAT suggested that only in exceptional cases should a Tribunal award pay for half of the statutory notice period and that less would usually be more appropriate. This is not a case in which the Claimant is rebuilding his statutory notice rights on the basis that he has been re-employed on statutory notice only. Instead, and as I return to below, he has effectively remained self-employed beyond the date by which he might otherwise have secured another job, thereby giving up his statutory rights as an employee. He is not to be compensated for that decision which reflects a failure to mitigate on his part. In any event, I have no reason to believe that had he mitigated his losses the Claimant would have secured a new job with statutory notice rights only. Instead, I consider, as mid to senior level engineering professional, that the Claimant could expect, on successful completion of any probationary period, to be employed on the basis that he would be entitled to three months' notice terminating his employment.

22. The sum of £600 is sought in respect of loss of statutory rights in the Claimant's Schedule of Loss. Although, in my experience, that is a relatively generous award for loss of statutory employment rights, it is not challenged by the Respondent. Accordingly, it is the sum I shall award him.

c. *The Impact of the Claimant's Notice Pay on the Compensatory Award*

23. I agree with Mr Humphrey's submissions at paragraphs 39 – 43 of his submissions that the sum of £10,800 in respect of notice pay and further sum of £2,430.97 in respect of pension contributions relating to notice pay

is to be deducted from the Claimant's losses. I understand this also to be agreed by Ms Churchhouse (paragraph 3.2 of her skeleton argument).

d. ***The Issue of Mitigation***

24. The Respondent has the burden of proving any failure by the Respondent to mitigate his losses. The principles on mitigation are set out at paragraph 26 of Ms Churchhouse's skelton argument and were not challenged by Mr Humphreys. Save for a job secured by the Claimant's brother, which the Claimant understandably would not have wished to have been in competition with his brother for, and suggesting to the Claimant that he might have approached his brother's employer to see whether there were potential opportunities for him with the company (which I accept the Claimant did in fact do), the Respondent has not advanced a positive case on mitigation with reference to specific identified jobs the Claimant might have applied for. Instead, as it is entitled to do, it has largely sought to discharge its burden in the matter by reference to the materials that have been placed before the Tribunal by the Claimant and also in reliance upon the general strength of the jobs market over the last year. The Respondent makes a potentially valid observation when it says that all twenty or so of the Claimant's colleagues who were made redundant in 2020 and 2021 have secured alternative employment. However, those colleagues were employed in a range of roles, most if not all of them at a less senior level to the Claimant, and many of them left the business in 2021 rather than, as the Claimant did, in 2020 when the country was only just about to emerge from its first full national lockdown and millions of people were furloughed.

25. The Respondent must take the Claimant as they find him, namely someone with a young child of pre-school age who on losing his employment was then without an income or immediate expectation of an income to be able to commit to nursery fees, with the result that his daughter lost her place at the Claimant and his wife's preferred nursery and instead joined a year long wait for another place at a different nursery. The Claimant is not infallible. He had worked for the Respondent for 12 years and with Dr Rumsby for a further 12 or so years before that. Having seemingly therefore joined Mr Rumsby's predecessor company, Exitech Limited directly from school or college, he has no meaningful experience of seeking employment or promoting himself to prospective employers. I accept the Claimant's evidence that the loss of his employment was a significant blow to his self-esteem and that it impacted his mental well-being. I find that there were times in 2020 when he lost focus and lacked motivation. He may have incorrectly believed that he had been dismissed for exercising his right to family leave, but he was right to believe that he had been treated unfairly by the Respondent and that Dr Rumsby had been deeply uncaring in the months prior to his redundancy. Critically, he was placed at risk of redundancy just two or three weeks into the Coronavirus national lockdown when, putting aside peoples' health anxieties, there was very considerable uncertainty, indeed fear, as to how the global economy might withstand the effects of the pandemic. I take

judicial notice of the fact that GDP in the UK declined by a staggering 9.9% in 2020.

26. In the weeks immediately following his dismissal, the Claimant took no documented active steps to find another job. In the exceptional circumstances that then existed, I do not think that was unreasonable. Even if there had not been a pandemic, many people in the Claimant's situation would take some time off, perhaps a few weeks to gather their thoughts and identify a way forward. I do not consider that the Claimant delayed unduly in contacting recruitment agents and registering with them. Furthermore, even given the economic uncertainties generated by Coronavirus and notwithstanding he was warned by recruitment agents that there were limited jobs at his former level, I consider that it was reasonable for the Claimant to initially focus his efforts on securing a position with a comparable remuneration package to that he had enjoyed with the Respondent. However, the evidence, including the Claimant's testimony at Tribunal, supports that the Claimant was largely reactive in his approach and that he lacked motivation and enthusiasm. Within a few months the Claimant had turned his sights elsewhere and set himself up in business as a 'handyman'. The fact that his wife secured branding for this, including a potential logo for use on a van, suggests to me that by early autumn 2020 this was where the Claimant's main focus then lay. Nevertheless, I do not consider the Claimant to have been acting unreasonably in the matter given the country was only tentatively emerging from the first national lockdown. Significant restrictions remained in place and infection levels quickly increased when the schools returned in September 2020. It was an uncertain time and the situation was constantly evolving. In my judgement the Claimant acted reasonably in seeking to secure an immediate replacement income for himself and the family with fairly limited outlay on his part. On his own evidence, he did not regard it as a long term solution. He is not to be judged with the benefit of hindsight, in the sense that the venture did not generate the levels of income he may have hoped for. Mr Humphreys criticises the Claimant for his lack of documented job search activity over a period of 18 months, but his criticisms overlook that the country went into a form of lockdown in November 2020 and a second full national lockdown between January and April 2021. By the time the economy began opening up again substantively in spring 2021, and a rapid rebound in GDP followed, the Claimant had been out of full time employment for over 9 months. However, he was not idle over that period. He was generating a modest income through his business. I accept the Claimant's evidence that his family commitments and the risk that he and his wife may lose their home, meant he had no motives not to find a job to secure their futures. He may have become despondent and as he said, "gone to a dark place", but in my judgement he did not unreasonably fail to mitigate his losses during 2020 and into the start of 2021.

27. However, the weight of evidence is that the Claimant effectively stopped actively looking for another job by March 2021 just as the UK was on the cusp of emerging from the second national lockdown. The second and

third quarters of 2021 witnessed a well-documented significant re-bound in economic activity in the UK. Even accepting, as I do, that the Claimant had been without a job for over 9 months by the time the global and national economies began to emerge strongly from the shadow of the pandemic, and that this would have impacted both his own confidence and possibly how he was perceived by prospective employers, in my judgement the Claimant ought reasonably to have been much more pro-active in pursuing alternative work opportunities from April 2021, particularly as it would by then have been increasingly apparent to him that he was not going to generate significant earnings from his business. According to his Schedules of Loss he received income of £14,946.09 from this source up to the end of March 2022. In his Witness Statement he refers to working as sole trader from October 2020, albeit his company, PLM Projects Ltd was not registered with Companies House until December 2020. Whichever date is used, his income from the business has amounted to no more than about £1,000 per month. Faced with that level of income and having been out of his chosen field for an increasing number of months, in my judgement by early 2021 the Claimant ought reasonably to have lowered his expectations and to have accepted that he might have to accept a less well paid job, even if this involved a comparable commute as well as similar travel costs associated with his employment with the Respondent. In my judgement, his modest earnings from his business were such that any additional childcare costs cannot justify what I find is his failure to actively seek alternative employment in 2021.

28. Having submitted two job applications in January 2021, the Claimant only submitted two further job applications throughout the rest of 2021. Two further potential opportunities arose in 2022, but the Claimant seems not to have pursued these with any particular enthusiasm notwithstanding he had by then been without work for 18 months and would clearly have understood that he was generating limited income from his business even though Coronavirus restrictions had by then been completely lifted. In my judgement, had the Claimant taken reasonable steps from March 2021 to secure alternative employment he would have secured and started employment in another position by no later than 5 July 2021, namely within 12 weeks of the end of the second full national lockdown, on a salary of between £60,000 and £65,000 per annum. In this regard I note that in October 2021 the Claimant decided not to proceed to second interview with Oxford Lasers, notwithstanding the position offered a salary of between £60,000 and 65,000 per annum. Whilst it involved a comparable commute to that with the Respondent, the available evidence in the exhibit to the Claimant's Witness Statement (A.20) is that the company was receptive to a discussion with the Claimant as to some form of flexible working arrangement. That is consistent with anecdotal reports in the media that employers are offering flexible working arrangements to candidates given the widespread shortage of skilled workers and changes in workers' expectations brought about by the pandemic. Whilst it is not certain that the Claimant would have secured a job offer from Oxford Lasers, given his previous more senior level experience, I conclude that

the Claimant would have been a potentially strong candidate for the role and would also have been well placed to negotiate a competitive remuneration package. In my judgement, the Claimant's losses should be capped on the basis that he ought reasonably to have secured another position by 5 July 2021 on a salary of £62,500 per annum. I think it unlikely that any new employment would have involved a comparable level of employer pension contribution to that he received with the Respondent. The minimum level of employer contribution is 3%. As a mid to senior level engineer, I consider that the Claimant might reasonably to have expected to have secured a role with a 6% employer pension contribution.

29. To the extent this means the Claimant has sustained loss of remuneration compared to what he might have received had he remained in the Respondent's employment, I consider that it would be just and equitable to limit any award of compensation to the period up to and including 31 December 2021, particularly as this would cover any probationary period during which the Claimant might have proved his worth to any new employer and negotiated an increase to his initial remuneration package.

e. ***Section 123(1) of the Employment Rights Act 1996 – Just and Equitable Reduction of the Compensatory Award***

30. I refer to Ms Churchhouse's submissions at paragraphs 17 – 20 of her skeleton argument. I do not agree with her that the Polkey reduction in this case is to be limited to 60%, rather that there should be a 60% reduction in compensation for the period 2 July to 1 August 2020, together with a 66% reduction thereafter. I do not agree with Ms Churchhouse that this offends against the principles in Zebrowski v Concentric Birmingham Limited UK EAT/0245/16. This is not a case in which the Tribunal has, as Ms Churchhouse summarises it, conflated the percentage method with the dating method. In Zebrowski the decision of the Employment Tribunal was overturned because its decision to limit compensation to a two month period was inconsistent with its conclusion that there was a 60%, as opposed to a 100%, chance of dismissal absent unfairness. By contrast, my assessment that there was a 15% chance the Claimant would have been dismissed from the Chief Technologist role had he been appointed to it, is consistent with my separate assessment that there was a 40% chance of appointment to the role. The subsequent chance of dismissal was not reflected in the assessment of a 40% chance of appointment, which instead reflected his skills, experience and attributes relative to Mr Milne's. Accordingly, the Claimant has not been penalised twice in respect of the same chance. Instead, the Liability Judgment involves the "fourth possibility" identified in Zebrowski and by the Court of Appeal in O'Donoghue v Redcar & Cleveland Borough Council [2001] EWCA Civ 701, namely two percentage chances of events separated in time which give rise to a discrete time specific calculation of loss.

31. I can dispose of the issue of contributory fault in relation to the compensatory award fairly briefly. Counsel disagree whether I am precluded from bringing the Claimant's conduct to bear in terms of the

compensatory award. What is clear, as I said on 29 March 2022, is that I am precluded from making a just and equitable reduction under Section 123(6) given that the Claimant's misconduct did not cause or contribute to his dismissal by reason of redundancy. However, there is disagreement between Counsel as to whether conduct can be reflected insofar as the Tribunal considers it would be just and equitable to make no award or a reduced award, particularly where that conduct was known about by the Respondent at the time of dismissal but not relied upon by it. I was referred by Counsel to Devis & Sons Limited v Atkins [1977] IRLR314 and Devonshire v Trico-Folberth Limited [1989] ICR747, CA. Mr Humphreys submits that Devis is not limited to situations in which misconduct is only discovered after dismissal. I have concluded that it is not necessary for me to determine the point. Even if Mr Humphreys is correct in his submission, I would not be persuaded to make any further reduction in the compensatory award in circumstances where it has already been reduced by between 60% and 66%. Whilst this is not a case where a further reduction would involve the risk of the Claimant being materially penalised twice for the same conduct, nevertheless in terms of the overall justice and equity of the matter I have reduced the basic award by 60% to reflect what I consider to be the Claimant's greater culpability in terms of the parties' respective conduct in the period prior to dismissal. In circumstances where the Claimant was unfairly dismissed in the first weeks of the pandemic and unfairly denied a chance of redeployment that might have secured his family's situation at a very difficult time, it would not be just or equitable to deprive him of compensation altogether. I therefore make no further reduction.

f. ***ACAS Uplift***

32. Although the Claimant's Schedule of Loss included a claimed uplift of 25%, Ms Churchhouse accepted at Tribunal and in her skeleton argument, that this is not a case in which an uplift may be made.

g. Deductions for any excess of the redundancy payment

33. No reduction is to be made to the compensatory award pursuant to s.123(7) ERA since, on the information available to me, the amount paid by the Respondent to the Claimant by reason of his dismissal for redundancy did not exceed the amount of the basic award which would be payable but for s.122(4). The amount payable but for s.122(4) was £6,456 and that is the amount that was paid to the Claimant. There is reference in the Schedules of Loss to a reduction of £538, but it is not referred to in Ms Churchhouse's skeleton argument or Mr Humphreys's written submissions, and neither of them referred to the matter in the course of their oral submissions. There is no basis therefore for me to make a reduction pursuant to s.123(7).

h. The Application of the Statutory Cap

34. Pending agreement between the parties, or alternatively their further submissions, as to the Claimant's net loss of earnings on the basis of a gross annual salary of £68,000, I reserve the question of whether the statutory cap is engaged under s.124 ERA.

i. The Claimant's Claim for Re-payment of the 20% Salary Reduction

35. The Claimant's Schedule of Loss includes a claim for the reduction in salary which he agreed to from April 2020 to be repaid. Ms Churchhouse accepts that there is no Breach of Contract claim before the Tribunal and accordingly that the Tribunal does not have jurisdiction to consider the matter.

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Employment Judge Tynan

Date: …25 July 2022…….

Sent to the parties on 2 August 2022....

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For the Tribunal Office.