EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Daniels	**v**	**(1) United National Bank Ltd**
		(2) Mr B Firth

Heard at: Central London Employment Tribunal (by CVP)

On: 17 March 2023

Before: Employment Judge Brown

Members: Dr V Weerasinghe
Ms J Cameron

Appearances:
For the Claimant: Ms L Banerjee, Counsel
For the Respondents: Mr J Davies, Counsel

REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The Respondents shall pay the Claimant a grand total of £137,894.37 in compensation for his claims, including injury to feelings, past loss, an ACAS uplift and grossing up.**

2. **The grand total includes:**

   2.1. **A global injury to feelings award of £7,200 (that figure has already been reduced by 40% for Polkey).**

   2.2. **An award for past economic loss of £ 78,924.20 (already reduced for Polkey) .**

   2.3. **An ACAS uplift of 10%.**

3. **The Claimant mitigated for loss.**

4. **A further Polkey deduction is not appropriate.**

5. **No reduction for contributory fault is appropriate.**

REASONS

Preliminary

1. By Judgment promulgated on 8 December 2022 the Tribunal found that

   1.1. The First Respondent automatically unfairly dismissed the Claimant under *s103A ERA 1996* and the Respondents both subjected the Claimant to a detriment by dismissing him.

   1.2. It was 40% likely that the First Respondent would have dismissed the Claimant fairly in any event.

2. For the purposes of this remedy hearing, the following was agreed between the parties:

   2.1. the Claimant's annual gross pay was £ 165,000;

   2.2. the Claimant was not entitled to a basic award because he did not have 2 years' service;

   2.3. the Claimant was paid 13 weeks' notice and this should be deducted from his compensatory award;

   2.4. there was no claim for future loss because the Claimant was due to start a new role immediately after the remedy hearing, which would fully extinguish any ongoing loss;

   2.5. loss of salary and pension loss are prima facie attributable to the detriment or dismissal.

3. The following matters were in dispute:

   3.1. the Claimant's net weekly wage – the Respondent contended that it was £1,724.72 per week, calculated from the Claimant's last 3 month's payslips; the Claimant said it was £1,859.80 per week, using an online calculator for net pay from gross pay. The Claimant contended that the Respondent's figure was incorrect, because a Tax Code had been applied to his wages in that period, to recover underpayments of tax from a previous employment;

   3.2. the correct amount to be awarded for compensatory loss: within the compensatory award, the period of loss and mitigation were both in dispute, as was whether the Claimant should recover compensation for loss of private medical insurance and for having had to sell a property.

   3.3. The amount of an injury to feelings (and aggravated damages) award; and

   3.4. The amount of any ACAS uplift.

4. The Respondents contended that there should be a further Polkey deduction to reflect the likelihood the Claimant would have left the First Respondent's employment in any event, of his own accord.

5. The Respondents additionally said that there should be a deduction for contributory fault.

6. The Respondent did not seek to argue that the Claimant had not made his protected disclosures is good faith.

4. The Tribunal heard evidence from the Claimant. It heard evidence from Mr Firth, the Second Respondent. There was a Bundle of documents. Both parties made submissions. The Tribunal reserved its judgment. The hearing was conducted by CVP videolink with no interruptions.

Relevant Facts

5. The Claimant was dismissed by the First Respondent on 1 April 2021, having started his employment there in July 2019.

Duration of Former Employments and Reasons for Leaving

6. The Claimant's CV showed that he had worked at numerous large banks and/or financial institutions before he was employed by the First Respondent; and that his employment at each previous firm, since 2005, had been of under 3 years' duration - and had frequently been of only 1 – 1.5 years' duration.

7. An expert report on the Claimant's autism, p254, recorded of the Claimant, "… he loses his job every 18 months. This is usually related to interpersonal difficulties with colleagues rather than his technical skills or knowledge."

8. However, the Claimant gave evidence about the reasons he had left his previous employers. The reasons included being head hunted (ICICI Bank UK Plc to Wiprow), being appointed as deputy head of a liquidity team (Ernst and Young to Bank of America Merrill Lynch) and redundancy due to not wishing to move to Germany (CGI to Grant Thornton). The Claimant also gave evidence that the autism report was based on his account to the expert of his feelings about job loss, rather than the facts.

9. The Tribunal accepted the Claimant's evidence about the reasons for these moves and found that the Claimant had left his previous roles, not because of interpersonal difficulties, but because he received attractive job offers elsewhere, or because his roles had come to an end.

10. The Tribunal also accepted the Claimant's evidence that, although he had considered other jobs during his employment at the First Respondent, when he was approached by head hunters or recruiters, he had not actively looked for alternative employment. It also accepted his evidence that he was happy in his employment with the First Respondent and enjoyed its convenient location, close to his flat in London.

Amount of Net Pay

11. In January – March 2021 the Claimant received £7,473.79 net per month after tax and national insurance, or £1,724.72 net per week, in pay from the First Respondent. The Claimant's payslips from the Respondent showed the tax code "K1978 M1". The Claimant told the Tribunal that that Code meant that HMRC was applying a higher tax rate, in order to recover underpaid tax from the Claimant's previous consultancy work done through his own company. The Tribunal accepted the Claimant's evidence regarding this. That was an unusual tax code. The Claimant was being taxed at a higher rate than a normal tax code. Using the government's online tax calculator, his net weekly pay would have been £1,859.80 applying standard tax codes for that level of income when he was employed by the First Respondent in 2021.

12. The Tribunal did not know when the K1978 M tax code would have come to an end. It noted that the Claimant was dismissed at the start of a new financial year. The Tribunal decided that it would use the government online tax calculator to calculate the Claimant's net loss of pay for the period April 2021 onwards, as there was no clarity as to the Claimant's likely tax code from April 2021.

13. Insofar as any grossing up would be necessary to the remedy award, the Tribunal would also only apply normal tax rates for grossing up, not the higher K1978 M tax rate applied by HMRC to the Claimant's 2020- 2021 income. That would mean that the Claimant, not the Respondent, would pay any higher rate due to HMRC on the Tribunal's award because of any previous underpayment of tax by him. That seemed a fair approach.

Efforts to Find Other Work

14. As a consequence of his dismissal by the Respondent, the Claimant became distressed and lost self-confidence, which the Tribunal will return to below. However, he was able to look for work.

15. He attended 40 interviews between April and December 2021. He applied for more than 170 jobs in 2022 and attended 37 interviews in 2022. He progressed to final stage interviews with 2 major institutions, but was not offered a job - paragraph [20] of his remedy witness statement.

16. The Claimant commenced a consultancy contract role with Grant Thornton on 18 October 2021. Under the consultancy arrangement, he received payments based upon the hours he worked. The terms of the consultancy contract allowed him to undertake additional external consultancy work for Nationwide. The consultancy was due to finish on 17 December 2022, but was extended. The Claimant has earned £66,347.48 in mitigation from his Grant Thornton Consultancy, and from another consultancy with Nationwide, since his dismissal by the First Respondent.

17. The Claimant told the Tribunal that he was not offered other jobs, despite his numerous applications. In his witness statement he said, "I told each interviewer that I was in a dispute with the Board of my former employer."

18. Mr Firth gave evidence that the Claimant was not required to tell future employers this. The Claimant was cross examined about him telling interviewers that he was in dispute with the First Respondent. It was put to him that he was unreasonable in his approach and had sabotaged his own chances of being employed.

19. The Claimant told the Tribunal that he only gave the explanation that he was in dispute with the First Respondent's Board when he was asked about the circumstances of him leaving the First Respondent. The Claimant said that he considered that he was required to be open and honest with future employers, particularly as the previous holder of an SMF4 role in a financial institution.

20. The Tribunal accepted the Claimant's evidence. He works in a highly regulated industry and the Tribunal accepted that he believed that he should be open and honest in applications for senior roles in which a high degree of honesty and integrity would be expected.

21. The Respondents contended that, from about July 2021, the Claimant could have found alternative employment paying a higher salary. Mr Firth told the Tribunal that, from his experience of attempting to hire a replacement for the Claimant, which had been very difficult, risk professionals like the Claimant are very much in demand. The Respondents did not produce evidence of suitable vacancies for the Claimant.

Medical Insurance

22. There was a dispute as to whether the Claimant had the benefit of private medical insurance during his employment with the First Respondent. Mr Firth told the Tribunal that the Claimant had not opted in to the First Respondent's private medical insurance arrangements. He said that the First Respondent had checked its records and had found that it held no form P11D recording any benefits in kind for the Claimant. Mr Firth said that the First Respondent was obliged to keep records of these forms for about 6 years, so the Claimant could not have had benefits in kind, including medical insurance, while at the First Respondent.

23. The Tribunal preferred Mr Firth's evidence on this and found that the Claimant did not have the benefit of medical insurance at the First Respondent.

Costs Consequent on Sale of Property

24. The Claimant also sought to recover storage costs and legal fees arising out of the forced sale of a London flat owned by his fiancée. He told the Tribunal that, because the First Respondent dismissed him, he could no longer afford to pay the mortgage on his fiancée's flat. However, he also told the Tribunal that his fiancée had lost her own job and that they had decided to move to Dorset.

25. The Tribunal did not award the Claimant compensation in respect of expenses arising out of the sale of his fiancée's flat. It was not clear to the Tribunal that the reason for the sale was the loss of the Claimant's job, rather than his fiancée's lack of finances. Nor was it clear that the sale was forced, rather than the result of a decision to relocate out of London. The Tribunal was given almost no documents relevant to this sale. It did not accept that the Respondents' late response to the remedy claim affected the Claimant's ability to produce supporting documents. This was an unusual head of claim, for which the Claimant ought to have provided supporting documents to justify it.

Injury to Feelings

26. The Claimant told the Tribunal that his dismissal has had a deeply detrimental impact on his mental health, in that he has suffered from sleeplessness, trauma, stress-related issues – including a bleed on the eye - lack of concentration and lack of social contact.

27. He relied on his liability hearing witness statement, wherein he told the Tribunal that he has suffered a severe loss of enjoyment in life: he has stopping reading for pleasure, whereas previously he typically read 2 books each week; he has ceased visits to his son; he had previously been an active runner and cyclist, but has stopped taking exercise on a regular basis and has suffered significant weight gain.

28. The Claimant told the Tribunal that friends have noted the severe strain and pressure he has been suffering, which has resulted in friends' visits being cut short.

29. The Claimant was not challenged on his assertion that his enjoyment of life has been badly affected by his dismissal.

30. The Claimant did not produce medical evidence to support his assertion that the dismissal caused physical symptoms such as a bleed on the eye. However, the Tribunal accepted the Claimant's evidence that his dismissal was traumatic for him and has led to him suffering disturbed sleep, withdrawal from social contact and being distracted and demotivated. It accepted that the dismissal led to him becoming uninterested in activities he had previously enjoyed, including reading and cycling.

31. The Tribunal also noted that the Claimant had been unable to secure commensurate employment for almost 2 years. The Claimant had told the Tribunal in his liability witness statement, "The financial strain on me has been considerable. Instead of a regular income, I have been forced to take on ad hoc consulting work."

32. The Tribunal found that the Claimant's loss of income and his now irregular working pattern would inevitably have had a detrimental impact on his wellbeing. He would inevitably have suffered anxiety because of his reduced income.

Relevant Law

Mitigation

33. When calculating the compensatory award in an unfair dismissal case, the calculation should be based on the assumption that the employee has taken all reasonable steps to reduce his or her loss. If the employer establishes that the employee has failed to take such steps, then the compensatory award should be reduced so as to cover only those losses which would have been incurred even if the employee had taken appropriate steps.

34. Sir John Donaldson in *Archibald Feightage Limited v Wilson* [1974] IRLR 10, NIRC said that the dismissed employee's duty to mitigate his or her loss will be fulfilled if he or she can be said to have acted as a reasonable person would do if he or she had no hope of seeking compensation from his or her employer.

35. In *Savage v Saxena* 1998 ICR the EAT commented that a three-stage approach should be taken to determining whether an employee has failed to mitigate his or her loss. The Tribunal should identify what steps should have been taken by the Claimant

to mitigate his or her loss. It should find the date upon which such steps would have produced an alternative income and, thereafter, the Tribunal should reduce the amount of compensation by the amount of income which would have been earned.

Expenses

36. The compensatory award for unfair dismissal can include expenses reasonably incurred by the Claimant in consequence of the dismissal: *s123(2)(a) Employment Rights Act 1996*.

Contributory Fault

37. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce any compensatory award by such proportion as it considers just and equitable having regard to that finding, *s123(6) ERA* 1996. In *Optikinetics Limited v Whooley* [1999] ICR 984: it was held that it is obligatory to reduce the compensatory award where there is a finding of contributory fault.

38. In *Nelson v BBC (No 2*) [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

(a) The relevant action must be culpable and blameworthy

(b) It must actually have caused or contributed to the dismissal

(c) It must be just and equitable to reduce the award by the proportion specified.

39. It is open to a Tribunal to make deductions both for Polkey and contributory fault.

40. Where there is a significant overlap between the factors the ET takes into account in making a *Polkey* deduction and in making a deduction for contributory fault, the ET should consider whether, in the light of that overlap, it is just and equitable to make a finding of contributory fault, and if so, what its amount should be. The overlap can mean that there is a real risk of the Claimant being penalised twice for the same conduct, *Lenlyn UK Limited V Kular* UKEAT/0108/16/DM.

Injury to Feelings

41. It has been common practice to make awards for injury to feelings in detriment claims even though there is no express provision in the statute for such an award: see *South Yorkshire Fire and Rescue Service v Mansell* UKEAT/0151/17 (30 January 2018, unreported).

42. The Tribunal is guided by principles set out in *Prison Service v Johnson* [1997] IRLR 162 in relation to assessing injury to feeling awards. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the Claimant, (without punishing the Respondent) only for proven, unlawful discrimination for which the Respondent is liable.

43. Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power.

44. It is helpful to consider the band into which the injury falls*, Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102. In Vento the Court of Appeal said that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of race or sex. The middle band should be use for serious cases which do not merit an award in the highest band and the lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

45. The Claimant's claim was presented on 29 June 2021. The relevant Joint Presidential Guidance provides, "In respect of claims presented on or after 6 April 2021, the Vento bands shall be as follows: **a lower band of £900 to £9,100** (less serious cases); **a middle band of £9,100 to £27,400** (cases that do not merit an award in the upper band); and **an upper band of £27,400 to £45,600** (the most serious cases), with the most **exceptional cases capable of exceeding £45,600**." These bands take account of the 10 per cent *Simmons v Castle* uplift.

Aggravated Damages

46. Aggravated damages are available for an act of discrimination (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162, [1997] ICR 275, EAT).

47. The award must still be compensatory and not punitive in nature, *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291, EAT . In that case, the EAT said that aggravated damages are usually an aspect of injury to feelings. The aggravating factors cause greater hurt, thus increasing damages. The EAT also said that a separate figure for aggravated damages can be given; or it can be wrapped up in one overall figure. The circumstances attracting an award of aggravated damages fall into three categories:

(a) The manner in which the wrong was committed. The basic concept here is that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase "high-handed, malicious, insulting or oppressive" is often referred to – it gives a good general idea of the kind of behaviour which may justify an award, but should not be treated as an exhaustive definition. An award can be made in the case of any exceptional or contumelious conduct which has the effect of seriously increasing the claimant's distress.

(b) Motive. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury. There is thus in practice a considerable overlap with (a).

(c) Subsequent conduct.

48. In *HM Land Registry v McGlue UKEAT*/0435/11, [2013] EqLR 701, EAT. The EAT said that aggravated damages 'have a proper place and role to fill', but that a tribunal should also 'be aware and be cautious not to award under the heading "injury to feelings"

damages for the self-same conduct as it then compensates under the heading of “aggravated damages”'.

Polkey and Discrimination

49. The *Polkey* principles can apply to compensation for discriminatory dismissals, *Abbey National plc and another v Chagger* [2010] ICR 397, CA.

ACAS Code of Practice

50. Where an employee is successful in a claim listed in Schedule A2 to TULR(C)A 1992 the tribunal has power to increase or decrease, as the case may be, by up to 25 % an award of compensation, where it has found that the employer, or employee, unreasonably failed to comply with a requirement of a relevant ACAS Code of Practice: *s207A TULR(C)A 1992*.

51. In *Allma Construction Ltd v Laing UKEATS/0041/11* (*25 January 2012, unreported*) Lady Smith suggested that a tribunal should approach an ACAS uplift in the following way: 'Does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Do we consider that that failure was unreasonable? If so, why? Do we consider it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? If we consider that the award ought to be increased, by how much ought it to be increased? Why do we consider that that increase is appropriate?' Similar guidance on structured decision-taking here was given by Judge Tayler in *Rentplus UK Ltd v Coulson [2022] EAT 81*, *[2022] IRLR 664*.

52. Guidance on quantifying an award was given by Griffiths J in *Slade v Biggs [2022] IRLR 216*, EAT, at [77] where it was suggested that the ET should pose the following questions:

"i) Is the case such as to make it just and equitable to award any ACAS uplift?

ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?

Any uplift must reflect “all the circumstances”, including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.

iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise.

iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is "just and equitable in all the circumstances", and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is "just and equitable" by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested."

53. The aim of the uplift is at least partly punitive, *Brown v Veolia ES (UK) Ltd UKEAT/0041/20 (6 July 2021, unreported)*.

Discussion and Decision

Weekly Wage

54. The Tribunal has found that it is appropriate to use the figure of £1,859.80 to calculate the Claimant's net weekly loss of pay.

Unfair Dismissal

55. The Claimant claimed a sum for loss of statutory rights for unfair dismissal. The Claimant did not have 2 years' service and did not have statutory rights. His employment had started in July 2019 and ended on 1 April 2021. He was more than 3 months away from acquiring statutory rights, which was a period considerably in excess of his statutory notice period. The Claimant did not explain the legal basis for awarding a sum for loss of statutory rights.

56. The Tribunal did not award the Claimant a sum for loss of statutory rights.

Polkey

57. The Tribunal did not find that an additional *Polkey* deduction was appropriate. The Respondents had argued at the liability hearing, for a *Polkey* deduction on the basis that the Claimant would have left the First Respondent of his own accord because of his dissatisfaction with the First Respondent, as reflected, for example, in his comments in his appraisal. The Tribunal had not made a *Polkey* deduction on that basis in its liability judgment because it did not consider that there were any substantial grounds for doing so. The Tribunal had made a Polkey deduction only on the grounds upon which it considered proper to do. The matter had therefore already been decided. For the avoidance of doubt, however, and if the Respondents were, in effect, asking the Tribunal to reconsider its decision on the *Polkey* issue, the Tribunal did not consider that it was appropriate to reconsider its decision, for the following reasons.

58. The Tribunal accepted the Claimant's reasons for having left his former employments. The vast majority of those reasons did not relate to interpersonal difficulties, or general dissatisfaction with an employer. On the contrary, the Claimant left previous

employment for better job opportunities, or where his role had come to an end. The Tribunal accepted the Claimant's evidence that, although he had considered other jobs during his employment at the First Respondent, when he was approached by head hunters or recruiters, he had not actively looked for alternative employment. There was no evidence that he was considering any particular other work, or that he had decided to leave the First Respondent. Indeed, on all the evidence, the Tribunal considered that the Claimant was happy in his own team at the First Respondent and was a committed and hardworking employee there. It accepted that he enjoyed living close to work. It did not consider that there was any appreciable likelihood that he would have left of his own volition.

Contributory Fault

59. The Respondents also argued, at the liability hearing, that there should be a finding of contributory fault. The Tribunal did not make a finding of contributory fault. For the avoidance of doubt, the Tribunal does not consider that any finding of contributory fault is appropriate. The Claimant's relevant conduct was not sufficiently wrong to be properly described as culpable or blameworthy. The Tribunal found that "there were significant and ongoing concerns about the claimant's judgment and communication." However, this was not a case where, for example, the Claimant was warned about his performance, but refused to improve, or was reckless about the need to improve, so as to be blameworthy in relation to his performance.

60. Even if the Claimant's conduct was culpable, the Tribunal decided that the 40% *Polkey* deduction made in respect of the same conduct appropriately reflected the degree to which his conduct might have contributed to his dismissal. Making an additional finding of contributory fault in respect of that same conduct would result in an unjust and inequitable, excessive deduction from compensation, *Lenlyn UK Limited V Kular* UKEAT/0108/16/DM.

Past losses – Mitigation

61. It is for the Respondents to show that the Claimant has not taken reasonable steps to mitigate his loss.

62. The Tribunal did not find that the Claimant acted unreasonably in telling future employers, when asked, that he was in dispute with the First Respondent. He works in a highly regulated industry and the Tribunal found that he was reasonable to consider that he should be open and honest in applications for senior roles in which a high degree of honesty and integrity would be expected.

63. The Respondents contended that, from about July 2021, the Claimant could have found alternative employment paying a higher salary. The Respondents did not produce evidence of suitable vacancies for the Claimant.

64. On all the evidence, the Tribunal did not find that the Claimant had acted unreasonably in his attempts to mitigate his loss. He made a multitude of applications and did, in fact, mitigate some of his loss through his consultancy roles. Despite attending numerous interviews and having been exceptionally diligent in his job searches, the Claimant did not secure alternative employment. He mitigated his loss by accepting

consultancy work. The Tribunal was unable to find that the Claimant would have secured any other role at a higher rate of pay if he had acted differently.

65. The Tribunal therefore awarded the Claimant the whole of his past loss of earnings between the date of his dismissal and the remedy hearing. The relevant period was 102 weeks. 102 weeks x £1,859.80 = £189,699.60. It was not in dispute that the Claimant also suffered pension loss of £317.31 per week. 102 x £ 317.31 = £32,365.62. Total 189,699.60 + 32,365.62 = £222,065.22.

66. The Tribunal deducted (13 x £1,859.80 = £24,177.40) for the 13 week notice period and the £ 66,347.48 the Claimant had earned in mitigation. Total deductions: £24,177.40 + £66,347.48 = £ 90,524.88.

67. Net loss for the 102 weeks was £131,540.34.

68. Applying the Polkey deduction X 0.6 = £ 78,924.20.

Injury to Feelings

69. The Tribunal decided that it would make an injury to feelings award for the protected disclosure detriment of dismissal. It noted that cases involving awards for protected disclosure detriment had been considered by the EAT and the EAT had not indicated that such awards should not be made. The Tribunal decided that it should not depart from the normal practice of making injury to feelings awards in whistleblowing detriment cases without clear authority on the matter.

70. The Tribunal accepted that the Claimant had suffered severe injury to feelings as a result of his dismissal. His distress has been such that he has lost enjoyment in life for about 2 years- losing contact with his son, reducing time with friends, and giving up reading and regular exercise. His sleep and concentration have both been affected. While he has striven to find alternative, commensurate work, he has been unsuccessful in doing so until very recently. That has caused him significant financial worries.

71. The Tribunal considered that the Claimant's loss of enjoyment in life has been particularly marked and that his injury to feelings award should properly reflect the severely deleterious effect of the Respondents' actions.

72. Regarding aggravated damages, the Claimant contended that these were appropriate because of the way in which the Respondents had conducted the litigation, including their high handed and late preparation for the remedy hearing. The Claimant also contended that the way in which he discovered about his dismissal was high handed and damaging.

73. The Tribunal made findings about the Respondents' handling of the Claimant's dismissal in its liability judgment at [359] – [360]. The Tribunal did not agree with the Claimant's description of his dismissal as being harsh and perfunctory.

74. It did not agree that the Respondents' conduct of the litigation had been high handed. Certainly in the Tribunal both the Respondents' Counsel and witnesses had been courteous and professional. The Respondents were entitled to require the Claimant to prove his loss at the remedy hearing.

75. It was not clear to the Tribunal, in any event, that these features, in fact, exacerbated the Claimant's injury to feelings.

76. It did not make a separate award of aggravated damages.

77. The Tribunal acknowledged that the dismissal was a single act of detriment and that the Claimant had been able to continue to do consultancy work afterwards.

78. Nevertheless, it considered that the Claimant's retreat from the life he had previously enjoyed, because of his dismissal, was so severe and damaging that an award above the bottom band of Vento was appropriate.

79. The appropriate award for injury to feelings in the case was £12,000.

80. It was 40% likely that the Respondent would have dismissed the Claimant at the same time in any event. It was therefore appropriate to apply the *Polkey* deduction to the injury to feelings award.

81. £12,000 x 0.6 = £7,200.

Breach of ACAS Code

82. The ACAS Code of Practice No 1 on Disciplinary and Grievance Procedures does apply to a conduct / capability dismissal, even if the employee has less than 2 years' service. The Claimant's dismissal was not for the principal reason of redundancy or failure to renew a fixed term contract, which would disapply the Code.

83. The Tribunal decided that the First Respondent's breaches of the ACAS Code of Practice were numerous. The First Respondent did not warn the Claimant that there were issues with his performance or conduct and did not provide the Claimant with copies of written evidence, in breach of paragraph [9] CoP. It did not hold a meeting before deciding to dismiss the Claimant, in breach of paragraphs [11] [12] and [18].

84. The Tribunal can make an uplift of up to 25% pursuant to *TULR(C)A 1992, s 207A.* The uplift applies to complaints listed in TULR(C)A Schedule A2. These include unfair dismissal and detriment complaints.

85. In this case, there was a thoroughgoing failure to adhere to a fair process. However, the Tribunal accepted that the Respondents considered that the Claimant did not have employment rights and, therefore, it was not necessary for them to show a fair reason for dismissal or follow a full process.

86. .As the Code does apply to dismissals, the Tribunal decided that the Respondent's failure to follow any part of it was unreasonable. However, because the Claimant did not have 2 years' service, it was just and equitable, in all the circumstances, to increase the claimant's award by a limited amount.

87. The Tribunal therefore awarded a 10% uplift. It was satisfied that this avoided double recovery, but, at the same time, reflected the punitive nature of the award for serious breaches of the Code.

88. Taking into account the amount of the award, that percentage uplift (about £ – see further below) was not disproportionate in absolute terms.

Applying the ACAS uplift

89. Before uplift, the award totalled: Injury to feelings: £7,200 + Unfair Dismissal compensatory award £ 78,924.20 = £86,124.20.

90. Adding 10%: £74,834.06 x 1.1 = £94,736.62.

Grossing up

91. It is appropriate to gross up the Claimant's award where it exceeds the £30,000 tax free element, to ensure that the Claimant is adequately compensated*Shove v Downs Surgical plc* [1984] IRLR 17, [1984] ICR 532.

92. The amount by which the award exceeds £30,000 and the amount which therefore needs to be grossed up is £64,736.62.

93. S 406 ITEPA has been amended to provide that, although 'injury' includes psychiatric injury, as from the 2018/19 tax year it does not include 'injured feelings'. For that reason, compensation for injury to feelings counts towards the £30,000 and will be taxable to the extent that it exceeds this sum, *Sir Benjamin Slade v Biggs* [2022] IRLR 216, EAT.

94. In this case, the award itself will take the Claimant into the 40% tax band.

95. Further, on his mitigation earnings in this tax year 2022-2023, it appears that he will already have used up his personal tax allowance of £12,570 and his 20% tax band on the next £37,700. (He earned £52,118.68 in 2022 and £1,621.58 up to 17 February 2023 and was due to start a well-paid job in the week commencing 20 March 2023).

96. The Tribunal therefore applied the 40% tax band to the award.

97. Grossing up £64,736.62 for 40% tax is £64,736.62 / 0.6 = £107,894.37.

Total Award

98. <u>The total award is therefore £30,000 (tax free) + £107,894.37 (element grossed up for 40% tax) = £137,894.37.</u>

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Employment Judge **Brown**

Date: 23 March 2023

SENT to the PARTIES ON

24/03/2023

FOR THE TRIBUNAL OFFICE