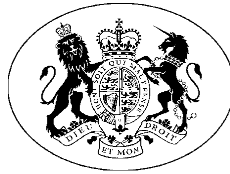

EMPLOYMENT TRIBUNALS

Claimant: Ms P Austin

Respondent: Mears Group plc

Heard at: Watford Employment Tribunal (in public by video)

On: **21 and 22 September 2022**

Before: Employment Judge Quill; Ms J Hancock; Mr D Wharton

Appearances
For the claimant: Mr D Hodson, counsel
For the respondent: Mr E Kemp, counsel

REMEDY JUDGMENT having been sent to the parties on 10 October 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013 on 14 October 2022, the following reasons are provided:

REMEDY REASONS

1. The remedy hearing involved us hearing the evidence from two witnesses in person. These were the claimant and, for the Respondent, Mr Critchley, both of whom gave evidence at the liability hearing.

2. We also had a written statement on behalf of the Respondent from Mr Gough. It was agreed that we would take his statement as read, giving it the same weight that we would have given it had he attended and sworn to his written statement on oath, as the Claimant had no questions for him.

3. The documents that we have had available are all of the documents from the liability hearing together with a remedy bundle prepared specifically for this hearing, of around 680 pages.

4. We also had the skeleton arguments from each side, schedule of remedy, counter schedule, authorities bundle and some additional documents which were submitted that had not been included in the bundle.

5. The Claimant and Mr Critchley (as well as Mr Gough) had each prepared written statements that had been exchanged the week before this hearing started. There was no dispute that we could take these as evidence in chief.

The Claimant also sought to rely on a supplementary statement dated Tuesday 20 September 2022 (in other words, the day before this remedy hearing started). The Respondent had only received this around 4pm on the day before the hearing. This was not satisfactory conduct of the litigation on the Claimant's behalf, but, for the reasons we gave orally, we did not consider the contents to be such that it be unfairly prejudicial to the Respondent (or that a postponement to a later date would be required), and we gave the Claimant permission to rely on both written statements as her evidence in chief.

Law

6. The purpose of compensation is to provide proper compensation for the wrong which we found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

7. Section 124 of the Equality Act 2010 ("EQA") states, in part:

> 124 Remedies: general
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court … under section 119.

8. Section 119 of EQA states, in part

> (2) The county court has power to grant any remedy which could be granted by the High Court—
>
> (a) in proceedings in tort;
>
> (b) on a claim for judicial review.
>
> (4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

(6) The county court … must not make an award of damages unless it first considers whether to make any other disposal.

9. For financial losses, we must identify the financial losses which actually flow from complaints which we upheld. We must take care not to include financial losses caused by any other events, or losses that would have occurred any way.

10. For injury to feelings, we must not simply assume that injury to feelings inevitably flows from each and every unlawful act of discrimination. In each case it is a question of considering the facts carefully to determine whether the loss has been sustained. Some persons may feel deeply hurt and others may consider it a matter of little consequence and suffer little, if any, distress.

11. When making an award for injury to feeling, the tribunal should have regard to the guidance issued in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] EWCA Civ 1871*, *[2003] IRLR 102*, *[2003] ICR 318, CA*, and taking out of the changes and updates to that guidance to take account of inflation, and other matters. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:

    a. The top band was (at the time) between £15,000 and £25,000. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.

    b. The middle band was, initially, £5,000 and £15,000. It is to be used for serious cases, which do not merit an award in the highest band.

    c. The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.

12. In *Da'Bell v NSPCC* (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and uprated them for inflation. In a separate development in *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that - with effect from 1 April 2013 - the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879, the Court of Appeal ruled that the 10% uplift provided for in *Simmons v Castle* should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury.

13. There is presidential guidance which takes account of the above, and which is updated from time to time. This claim is one which was issued in August

2019. The relevant guidance applicable to this claim is the second addendum which states:

> *In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.*

14. There can be an award for aggravated damages where the necessary factors have arisen. Where it arises, it is part of the overall award of compensation for injury to feelings. The award is made as a recognition that the existing injury to feelings has been aggravated further by factors which are in some way related to the act of discrimination but may not necessarily form part of the statutory tort itself.

15. In Alexander v Home Office [1988] 2 All ER 118, the court said:

> *compensatory damages may and in some instances should include an element of aggravated damages where, for example, the defendant may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination.*

16. In Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT, the EAT undertook a review of aggravated damages. It stated that it may be appropriate to make an award of aggravated damages based on analysis of
    a. The manner in which the discrimination was committed and/or
    b. The motive of the discriminator and/or
    c. The discriminator's subsequent conduct.

17. An analysis of these things might determine that there has been conduct which is capable of being "aggravating". However, the purpose of analysis is not to determine whether the discriminator acted so badly that they deserve some sort of punishment; it is to consider whether, because of the manner of the conduct, some further injury has been caused to the claimant.

18. Section 123 of the Employment Rights Act 1996 ("ERA") provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal. However, compensation for unfair dismissal under s.123(1) cannot include awards for non-economic loss such as injury to feelings (see the House of Lords decision in Dunnachie v Kingston upon Hull).

19. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance of the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and

equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

20. A similar approach should be taken when analysing and deciding what financial loss to award for a dismissal which has been found to be a breach of the Equality Act 2010. In other words, the Tribunal must ask itself what might have happened in the absence of such contraventions, and consider the possibility that there might have been a dismissal which was (not unfair and) not discriminatory and not an act of victimisation or harassment. See Chagger v Abbey National plc Neutral Citation Number [2009] EWCA Civ 1202 (where it was said that: *The task is to put the employee in the position he would have been in had there been no discrimination; that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination*)

21. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.

    a. In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair and non-discriminatory dismissal (or other termination of employment contract) would have inevitably taken place.

    b. In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair and non-discriminatory process been followed (as well as acknowledging that such a process might have led to an outcome other than termination).

    c. If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

22. There is no one single "one size fits all" method of carrying out the task. The tribunal must act rationally and judicially, but its approach will always need to be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the tribunal must also bear in mind that when asking itself questions of the type "what are the chances that the claimant have been dismissed if the process had been fair and non-discriminatory?", it is not asking itself "would a hypothetical reasonable employer have dismissed"? It must instead analyse what this particular respondent would have done (including what are the chances of this particular respondent deciding to dismiss) had the unfair and discriminatory dismissal not taken place, and had the respondent acted fairly and reasonably instead.

23. Awarding a loss based on a decision that the employee would have remained with the same employer until retirement date is justified only in exceptional circumstances.

24. When assessing alleged loss of earnings, we apply the same rules concerning the duty of a claimant to mitigate their loss as apply to damages recoverable under the common law. Where the employee has mitigated, a tribunal should give credit for sums earned.

25. When assessing the amount of deduction for the employee's failure to mitigate their loss, the tribunal does not reduce the award that it would otherwise make by a percentage factor. The correct approach is to make a decision about the date(s) on which the Claimant would have found work (and/or work at higher income than they actually obtained) had they been acting reasonably to seek to mitigate their losses, and then make an assessment of what income they would have had from such work.

26. So the approach is:

    a. Consider what steps it would have been reasonable for the claimant to have had to take to mitigate their loss;

    b. Ask if the claimant failed to take reasonable steps to mitigate their loss;

    c. Decide to what extent would the claimant have mitigated their loss had they taken those steps

27. It is for the Respondent to prove that the Claimant has unreasonably failed to take appropriate steps, and that – on balance of probabilities - had those steps been taken, then the losses would have been mitigated.

28. The ACAS Code of Practice on disciplinary and grievance procedures must be taken into account by the employment tribunal if it is relevant to a question arsing during the proceedings.

29. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides

> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so,increase any award it makes to the employee by no more than 25%.

30. So, a failure to complain with a Code has to be an unreasonable failure for this provision to have effect. Some failures might not be unreasonable, and so that is one of the decisions the Tribunal has to make.

31. In this case, it was common ground between the parties that the ACAS Code of Practice on Disciplinary and Grievances was applicable, given our findings in the liability decision about the Respondent’s true reasons for dismissing the Claimant.

32. In Wardle v. Crédit Agricole Corporate Bank [2011] ICR 1290, a case decided under the previous litigation, but which contains guidance which is still applicable under the current legislation, the court of appeal said:

> Once the tribunal has fixed on the appropriate uplift by focussing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms. As I have said, this must not be disproportionate but there is no simple formula for determining when the amount should be so characterised. However, the law sets its face against sums which would not command the respect of the general public, and very large payments for purely procedural wrongdoings are at risk of doing just that …

33. So the correct approach is to first consider if there was an applicable code, and if so, decide if the party (in this case, the Respondent) had obligations under the code, and, if so, if it breached them. Then decide if that breach was unreasonable. If so, then decide if there should be an uplift, and fix the amount. The maximum is 25%, and that might be – but is not necessarily – appropriate in cases where there is a complete failure. However, taking into account whether there was partial compliance, and other relevant factors, including the Respondent's size and resources, and the reasons for the default, then the uplift (if any) can be fixed at any appropriate figure which does not exceed 25%.

34. After all that is done, the Tribunal the tribunal should apply a common sense and proportionality check. If the simple application of the percentage would result in a cash amount that seems to be too large a sum to compensate the claimant for the specific wrongdoing in question (that is, the specific failures to comply with the requirements of an applicable ACAS code), then the Tribunal must reduce the award to an amount which is proportionate, so as to ensure that, in the words of the statute, the award is actually "just and equitable".

Facts

35. The breaches of the Equality Act 2010 ("EQA") are as set out in our judgement.

36. The breaches included that it was unfavourable treatment to fail to give the claimant an opportunity to apply for the job of Head of Bid Management prior to appointing Mr Hughes to that job sometime around February 2019.

37. The dismissal itself was disability discrimination and victimisation. We commented on the manner of the dismissal in our liability reasons. We described, in particular, the fact that, out of the blue, the claimant received a telephone call which she thought was just going to tell her whether or not she had been successful in been appointed to either Senior bid manager or else Business Development Manager which instead told her that she was being dismissed and not dismissed by reason of redundancy, but for the reasons

stated in paragraph 87 of the liability decision. During the phone call, she was simply told that she was being dismissed for some other substantial reason and that that concluded that the meeting. The Claimant only got written details of the purported reasons for the dismissal a week or so later.

38. Furthermore, the Claimant appealed promptly, and had an appeal meeting fairly promptly after that, but then there was a gap of several months until she got an outcome letter rejecting the appeal against dismissal, but purporting to change the dismissal reason from some of the substantial reason to redundancy. It was several further months after that before she even got the redundancy payment.

39. At the time of these events (non-appointment to Head of Bid Management, reorganisation, and dismissal), the claimant was off on sickness absence for the reasons stated in our liability decision. The sick notes recorded that she was off for reasons connected to her spinal cord injury, but we also accepted that she was upset at the time by dealing with her bereavement and - as stated in the liability reasons - the psychological effects of coming to terms with her disability.

40. The respondent's contraventions of EQA caused significant distress to the claimant. The distress was exacerbated by the fact that - as far as the Claimant had been concerned - she been raising legitimate questions with the respondent about reasonable adjustments for her continued employment, but the respondent had reacted by telling her that it was treating her conduct during the consultation as being so unreasonable that she should be dismissed. (That is, so unreasonable that it thought continuing to employ her in any capacity was untenable).

41. The Claimant believed that her questions about reasonable adjustments were reasonable. Furthermore, she also raised questions that she thought were reasonable about why somebody been appointed to a job which had a similar title to the one she had had when she was Head of Bid Management North. It was distressing to her that the information had not been given to her before an appointment was made, and it was distressing that when she asked questions about it during the redundancy consultation, the Respondent seemingly treated that conduct (or the alleged manner of it) as being part of the reason to terminate her employment.

42. One of the issues and that we had to deal with during this hearing was the parties competing views about how the payment from UNUM should be treated. We were told at the liability hearing (as mentioned in the liability reasons) that there was the possibility of litigation elsewhere in relation to UNUM. So far that litigation (if there is to be any) has not materialised. Our decisions about UNUM entitlements are based purely on what we have been told during this hearing.

43. The parties appear to be in agreement that the approach to UNUM that this panel should take for the purposes of these employment tribunal proceedings is to find that the arrangement, while the claimant was an employee of the respondent, was that she would have been entitled to benefit from the fact that the respondent had an insurance policy with UNUM, as a result of which UNUM would pay the respondent certain sums which the respondent would pass on to the claimant to partially replace the loss of earnings that the Claimant would otherwise suffer as a result of the injuries that she incurred in 2015. This would cover, for example, reduction in earnings if her hours were reduced and/or if she was incapable of work and her sick pay entitlement ran out (or was less than full pay).

44. It is also common ground that once the employee leaves the respondent's employment, there is no obligation on UNUM to pay anything to the Respondent.

45. It also is common ground that, on a purely discretionary basis, UNUM has been paying the claimant directly since the end of her employment.

46. The claimant commenced work on 1 June 2022 and this is the first time that she has worked since the end of her employment. The claimant has been seeking clarification from UNUM about whether they will continue to make any payments to her now she has started work, and, if so, how much, but she has not received confirmation that they will do so.

47. It is common ground that the claimant has no legally enforceable right against UNUM.

48. It is common ground that the respondent should effectively receive credit for all of the UNUM payments that have actually been made to the claimant up to the date of this hearing. However, the difference of opinion is that on the claimant's case, we should assume that there will be no further payments after today and on the respondent's case, we should assume that they will continue indefinitely, albeit perhaps with some adjustment to reflect the fact that she is now in employment.

49. We take into account what is said in <u>ATOS Origin IT Services UK Ltd v Haddock</u> by the EAT and in particular, the comments at paragraph 30.

> *A contractual entitlement to a payment may make it more certain that a loss will be mitigated than a mere expectation that a discretion will be favourably exercised or, as in Hussain [1988] ICR 259, that the employers would continue to employ the plaintiff. The obligations of underwriters may need to be considered and if they have a discretion to exercise so may the chances of their doing so in a way favourable to a beneficiary. The exercise may be difficult, and as we have observed it is unlikely to produce a figure which is precisely right, but it must be undertaken.*

50. In this case, if we were to make an assumption that the payments would continue on a discretionary basis for a lengthy period of time, then while it is conceivable that UNUM would take account of our assessment and agree to pay it for the period of time, we have identified, there is no guarantee that they will do so.

51. On the other hand, in our opinion if we were to make an assessment in this judgement that UNUM was very likely to end the payments in a comparatively short period of time, then the likelihood of UNUM actually making the discretionary payments for a longer period of time than we have envisaged is very small.

52. Our assessment is that is reasonable for us to assume that if UNUM decides to cancel the payments to the claimant, it would give her some reasonable period of notice. They have not given her any notification as yet of termination, just like they have not yet given her notification that they propose to continue to make the payments (possibly recalculated to reflect change in income) now that she has started work.

53. We infer that, since they have not notified her of their intention then they have not yet reached a decision one way or the other. However, if it was their position that they were going to continue to make payments to the Claimant indefinitely (subject only to reductions to take account of what sums she could earn), then they could have told her that already. That is, if UNUM accepted the principle of paying her, subject only some arithmetic about the specific amount, there would be no reason not to tell her that.

54. Since UNUM have mentioned the possibility of there having been an overpayment, then reduction or cancellation must be something being contemplated, and, if it were reduction only (not cancellation) then they could have said that already based on the information which the Claimant has supplied about income from her new job.

55. Our assessment is that there is a reasonable likelihood that the UNUM payments will carry on until at least 31 December 2022. However, we think that there is no realistic possibility that the payments will continue beyond that date.

56. We have the report of a jointly instructed expert, Mr Osman, at pages 358 to 379 of the remedy bundle, which we have found helpful and have taken into account when assessing (i) what the Claimant's earnings might have been had she stayed with the Respondent and (ii) what the Claimant's actual earnings might be in the future. Amongst other things, we have noted, and we accept:

    a. There is a 10% chance of surgery being required due to degeneration of the spine. (paragraph 44)

b. There is a chance that hospital admission might be required in the even of urinary tract infection or urosepsis (paragraph 46)

c. There is likely to be an ongoing need for physiotherapy (paragraph 47)

d. There us a chance of syringomyelia, though only around 2% of patients (with conditions comparable to the Claimant’s) develop syringomyelia which needs surgical intervention (paragraphs 49 – 50)

e. There is an on-going need for monitoring and the finite chance of complications, including one or more of those in the list of examples given in paragraph 51. If this happens, then it might affect her future ability to work, and/or might require adjustments to be made by her employer if she is to be able to work (paragraph 55).

f. The Claimant is potentially fit to work at home. Working at a specific office locations (and/or travelling to work at various locations) would be likely to require adjustments from the employer in order for it to be practicable for the Claimant to do so (paragraphs 52-53 and 55-56).

g. The Claimant is currently fit to work from home part-time.

57. Mr Osman does not rule out that (as per the Claimant’s aspiration mentioned in paragraph 54) she might increase her hours, possibly even to full-time. We infer from the report as a whole (and especially paragraph 55), that he also does not rule out that potentially there might need to be a reduction in hours in the future, depending on what complications, if any, develop.

58. In terms of earnings from Mears, the claimant's career is set out in the liability decision, and we will not repeat all of that here. Suffice to say that the claimant had been a very good performer and had been very well thought of by the respondent. The Respondent’s high opinion of her is demonstrated by, amongst other things, their making efforts to keep her when she had indicated that she might potentially leave.

59. The claimant had reached the position of Head of Bid Management North and only moved from that to Bid Manager as a result of a reorganisation after her injuries. As we said in the liability reasons and that change was not discriminatory. She retained the same pay immediately after this 2017 change as before it.

60. The respondent has failed to prove to us that when there was a reorganisation in 2019 that the claimant was one of the lowest scoring of the five people who went through the process for Bid Manager. They have failed to prove any of the scores, except for the Claimant’s.

61. If the Claimant was one of the two highest scoring candidates then our finding is that – according to the approach the Respondent had informed staff and

representatives it was taking - she would have met the criteria to be appointed to one of the new Senior Bid Manager posts. However, we have no evidence on that point. We cannot find that she was one of the two highest scorers, just like we cannot find that she was the lowest.

62. However, in terms of income, since the Claimant was still on the old salary of the Head of Bid Management North, we infer that, even had she been appointed to a new Senior Bid Manager post, that would not have led to a salary increase for her. The claimant's salary would not have increased as a result of the 2019 exercise (had it been conducted fairly and without discrimination). She would have ended up either with the job title Bid Manager (as she had had since late 2017) or with the job title Senior Bid Manager), but, either way, she would still have been on the old Head of Bid Management - North salary (as far as we can deduce from the available evidence supplied by the parties).

63. Our finding is that the claimant had no incentive to voluntarily depart from the respondent's organisation. The chances of her obtaining a job of comparable seniority and salary elsewhere in all the circumstances were small. It is our finding that her preference would have been to work until the age of 70 with the respondent. This is slightly beyond the current retirement age. However, even leaving aside what adjustments there might be to retirement ages between 2022 and the Claimant's 67th birthday in 2038, there is an increasing trend for people to work to slightly older ages. The respondent has not satisfied us that it would have had sufficient reason to terminate her employment unilaterally simply because she turned 67, and the Claimant has satisfied us that, as best as she can tell in 2022, it would have been her intention to work until 70 with the Respondent.

64. There are, of course, various factors that can lead to an employee leaving employment prior to the date that would have been the employee's first preference (or before the date that they genuinely predicted for themselves when they were around 50-ish).

65. A great many things can happen that could lead to the employee being dismissed for one reason or another, including an business reorganisations. Employees can also have changes in life circumstances so that they can no longer work at all, or else that they decide not to have a career change, for example. Indeed, not everybody lives to the age of 70.

66. So the mere fact alone that it is our finding that it was the Claimant's preference to work with the Respondent until 70 does not mean that it is guaranteed that she would, in fact, have done so.

67. We heard evidence from Mr Critchley about what types of work the Respondent might focus on in future. We also heard the Claimant's opinions about the state of the market. Mr Critchley confirmed, in answers to

questions, that he was not necessarily suggesting that the Claimant would have already been made redundant in the period from the dismissal date to the remedy hearing date, or in the very near future. It is not argued that the Respondent has carried out further redundancy exercises affecting bid managers since the 2019 exercise that was discussed in the liability decision.

68. We do take account of the fact that, hypothetically, there could be some future reorganisation of the Respondent's staffing such that the Claimant might be one of those put at risk of redundancy.

69. However, we do not accept that the Claimant's skill set is quite as narrow as suggested by Mr Critchley. We are satisfied, on the evidence before us, that the Claimant has demonstrated, throughout her career, the capacity to be adaptable. She has the ability to learn, and to improve, and to move into different roles. Even if – hypothetically – the types of contracts between the Respondent and its clients for which the Claimant had been doing bid management work were for work of a type which the Respondent was potentially going to reduce in future, then it does not follow that the Claimant's skill set is such that she could not move into doing bid management work for the Respondent's contracts providing different services to (the same or) different clients).

70. Furthermore, and in any event, it seems unlikely to us that, in the foreseeable future, the Respondent is going to stop bidding for Housing Maintenance contracts. It will continue to tender for contracts which include Housing Maintenance, even where the contract will potentially include other services as well. Thus, even if the Claimant's skill set was as narrow as that claimed by Mr Critchley (and we have found that to be incorrect), then there will still be bid management work for employees with that narrow and specific skill set for the foreseeable future.

71. If there is a reduction in the Respondent's requirements for bid managers, then it does not automatically follow that the Claimant's employment will cease, on the assumption that there is a fair and non-discriminatory redundancy process. However, there would be a non-zero chance of the Claimant being made redundant (or accepting voluntary redundancy) in such circumstances.

72. Within the Bid Management role at the Respondent (whether Bid Manager or Senior Bid Manager), we are not persuaded that there is a significant likelihood that the Claimant would have been promoted from that role.

73. In terms of actual future career progression, in the role she has obtained since the dismissal, the claimant has been in her new job since 1 June 2022. It is as a bid writer, which is a less senior and responsible role than "bid manager". While working for the Respondent, the Claimant demonstrated the ability to do roles that were more senior even than bid manager (as

described in the liability decision).

74. The full-time equivalent salary for the Claimant's actual new job is £50,000 a year. The claimant works half time and so her salary is around £25,000 a year gross.

75. Our assessment is that we think that there is no chance that the claimant would get a promotion from bid write within three years of the start date.

76. Based on the adverts in the bundle are bid manager jobs and have a variety of salaries attached to them. Some are around £55,000; some around £60,000; some are as high as £70,000.

77. To take account of future career progression after three years in her current job, we have roughly estimated that there is around about a 50% chance of the claimant getting an increase in salary of around 20%. In other words, we have decided that we should calculate her future earnings from 1 June 2025 onwards as being around about 10% (50% chance of 20% increase) higher net than they are currently.

78. We have been invited to make a finding that the Claimant's new job will come with a bonus. The Respondent suggests that we should add on 20% to 40% of her gross annual salary to reflect such a bonus. We are not persuaded to do so. There is no evidence to support such a finding. We accept that her current employer says that it might make a discretionary bonus payment, on top of salary, but there is no evidence that there is a specific scheme that – for example - if certain targets are met, certain payments will be made. So, that demonstrates no more than that, in any given year, the Claimant might get some amount, or she might get zero. There is no basis for a finding that she will get between £5000 and £10000 per year on top of salary. The Respondent has not persuaded us to find as a fact that the Claimant's earning are higher than she has truthfully declared to us, based on her understanding of what her employer will pay.

79. We do not think that there is a realistic chance of the Claimant resuming full-time work.

    a. We do acknowledge that there is a non-zero chance of the Claimant being able to increase her hours (to a higher part-time fraction) at some point in the future. The Claimant is somebody who is keen to increase her hours if she is physically and mentally able to do so.

    b. There is, however, also a non-zero chance that her hours might have to be reduced, rather than increased, for health reasons.

    c. Our decision is that the best and most appropriate finding is to assume that the Claimant will continue on the same hours as she is on at present. That is, to assume that the chances of an increase in hours or a decrease

in hours cancel each other out.

d. We therefore proceed on the basis that the Claimant will work 50% of full-time for the rest of her career.

80. As set out fully in the liability reasons document, the Claimant was offered the opportunity to appeal and she did appeal. There was then an appeal meeting with her, and, several months later, an appeal outcome letter.

81. As set out fully in the liability reasons document, prior to the decision to dismiss the Claimant, the Claimant had been invited to consultation meetings (as well as to an interview for the posts she applied for). That part of the process related to possible redundancy. As we said in the liability reasons, prior to the second consultation meeting (and the interviews), it was already clear to the Respondent that it had enough Bid Manager posts in the new structure for all those Bid Managers who did not wish to be made redundant. Our finding was that the actual dismissal reason was as set out in the liability decision (and we rejected the Respondent's argument that the dismissal reason was either redundancy, as per the appeal outcome letter, or the alleged "some other substantial reason" set out in the dismissal letter).

82. The dismissal decision itself was communicated to the Claimant without any warning that she might be dismissed for the reasons set out in the dismissal letter (which was about a week after the phone call in which she was told that she was dismissed). She was given no opportunity to comment on the proposed dismissal reasons. She knew there was a telephone meeting scheduled but not that the Respondent was proposing to dismiss her for the reasons it supplied at the time (in the subsequent letter). She was not told about any allegations about the way she had conducted herself in the meetings (the Respondent's case being that the dismissal reason was not conduct, but was "some other substantial reason"). She was not told at all about the allegations before the meeting (in writing or orally) and – as per the transcript of the call quoted in the liability reasons – was not given any specific details in the (very brief) telephone meeting either.

83. The Claimant asked outright to have a discussion during the phone call, and that was refused. The Respondent when she asked for clarification, the same scripted answer was repeated and then the phone call was terminated even though the Claimant wanted some further discussion (or, at the least, clarification). Even when she contacted Mr Long, Mr Hughes's boss, there was still no discussion. She was just told to wait for the dismissal letter.

Analysis and Conclusions

Financial loss due to loss of chance of Head of Bid Management

84. We have to assess the financial losses flowing from the failure to give the

Claimant an opportunity to apply for Head of Bid Management, which we decided was disability discrimination within the definition in section 15 EQA.

85. The loss is a loss of chance. We do not approach it by deciding whether, on the balance of probabilities, the Claimant would have been appointed (and assessing loss based on the full earnings that she would have therefore had in that role) or whether, on the balance of probabilities, someone other than the Claimant would have been appointed, and thus deciding the Claimant's loss is nil.

86. Rather we must do our best to assess the percentage likelihood of the Claimant being appointed, in the absence of discrimination. In other words, had the Respondent notified the Claimant of the vacancy, and given her the opportunity to put her name forward if she wished to do so.

87. In the liability reasons, we described what had happened when Mr Pace had decided that he might wish to appoint someone to a post with job title Head of Bid Management, but with job description different to the one to which Mr Hughes was later appointed. We take into account our findings about that event, and it is not necessary to repeat everything here. Suffice it to say that Mr Pace did phone the Claimant about the potential vacancy and said to her that he had someone in mind for the appointment (and supplied that name to the Claimant). In response, and at that time, the Claimant did not put in any written grievance, or similar, challenging Mr Pace's intention, and/or arguing that she should be slotted into the new role.

88. As we said in the liability decision, the way it was left as far as the Claimant was concerned was that Ms Fry was going to contact the Claimant. The Claimant did not follow it up with Ms Fry when she did not hear anything further. That may, or may not, have been connected to the fact that the Respondent's acquisition of MPS was announced in the trade press, and the Claimant saw it there. Possibly, the Claimant realised (correctly) that this would change things, and Mr Pace's plans would be shelved pending a review of how the new combined entity would operate. However, in any event, there is no evidence that the Claimant felt so strongly that she was entitled to be slotted into Head of Bid Management that she sought to contact the Respondent for details of its plans, and whether it had decided to proceed with Mr Pace's proposals. As of the end of 2018, the Claimant could have taken action (writing to the Respondent, for example; contacting Ms Fry by phone, perhaps) to challenge the Respondent's thought processes re appointing someone (not her) to a post called "Head of Bid Management", but she did not feel strongly enough about the subject to do so.

89. For the reasons set out in the liability decision, it was disability discrimination to fail to contact her around February 2018 to at least have a discussion about the proposed new role, and to find out if she was potentially interested (and to fail to give her the opportunity to apply if she said "yes").

90. It is not certain, however, that the Claimant would have said “yes”, that she was interested. It is not certain that she would have applied if the Respondent had told her that that option was one which was open to her.

91. She had been off sick for around 10 months. Furthermore, although the Claimant would not have known this at the time, she remained unfit for several further months after February 2019. Therefore, we take that into account when assessing the likelihood of her applying for the role in February 2019, if it had been presented purely as a promotion opportunity.

92. We also take into account that, when the redundancy proposals were announced, the Claimant did actively pursue other roles in the organisation.

93. Our assessment is that the chance of the Claimant’s applying for the role, if told about it in February 2019, is significantly higher than zero. However, it is also less than 50%.

94. Had she applied, then events would have unfurled in the hypothetical scenario in a way which was significantly different to what happened in actual fact. In actual fact, the Respondent produced no written job description at all for the role, and simply appointed Mr Hughes to it. (As mentioned in paragraph 51 of the liability reasons, it was Mr Long who took this decision.) Had the Claimant expressed interest, and had the Respondent been acting in a non-discriminatory way, it would have been necessary for the Respondent to draw up some formal requirements for the role, and address its mind to how it was going to fairly select between at least two people (the Claimant and Mr Hughes) and possibly more than two.

95. The types of things that the Respondent would have put into the written job description or selection criteria for the role, had they been acting in a non-discriminatory way, would have been likely to focus on things such as business development, and other activities that Mr Hughes was perceived – by Mr Long – to have been doing for MPS and prior employers. The list would conceivably not have included only activities which the Claimant had been performing in the Bid Manager role in the period (sickness absence permitting) from November 2017 to February 2019. Some of the activities included might have been duties she had had when Head of Bid Management – North. However, it is also possible that some of the duties would have been things which the Claimant had never done at all while working for the Respondent. This is somewhat speculative, given that the Respondent never produced a job description.

96. During submissions, it was pointed out that the Claimant was unlikely to have been able, in February 2019, to commit to taking on the job full-time (even at the end of her sickness absence). The suggestion was that the most that the Claimant would have been able to agree to was 20 hours per week, taking account of the reduced hours she had been on since returning from the

injuries she suffered in 2015, and prior to the start of the sickness absence in 2018.

97. We accept this argument by the Respondent. However, we also accept the Claimant's argument that just because she could only do (at most) 20 hours per week does not – in itself - mean that she could not be appointed to the role on a part-time basis, sharing the job with someone else.

98. The Respondent argues that if there was to be a job share, then that would require three people, each doing 20 hours, because the role itself would require 60 hours. As a matter of logic, we do not accept that proposition. If it were true that the full role required 60 hours per week, then there would be nothing to stop one person in the job share being expected to do no more than 40 hours per week, and the other person doing no more than 20.

99. Furthermore, in the hypothetical scenario that the Claimant asked to be considered for the new role, the Respondent would have had an obligation (if she otherwise met the criteria) to consider whether it could, as a reasonable adjustment, make arrangements such that the Claimant did not have to work 60 hours if, because of her disability, she was not able to do so.

100. The Respondent has not persuaded us that the number of hours which it argues were required to be performed per week by the employee(s) in the role of Head of Bid Management means that (for that reason) we should decide that there was zero chance of the Claimant being appointed, in the absence of discrimination.

101. However, we do think that there is a low chance that, if the Claimant had applied (and there were two candidates, her and Mr Hughes), the Claimant would have persuaded the Respondent to decide that she was the better of the two candidates. [And if the Claimant, Mr Hughes, and external candidates were all part of the process, then the Claimant's chances of success would be lower still.]

102. We do accept the Respondent's argument that it would have been keen to appoint someone who could start straight away. A decision to decline to appoint the Claimant (if she was otherwise suitable) because she could not start straight away might be unfavourable treatment which would fall within the definition of disability discrimination in Section 15 EQA if the Respondent could not justify that decision (by relying on the defence in section 15(1)(b) EQA). However, our finding is that the Claimant would not have been able to start straight away, and that the Respondent would have been likely to decide that it would be able to succeed in proving the defence (given, for example, the need to have someone in post to oversee the merger of the former MPS employees and the Respondent's pre-existing employees into a new unit.) We are talking about hypothetical circumstances, but hypothetically that might have been an argument that succeeded. (Though,

we do not know, of course, what the medical evidence would have said, in this scenario, about when the Claimant would have been able to start.)

103. Once we assess the chances of:

 a. the Claimant deciding not to apply at all, and

 b. the chances of the Claimant not being the best candidate even if she did apply, and

 c. the chances of the Claimant not being appointed, even if she was otherwise the best candidate, because she could not start straight away

 for the purposes of assessing the Claimant's financial losses, our decision is that the loss of chance should be assessed on the basis that the Claimant had a zero chance of being appointed to the post. (Though a component of the injury to feelings award is in relation to the Respondent's contravention of EQA by failing to give her the opportunity to apply.)

Injury to feelings and Interest on that award. Aggravated Damages.

104. Prior to the Respondent's contraventions of EQA, the Claimant had already been absent from work since April 2018, in the circumstances described more fully in the liability reasons. The effects of various matters on her mental health was a contributory factor for her absence, and we must take care to try to separate out those pre-existing matters from the injury to her feelings caused specifically by the Respondent's contraventions. That is particularly important when analysing the counselling and other treatment which the Claimant received after March 2019.

105. The Respondent's treatment of the Claimant – as per our decisions on liability - was not a one-off incident. Rather, there was a combination of different things by different people.

106. In our opinion, the significant injury to feelings caused to the claimant and the significant discrimination and victimisation by the respondent is not such that an award in the highest Vento band would be appropriate. Our decision is that this is a middle band case.

107. We have taken into account the matters which the Claimant has argued (in her schedule of loss) should be grounds for a separate component of the injury to feelings award to be identified as being for the injury caused by the "aggravating" factors. However, it is our decision that a separate itemisation is not necessary or appropriate. Our liability decision reflects the contraventions of EQA, and we have accepted that those contraventions had the effects on the Claimant as set out in her witness statement. We can, and we do, compensate her for the injury, based on the fact that she suffered on-going effects for a long time after the dismissal.

108. Taking account of the serious injury to the claimant's feelings and the specific nature of the conduct which caused the injury to feelings, an award towards the higher end of the middle Vento band is appropriate and our decision is to award £25,000.

109. We also award of interest on injury to feelings at 8% per annum from the date the claimant was told that she was being dismissed, namely 29 March 2019. Although we have taken into account, when assessing injury to feelings, the Claimant’s discovery of the fact that the Respondent had appointed Mr Hughes as Head of Bid Management without giving her any chance to apply, we do not think that it is just and equitable for interest to run from that date, as the more significant events causing those injuries occurred later.

Basic award and loss of rights associated with 12 years’ employment

110. The parties agree that there is no basic award payable because the claimant received a redundancy payment.

111. The Claimant also agrees that effectively the Claimant suffered zero loss of income after the dismissal up until 31 December 2019 as a result of the payments made to her during that period. (We have not been convinced by the Respondent that the Claimant made a “profit” or a “negative loss” during that period).

112. The parties also agree that £300 for loss of statutory rights is a reasonable sum.

113. The panel's decision is that, taking account of the sums already paid to the claimant and the award for loss of statutory rights, it is not appropriate to make any further additional award for loss of long notice entitlement.

Loss of Earnings

114. We give credit to the Respondent for all the sums which the Claimant has received from UNUM already, and all the sums she will receive from UNUM in the future. As stated in the findings of fact, our decision is that the UNUM payments will cease around 31 December 2022.

115. As we said in the findings of fact, the Claimant’s preference would have been to work until she was 70, and there was little likelihood of her voluntary leaving the Respondent on the basis that she had found a better job elsewhere. As we also said, it does not follow that there was a 100% chance of her staying with the Respondent until she was 70. There was no chance of her being dismissed in the 2019 exercise, had the Respondent being acting fairly and non-discriminatorily.

116. Doing the best we can, with all the available evidence, for future losses, it is just and equitable that we take account of the chances of the claimant leaving

the Respondent's employment prior to the age of 70 by making a 20% reduction to the figure that we would otherwise have awarded for her future losses. This also includes the reduction to reflect accelerated payment.

117. For the reasons stated in the findings of fact, our decision is that the Claimant's losses should be calculated on the basis that she will work 50% of full-time for the remainder of her career. It is also worth pointing out that if, as the Respondent invited us to do, we had decided that her health will enable her to do a higher fraction of full-time in the future, then we would have had to apply that higher fraction to the notional earnings that she would have had from the Respondent as well; it would not just mean that we increase the amounts which we treat as her likely actual future earnings.

ACAS Uplift.

118. In its skeleton argument, the Respondent concedes:

> 25. It is admitted that an ACAS Uplift is available but only in respect of the dismissal claims. There is no ACAS Code that can apply to the lost opportunity claim.
>
> And
>
> 27. It is accepted that the Claimant is entitled to some uplift for non-compliance with the ACAS Code of Practice in light of the Tribunal's findings.

119. The Respondent argues that this is not a case in which there was no procedure at all followed. We agree with that.

120. The disciplinary section of the Code of Practice includes:

Para 4

- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put

121. Neither of those things were done.

122. There was no compliance with paragraphs 5, 9 (and therefore 10), 11, 18 of the Code. Further, while the Claimant had, in principle the opportunity to arrange to be accompanied, the actual meeting that she thought she was going to be attending was entirely different to the one which the Respondent had decided to hold.

123. There was also a breach of paragraph 29. The facts set out in the liability reasons clearly demonstrate that the Claimant was not informed of the results of the appeal as soon as possible. On the contrary, Mr Watson decided at an early stage that dismissal for the alleged SOSR reason set out in the

termination letter was not justifiable. However, several more months passed before the Claimant received an outcome letter which purported to say that the reason for the dismissal had been reclassified as redundancy, but the dismissal itself was not being over-turned.

124. The Respondent is a large organisation, with a dedicated Human Resources department. Furthermore, it deliberately and consciously decided to dismiss the Claimant without giving her any opportunity to say anything.

125. The Respondent itself (both Mr Watson and Mr Woodcock) later decided that the "some other substantial reason" argument could not be sustained (and also that there would have been no proper basis to dismiss for alleged misconduct either, based on the arguments that had been put forward about the alleged behaviour by the Claimant which had been said to justify the March 2019 SOSR dismissal decision). Therefore, the lack of a proper opportunity for the Claimant to (i) receive details of, and (ii) consider, and (iii) respond to the arguments that she had behaved in such a way during the consultation meeting (and interview, it was claimed) cannot simply be said to be a procedural flaw which made no substantive difference. The Respondent's breaches of the Code were serious, and deliberate, and denied the Claimant the opportunity to raise – prior to dismissal – points similar to those which led Woodcock and Watson to decide that the Claimant should not have been dismissed for the reasons which the Respondent purported to rely on in the termination letter.

126. The Claimant asked for the maximum 25% uplift, whereas the Respondent concede that an uplift was something that could be awarded in these circumstances, but argued that 10% would be appropriate. Our decision is that an uplift of 20% is appropriate. There was an appeal, but the appeal itself was flawed. Furthermore, prior to telling the Claimant that she was dismissed, there was a complete failure to investigate fairly or independently, or to seek the Claimant's views on what she was accused of having done during the meetings (or on the Respondent's opinion that her conduct in those meetings demonstrated that she could not work for the Respondent, on any team, under any line manager). So there was not a complete failure to comply with the Code, and we do not think 25% is appropriate. However, the breach was so serious that 20% is, in our judgment, the correct amount.

127. However, once we had completed the arithmetic (as described below), we applied the common sense and proportionality check. There is no simple formula for that. However, as set out in Wardle, we must avoid making an award for procedural wrongdoing which is so high that it does not command the respect of the public.

Calculations and summary

128. As set out above, there was no financial loss award for the loss of chance of

being appointed to Head of Bid Management.

129. As mentioned above, there was £25,000 for injury to feelings.

130. For interest, the applicable rate is 8% per annum. There are 1274 days from 29 March 2019 to 22 September 2022. Interest on injury to feelings is therefore: £25000 x 0.08 x 1274/365 = £6980.83

131. There is no basic award for unfair dismissal.

132. There is an award of £300 for loss of statutory rights (and nothing separate for loss of long notice entitlement).

133. We have calculated the sums which we have found to be the loss of income from Mears for the period up to the Claimant's 70th birthday in 2041. We decided that there was not a high enough chance that the Claimant would have been promoted to apply an increase to earnings because of a chance of promotion within Mears.

134. For financial loss up to date of remedy hearing (22 September 2022):

    a. We assessed the losses for the period from the effective date of termination to 31 December 2019 to be nil, based on combination of what she would otherwise have earned in that period, the UNUM payments, and the payment in lieu of notice. We rejected the Respondent's argument that there was a negative loss, or an excess of income for which it should be credited, for this period.

    b. The Claimant's losses from 1 January 2020 up to 1 June 2022 are £44,789.86

    c. The parties are agreed that loss from 1 June 2022 to 22 September 2022: £2969.76

    d. The aggregate is therefore £47,759.62

135. The interest on that £47,759.62, at 8% per annum, using the parties' agreement that the period should be treated as 91 weeks, is £6686.35.

136. For future loss, we found that the UNUM payments would continue until 31 December 2022, and then cease.

    a. Loss from 23 September 2022 to 31 December 2022:

       The Claimant is worse off by

       [(Mears pay she would have earned) – (Actual Pay from new job plus UNUM income) + (amount by which Mears pension contribution exceeded pension contribution for new job)].

Per week that is [£962.99 – £841.69 + £49.52] = £170.82 per week

The number of weeks is 14.28.

So loss for this period 14.28 x £170.82 = £2439.31

b. Loss from 1 January 2023 to 31 May 2025 (which is the date when the Claimant will have been in current job for 3 years; we decided there was no realistic chance of promotion in this period). She will no longer be receiving UNUM payment, but otherwise the calculation per week is the same as above.

   The Claimant is worse off by

   [(Mears pay she would have earned) – (Actual Pay from new job) + (amount by which Mears pension contribution exceeded pension contribution for new job)].

   Per week that is [£962.99 – £442.82 + £49.52] = £569.69 per week

   The number of weeks is 126 weeks.

   So loss for this period 14.28 x £569.69 = £71780.94

c. Loss from 1 June 2025 to 27 July 2041. As mentioned above, we have applied a 10% increase to the Claimant's current weekly salary amount to reflect the chance that she might be promoted with the current employer, or move to a better paid job elsewhere)

   The Claimant is worse off by

   [(Mears pay she would have earned) + (Mears pension contribution) – (Actual Pay and pension contribution from new job increased by 10%)].

   Per week that is [£962.99 + £64.31 – £503.37] = £523.93 per week

   The number of weeks is 843weeks.

   So loss for this period 843 x £523.93 = £441672.99

d. The aggregate of these is therefore £2,439.31 + £71,780.94 + £441,672.99 = £515,893.24

e. However, for future loss, we have to factor in the chances that the Claimant would have left the Respondent's employment, for fair and non-discriminatory reasons, before the age of 70. That includes the chance of, amongst other things, not living to the age of 70. In principle, we might also have used tables to come up with an exact reduction for accelerated payments, for example. However, the parties were agreed that the appropriate approach did not require us to itemise that separately. Our decision was to apply a 20% reduction, and therefore the overall figure for future financial loss was £412,714.59.

137. So the total of all of the above, prior to any ACAS uplift was [£25,000 + £6,980.83 + £300 + £47,759.62 + £6,686.35 + £412,714.59]. That came to £499,441.39.

138. If we applied an ACAS uplift of 20%, then that would have been in the region of £100,000. We decided that that was too high. We therefore decided to reduce the cash figure for the uplift, on the grounds of proportionality, to £50,000.

139. So, prior to grossing up, the aggregate amount was £549,441.39.

140. We awarded all of the above financial losses under the Equality Act 2010. We did not make a separate award for the unfairness of the dismissal, as that would have been double recovery. The recoupment regulations do not apply.

141. We invited the parties to agree the appropriate sum for grossing up based on our decisions and calculations as set out above (and without prejudice to their rights to challenged those decisions and calculations). The parties kindly did so. The appropriate additional amount for grossing up was £415,023.98. The overall aggregate was therefore £964,465.37.

Employment Judge Quill

Date: 20 December 2022

Reasons sent to the parties on

22/12/2022

N Gotecha

For the Tribunal office