EMPLOYMENT TRIBUNALS

Claimant: Mr R Newlyn-Jones

Respondent: Herongrange Manpower Direct Limited
(Previously called Herongrange Security and Systems Limited)

Heard at: Cambridge Employment Tribunal

On: 8 and 9 March 2023

Before: Employment Judge Hutchings
Mrs L Davies (Tribunal member)
Mr K Rose (Tribunal member)

Representation
Claimant: Mr Bignell of Counsel
Respondent: Mr Kane (8 March only; did not attend in 9 March)

REMEDY JUDGMENT having been given at the hearing on 9 March 2022 and reasons being requested at that hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Tribunal delivered the following Remedy Judgment at the hearing on 9 March 2023.

The respondent shall pay compensation to the claimant of **£130,256.56* gross** made up as follows:

1. A basic award for unfair dismissal of £8,088.80
2. An award for the claimant's loss of statutory rights of £450
3. A compensatory award for unlawful discrimination of £116,715.53
4. Total net award £125,254.33.
5. *The award of £130,256.56 includes interest under the Equality Act 2010 and reflects the following adjustments:

   5.1. Deduction of payments received from the Insolvency Service; and

5.2. Grossing up of the award pursuant to section 401 of the Income Tax (Earnings & Pensions) Act 2003.

6. The recoupment provisions do not apply.

Preliminary matters

7. Representatives for the respondent have made several attempts to frustrate these proceedings. We record 3 attempts before this Tribunal.

8. First, we address an issue which arose after deliver of the Liability Judgment on 8 March 2023 as to whether Mr Kane could represent the respondent. Given our concerns as to how Mr Kane, a director of the respondent's parent company, a limited company registered at Companies House, mislead the Tribunal, we consider it necessary to record the issue in these reasons.

9. After Liability Judgment was delivered by the Tribunal at the hearing on 8 March 2023 Mr Kane told us he had no connection with the respondent. By his own admission at the hearing when the Tribunal referred Mr Kane to records from Companies House, this was false. Further it is the Tribunal's record that Mr Kane has attended previous case management and preliminary hearings as representative of the respondent. We find that Mr Kane deliberately mislead the Tribunal. In fact, Mr Kane is connected to the respondent and is very familiar with the respondent.

10. Before it transferred to Herongrange Group Limited 100% of the shares in the respondent were owned by a company called Venture (Group) 2017 Limited. At that time Mr Kane was the sole shareholder of Venture (Group) 2017 Limited. When questioned by the Tribunal he admitted that he would have had to authorise this transfer (despite maintaining that he did not recall doing so). The transfer took place recently, on 23 December 2022. Mr Kane is also a director of the company to which the shares in the respondent were transferred, Herongrange Group Limited. The other director is Mr Steven Withers. Mr Kane told us that either he did not attend or cannot recall attending the board meeting in December 2022 which authorised the purchased by Herongrange Group Limited of the shares in the respondent from Venture (Group) 2017 Limited. As the sole director of Venture (Group) 2017 Limited at that time only he alone could authorise the transfer. We find that he did so (the transfer having being recorded at Companies House) in December 2022 and his statement to the Tribunal that he could not recall doing so is plainly false given the proximity in time of this transaction.

11. It is the finding of this Tribunal that Mr Kane is not credible and deliberately mislead the Tribunal to frustrate the hearing. It is also the finding of this Tribunal that Mr Kane's connection to the respondent is sufficient to allow him to represent the respondent in these proceedings. Indeed, he attended with the intention of doing so, telling the Tribunal clerk that he was the respondent's representative, then subsequently told the Tribunal he did not know anything about the situation. We note that Mr Kane has attended previous hearings in these proceedings. We further note that the Tribunal gave Mr Kane the opportunity to respond to the applications in the hearing and each time he told the Tribunal that he had nothing to say.

12. It is disappointing and of concern by reference to the Companies Act 2006 and the principles of English company law that a director of companies registered

in England and Wales knowingly mislead the Employment Tribunal. We state our findings of fact only, mindful that it is not within the jurisdiction of this Tribunal to consider this matter further.

13. Second, on 9 March 2023, by email sent at 10.48am, the respondent made an application to adjourn the second day of the hearing (9 March 2023), stating: *"Our representative David Kane is struggling to get to the courts today due to the adverse weather we have been experiencing in the Midlands and North. He has been on the roads for several hours now and the weather has had a big impact on his arrival time."*

14. We note that the respondent telephoned the Employment Tribunal administration at Watford and informed them Mr Kane's satnav had an arrival time of 12.30pm. We received no further updates as to Mr Kane's progress with his journey. The message of the Tribunal that the hearing would not start until 12.45pm was relayed to the Tribunal administration to be passed to the respondent. We note that the respondent is based in Northamptonshire, as is the claimant, who was able to attend on time. Members of the Tribunal Panel also travelled from north Midlands and did not experience any issues with the journey.

15. This email does not copy the Claimant as required by Rule 92 of the Employment Tribunal Rules of Procedure 2013. Indeed, the email, from the respondent's HR manager, states: *"Please can claimant's solicitor forward onto Mr Newlyn-Jones as he has not been included in any other correspondent so do not have his contact details."* Despite repeated reminders in the Orders of the Tribunal since 2020, and requests from the claimant's solicitor, by this statement the respondent admits that it has not included the claimant in any other correspondence, contrary to Rule 92 thereby flagrantly disregarding the rules of the Employment Tribunal.

16. On 8 March the Tribunal delivered its judgment on liability. The hearing on 9 March was delivery of an oral Remedy Judgment. Evidence and submissions were completed on 8 March. There is no prejudice to the respondent in not being represented at this hearing to hear delivery of the Remedy Judgment. A written judgment is sent out after the hearing and parties have 14 days from the day it is sent out to request written reasons. We do not consider non-attendance a reason to adjourn delivery of a remedy judgment. Indeed, the claimant requested written reasons at the hearing.

17. By email at 10.59 the respondent requested an adjournment of the second day *"to be able to seek legal advice and the safety of our representative travelling to the courts from the midlands."* We have addressed non-attendance above. As to the request to seek legal advice. The claim form was served on 17 March 2020. The respondent has had 3 years to seek legal advice. It is a finding of this Tribunal in its Liability Judgment that the respondent has:

    17.1. Consistently failed to engage with proceeding, attending hearings with no relevant defence or witness evidence.

    17.2. Repeatedly ignored Orders of the Employment Tribunal (including disclosing documents, preparation and delivery of the hearing file, of witness evidence).

17.3. Attempted to frustrate the fair legal process: by email from Claire Malham dated 3 March 2023 the respondent requested an adjournment of the hearing on 8 and 9 March 2023 on grounds this Tribunal have found to be plainly false. Indeed, in this email Ms Malham actively misleads the Tribunal. The findings of fact in this matter are recorded below.

18. For these reasons the respondent's request to adjourn the hearing on 9 March 2023 was refused.

19. Third, it is relevant to the overall conduct of the respondent to record in these reasons the request made by the respondent on 3 March 2023 to postpone the hearing on 8 and 9 March 2023. By email from Claire Malham, the respondent's human resources manager, the respondent requested an adjournment saying it had received the hearing bundle from the claimant within 7 days of the hearing. The email misleads the Tribunal; by the case management order of Judge Tynan dated 11 July 2023 the respondent was ordered to produce the bundle. It failed to comply with this order and on 16 September 2022 the claimant produced the bundle. The claimant produced an updated bundle on 2 March 2023. This is the bundle about which the respondent complains; it contains an additional 16 pages from the bundle the claimant sent to the respondent in September 2022. We find that Claire Malham's email requesting an adjournment mislead the Tribunal as follows:

    19.1. That it was the claimant's responsibility to produce the bundle when, in fact, by the Order of EJ Tynan it was the respondent's responsibility; and

    19.2. The claimant did not do so until within 7 days if the hearing; in fact the claimant had produced the bundle in September 2022 when the respondent failed to do so and updated it with 16 additional pages.

20. In fact, it was the respondent's responsibility to produce the bundle, it did not do so and instead attempted to postpone the hearing on false grounds. This is a further example of the respondent's attempt to frustrate fair process in these proceedings.

21. Mr Bignell informed the Tribunal that the respondent had recently changed its name. The Tribunal has seen a copy of the certificate of incorporation on change of name filed at Companies House on 15 February 2023.

22. Accordingly, the respondent's name in these proceedings is amended to Herongrange Manpower Direct Limited.

23. Any change of name does not change the legal entity for the purposes of Judgments of the Employment Tribunals. The Judgments of the Employment Tribunal can be enforced against subsequent changes of name by a limited company, the record of the change of name being held on the public register at Companies House.

Evidence

24. For this hearing on remedy, we had the following evidence:

24.1. A hearing file of 264 pages;

24.2. 2 witness statements from the claimant, detailing the events surrounding dismissal, his attempts to find employment since that date and the impact of the decision to dismiss him, and the way it was handled, on his health.

24.3. An updated schedule of loss from the claimant detailing his losses from the date of his dismissal to the date of this remedy hearing. The schedule of loss states the claimant's gross and net weekly pay while employed by the respondent. The claimant is not seeking reinstatement or re-engagement.

24.4. We afforded Mr Kane the opportunity ask questions of the claimant. He declined, telling us that he did not have any questions to ask.

25. The figures in the schedule of loss were not challenged by the respondent and accord with the evidence in the bundle as to the claimant's salary and pension contributions. There are no figures in mitigation as the claimant has not found new employment for reasons he explained in his witness statements, which we address below. Mr Bignell made submissions on the schedule of loss. Mr Kane told the Tribunal that he *'did not have a problem with the schedule of loss"* and could not challenge it as it was not within his knowledge. It is noted that the respondent did not challenge the figures presented by the claimant nor his case that he cannot work again. All figures and evidence submitted by the claimant is unchallenged.

26. The evidence shows that the claimant received payments from the government's insolvency service. We have seen evidence of receipt of these. The amounts are correctly deducted on the claimant's schedule of loss. The claimant has not received any State benefits following his dismissal, so no issues of recoupment arise.

Findings of fact

27. The findings of fact on liability are set out in the reasons for the liability judgment dated 12 March 2022. Briefly, this Tribunal found that the claimant was automatically unfairly dismissed as the his employment had transferred to the respondent by virtue of regulation 4(2)(a) Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations 2006) on or around 10 December 2019. This Tribunal further found that the claimant established a case that his dismissal was automatically unfair as the principal reason for the dismissal was the TUPE transfer on the basis of his evidence to this Tribunal that the dismissal was very close in time to the transfer (10 December 2019). We concluded that this degree of proximity evidenced that the TUPE transfer was the sole or principal reason for the dismissal.

28. In its Liability Judgment this Tribunal has also found that the reason given for the claimant's dismissal in Ms Baxter's letter of 10 December 2019, namely that Herongrange Limited had been forced to make business cuts due to their biggest client going bust the previous week, was plainly false and that the claimant's dismissal had been pre-planned as evidenced by Clause 5.5.1 of the Agreement dated 1 December 2019; we found that this clause falsely asserted that the claimant had objected to being TUPE transferred.

29. In our decision on liability this Tribunal found that the respondent has provided no evidence to show that the principal reason for the dismissal was not the TUPE transfer. Indeed, the defence in the respondents ET3 is 3 sentences long. Employment Judgment Ord found that the third sentence is plainly false. We have found that the 2 remaining sentences do not relate nor are they a defence to a claim of automatic unfair dismissal by way of a TUPE transfer.

30. In proceedings which have been ongoing for 3 years the respondent has not made any applications to the Tribunal to amend its ET3 not least to a defence to the claims brought against it or at all. This approach to Employment Tribunal proceedings is curious. It is either very foolish or the respondent considers there is another way to defeat genuine claims brought against it. Quite simply there is not. The law is clear and the principle of the rule of law ensures that nobody, which includes legal persons such as companies, is above the law. Accordingly, in our decision on liability we found that there is no defence before us to the claim of automatic unfair dismissal by way of TUPE transfer and the damages detailed below are awarded.

31. As to the complaint of direct age discrimination, in its Liability Judgment the Tribunal found that the respondent treated the claimant less favourably than Mr Petrescu, the claimant's identified comparative. The claimant was dismissed whereas Mr Petrescu was retained following the TUPE transfer and the reason for the respondent's less favourable treatment was the Claimant's age. On that basis the response was struck out with no reasonable grounds of success

32. The claimant was aged 66 when he was dismissed on 10 December 2019. By the date of termination of employment, the claimant was working part time.

Past employment

33. In the absence of challenge, we accept the claimant's evidence that in the first 6 months following his dismissal he was feeling depressed and anxious. He searched for alternative part time employment on recruitment websites such as 'Indeed' for part time work which would suit his skills and abilities but did not find anything.

34. In making this finding we are mindful that when considering the extent to which a party has been unfairly dismissed or discriminated against, as here, the balance of probably is on the respondent to show that the claimant acted unreasonably. A claimant does not have to lower their expectations immediately. It is for us to determine the date they should have found work.

35. In not challenging the claimant's evidence the respondent has not discharged the burden. However, mindful that any compensatory awards must be just and equitable, in circumstances where the respondent has not engaged, we must consider when it would have been reasonable on the evidence of the Claimant alone. In making this finding we are also mindful that, while the claimant says that he was too distressed to work, we have no medical evidence to support the period in 2020 when we consider it reasonable to have sought work.

36. In March 2020, the country was struck by the Covid-19 Pandemic and the went into lockdown. This made finding another job very difficult. Given the claimant's age and the physical difficulties he experienced with his back, we find that he could not have been expected to secure employment during this period due to

the national lockdown. There was a short period in the summer of 2020 when lockdown lifted; given his age and physical limitations we do not consider it was reasonable for the claimant to secure work during this time.

37. This brings us to December 2020, one year after the dismissal. For the reasons stated for that year we find that the claimant could not have secured employment due to the impact of his dismissal and the circumstances of the Covid-19 pandemic.

38. From January 2021 the claimant says he could not work as he was distressed and anxious. In submissions Mr Bignell told us that there was a 6-month period prior to the claimant self-referring where he was in denial about the impact of the dismissal on his mental health and this is the reason there is no medical evidence until the letter evidencing that the claimant self-referred on 26 May 2021. Notwithstanding the lack of medical evidence for the first part of 2021, we do consider it was reasonable for claimant to have found a job of comparable pay at that time (£309.71 per week) within 2 months / 8 weeks.

39. Following his self-referral, the claimant was assessed on 1 June 2021 and was scored in the severe range of depression and the moderate range for anxiety disorder. The claimant undertook 4 sessions of Low Intensity Cognitive Behavioural Therapy with a Psychological Wellbeing Practitioner. He was discharged from the service on 7 September 2021. There is no evidence of other mediation.

40. The claimant's evidence is that his depression and anxiety disorder *'quickly got worse again and has remained so since. I have lost all my confidence. I have low self-esteem'* This evidence is unchallenged. However, the only medical evidence before the Tribunal relating to the period after 7 September 2021 is the letter dated 16 Feb 2023, 17 months after the previous assessment. We do not have any GP records in the interim. The February 2023 letter records that a telephone assessment on 10 February 2023 recorded that the claimant presented with low mood and depression and anxiety. We have only a snapshot of the claimant's health conditions over a 17-month period. We find that it was reasonable for the claimant during the period 7 September 2021 to 10 February 2023, to have found work; this is a period of 6 months /26 weeks.

41. Therefore, for the period from dismissal on 10 December 2019 to the hearing today we consider that there are 34 weeks when it was reasonable for the claimant to have secured new employment and a period of 135 weeks when the claimant could not work.

Future employment

42. The claimant considers that he cannot work again until his retirement at 75. He has financial obligations, including a mortagage. It is the claimant's evidence that his anxiety and depression has been caused by the dismissal and the stress of claiming compensation from the insolvency office. There is no evidence of underlying health conditions that have been exacerbated by the dismissal or at all.

43. In the absence of any medical evidence that his anxiety and depression are so debilitating and will continue after disposal of these proceedings, we disagree that the claimant cannot work again. By own evidence the claimant is a dedicated and diligent worker; we note his evidence to the Tribunal "*in all my time with the company I was rarely off ill and hardly took time off for holidays. I*

loved the work." Indeed, the refers to a procedure in 2009 where he only had 2 days off to recover. Mindful of his work ethic, it is our judgment that he can and will want to do so.

44. In making this finding we note that the claimant is 70 years old and has been out of the workplace for 3 years and 13 weeks. We consider that it will be more difficult for him to secure employment at this age. In these circumstances, we find that it is reasonable for the claimant to secure employment by no later than 12 months from today.

Pension

45. We have evidence of the claimant's employee and employer pension entitlement in a workplace pension with Scottish Widows. Both the employer and employee pension contributions are the same:

    45.1. Annual: £1,413.24;

    45.2. Monthly: £117.77; and

    45.3. Weekly: £27.18.

Issues for the Tribunal

46. The Tribunal must determine compensation for the claimant's losses arising from his automatic unfair dismissal and direct age discrimination. The Tribunal must consider a basic award and a compensatory award. The Tribunal may award compensation for unfair dismissal under the Employment Rights Act 1996 or the Equality Act 2010; the basis of the compensatory award is within the discretion of the Tribunal.

47. The Tribunal must consider:

    47.1. In respect of unfair dismissal, what is the basic award?

    47.2. Should any sum be awarded for loss of statutory rights?

    47.3. What steps did the claimant take to replace his lost earnings?

    47.4. For what period of loss should the claimant be compensated?

    47.5. What other financial losses has dismissal caused the claimant?

    47.6. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

    47.7. Should there be an award of aggravated damages?

    47.8. Has the discrimination caused the claimant personal injury and, if so, how much compensation should be awarded for that?

    47.9. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

    47.10. Did the respondent or the claimant fail to comply with it?

    47.11. Was the failure to comply with the ACAS Code unreasonable?

47.12. Is it just and equitable to award an uplift because of the failure to comply with the ACAS Code and, if so, by what percentage, up to 25%?

47.13. Should interest be awarded? If so, how much?

47.14. Is it necessary to gross up any part of the award if it will be subject to tax?

The law on remedy

Compensation for unfair dismissal

48. An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the compensatory award (see section 118 of the Employment Rights Act 1996 ("ERA")).

49. The provisions relating to the basic award are contained in ERA sections 119 to 122 and in section 126. The award is calculated according to a formula based on age, length of service and gross weekly pay. A week's pay is subject to a statutory maximum which, at the time of the claimant's dismissal stood at £508 (see ERA section 227). As the claimant was aged 31 when she was dismissed, the relevant rate is one week's gross pay, capped at £508, for each full year of service.

50. The provisions relating to the compensatory award are contained in ERA sections 123, 124, 124A and 126.

51. A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions. Furthermore, where a loss of earnings would have been taxable in a claimant's hands, loss must be calculated net of tax and NI (see British Transport Commission v Gourley [1956] AC 185). The relevant questions are: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the conduct of the employer; and whether it is just and equitable to award compensation.

52. Permissible heads of loss include: past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights. The award for loss of statutory rights reflects the fact that the dismissed employee will have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed.; The award is generally for a conventional amount, at present somewhere in the region of £500.

53. An employee who has been unfairly dismissed must mitigate his loss by taking reasonable steps to reduce his losses to the lowest reasonable amount. This does not mean she has to take 'all possible' steps. The burden of proving a failure by a claimant to mitigate lies on the respondent.

54. ERA section 124 places a cap on the compensatory award for unfair dismissal which, at the date of the claimant's dismissal, was the lower of £83,682 or 52 weeks' pay.

Remedies for discrimination

55. Where a tribunal finds that an employer has discriminated against an employee, there are three types of remedy available (see section 124 of the Equality Act 2010 ("EQA")). The tribunal may:

55.1. Make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate.

55.2. Order the respondent to pay compensation to the complainant.

55.3. Recommend that the respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant.

Compensation for discrimination

56. The central aim of any award of compensation is to put the claimant in the position, so far as is reasonable, that she would have been in had the discrimination not occurred (Ministry of Defence v Wheeler [1998] IRLR 23 and Chagger v Abbey National plc [2010] IRLR 47). The types of financial loss that are recoverable are, in general, the same as for an unfair dismissal compensatory award and include the value of lost earnings and benefits. The same principles of mitigation apply.

57. There are a number of key differences:

57.1. There is no statutory cap on the amount of compensation.

57.2. The tribunal does not award simply what is considers 'just and equitable' but must assess loss under the same principles as apply to torts (see EQA s124(6) and s119(2)), though the two approaches will often lead to the same result.

57.3. The tribunal can award compensation for non-financial losses such as injury to feelings, aggravated damages and general damages for personal injury.

57.4. The Recoupment Regulations do not apply (recoupment does not arise in this case in any event).

57.5. The tribunal has power to, and generally should award interest on past losses.

Compensation for injury to feelings

58. An award for injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment she has received. It is compensatory and not punitive, but the focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (see Komeng v Creative Support Ltd [2019] UKEAT/0275/18).

59. Tribunals have a broad discretion about what level of award to make. The matters compensated for encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102). The general principles that apply to assessing an appropriate injury to feelings award were set out by the EAT in Prison Service v Johnson [1997] IRLR 162, as follows:

59.1. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the

discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award.

59.2. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

59.3. Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards.

59.4. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings.

59.5. Tribunals should bear in mind the need for public respect for the level of awards made.

59.6. The Court of Appeal in Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102 identified three broad bands of compensation for injury to feelings. There is within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. Compensation must relate to the level of injury to feelings experienced by the particular claimant.

59.7. Presidential Guidance states that in respect of claims presented on or after 6 April 2018, and taking account of Simmons v Castle [2012] EWCA Civ 1039, the Vento bands shall be as follows: a lower band of £900 to £8,600 (less serious cases); a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £49,000. This claim was presented on 9 August 2018.

Aggravated damages

60. Aggravated damages are an aspect of compensation for injury to feelings, and are awarded only on the basis, and to the extent that the aggravating features have increased the impact of the discriminatory act on the claimant and thus the injury to his feelings. They remain compensatory, not punitive.

61. Instances when an award of aggravated damages may be appropriate are:

61.1. Where an act is done in an exceptionally upsetting way.

61.2. Where the discriminatory conduct is evidently based on prejudice or animosity or is spiteful or vindictive.

61.3. Where there is similar subsequent conduct, such as conducting the hearing in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness.

62. A tribunal must consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to

the claimant so as to avoid double recovery. The tribunal also needs to explain why the aggravating factor makes an ordinary award for injury to feelings insufficient to compensate the claimant and the extent to which the aggravating conduct has increased the impact of the discriminatory act on the claimant (see Wilson Barca LLP and others v Shirin [2020] UKEAT/0276/19).

Interest

63. A tribunal can, and usually will award interest on awards of compensation made in discrimination claims under s124(2)(b) EQA and the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Regulations"). Interest is limited to past loss, that is loss to the date of the Remedy Hearing. The current rate of interest is 8%.

64. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see reg 6(1)(a) of the Regulations). Interest is awarded on all sums other than compensation for injury to feelings from the mid- point date (reg 6(1)(b)). The mid-point date is the date halfway through the period between the date of the discrimination complained of and the date when the tribunal calculates the award (regulation 4).

65. The tribunal has a discretion to award interest on a different basis if it considers that serious injustice would otherwise be caused.

Other matters common to compensation under the ERA and EQA

66. The burden of proof: it is for a claimant to prove his loss and this will include proof of the causal link between the unlawful treatment and the loss. In many cases this will be obvious or relatively easy for a claimant to achieve.

67. As noted above, the claimant is under an obligation to take *reasonable* steps to mitigate his loss, but it is for the respondent to prove with evidence that she has failed to do so.

Choice of basis for compensation

68. It is a matter for the tribunal to decide whether to award compensation either under the ERA or EQA. It must, however, avoid double recovery.

The relevance of Codes of Practice

69. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A") an award of compensation for unfair dismissal can be increased by up to 25% if the employer has unreasonably failed to comply with a relevant Code of Practice issued by ACAS or the Secretary of State (there is a corresponding power to reduce awards by up to 25% where an employee unreasonably failed to comply with a relevant Code). This power to increase or reduce does not apply to a basic award for unfair dismissal (see ERA sections 118 and 124A).

Conclusions

Compensation under the ERA or EQA?

70. Apart from those awards that can only be made under the ERA, namely a basic award for unfair dismissal and compensation for loss of statutory rights, we

have decided to assess the claimant's losses under the EQA. This is so that we can award interest on the compensation to which the claimant is entitled to reflect the time which has elapsed since his discriminatory dismissal. We find that this reflects the justice of the case.

The basic award

71. Having regard to the claimant's length of service and age at dismissal we award 19.5 weeks' gross pay by way of basic award for unfair dismissal. We do not need to apply the statutory cap as the claimant's weekly wage of £414.81 was below the 2019-2020 statutory cap of £525.

72. Therefore, we make a basic award of **£8,088.8**.

Compensation for loss of statutory rights

73. We make an award of **£450** for loss of statutory rights.

Immediate / past loss of earnings and pension contributions

74. Immediate (sometimes called 'past') loss of earnings is the phrase used to describe the loss of earnings up until the tribunal hearing where remedy is determined. It is to be contrasted with future loss of earnings which are those losses suffered after the hearing. The tribunal will compare the financial circumstances of the claimant, had the unlawful act not occurred, with the circumstances in which they now find themselves. Both require the tribunal to assess uncertain scenarios: would the claimant have remained employed or would they have been dismissed in any event, if so would they have found equivalent employment or would they have suffered the same difficulties as they have experienced, or might they have been promoted and received higher pay; when did the claimant obtain equivalent remuneration, or when ought they to have done so? This tribunal has made findings as to the personal characteristics of the claimant (age and health).

75. Now we must assess the loss flowing from the dismissal, using '*common sense, experience and sense of justice'* (*Software 2000 Ltd v Andrews* [2007] IRLR 568, per Elias P).

76. Having regard to these factors, that the award must be just and equitable to both the claimant and respondent, compensate the claimant but must not be punitive to the respondent, and our findings in relation to the period we could consider the claimant could have secured new employment and our findings that the claimant is entitled to employee and employer pension contributions, this Tribunal concludes that there are 135 weeks between the 10 December 2019 and 9 March 2023 when the claimant was unable to work as a result of the dismissal and age discrimination.

77. Accordingly, we consider the claimant's loss for immediate / past loss of earnings and pension contributions of **£49,149.45**, calculated as:

    77.1. Loss of earnings: 135 weeks x 309.71 per week £41,810.85.

    77.2. Loss of employee pension contributions 135 weeks x £27.18 £3,669.30.

    77.3. Loss of employer pension contributions 135 weeks x £27.18 £3,669.30.

Future loss of earnings and pension contributions

78. We award the claimant a further 52 weeks' future loss. By that stage, we consider that he ought to have made up the shortfall in his earnings by finding part time work. No State benefits were claimed so it is not necessary to make any deduction in respect of those. Accordingly, we consider future loss of earnings of **£18,931.64,** calculated as follows:

    78.1. Loss of earnings: 52 weeks x 309.71 per week £16,104.92.

    78.2. Loss of employee pension contributions 52 weeks x £27.18 £1,413.36.

    78.3. Loss of employer pension contributions 52 weeks x £27.18 £ £1,413.36.

79. In sum we consider the claimant's total loss of earning and pension contributions before any interest, tax and uplift of £69,426.52.

Injury to feelings

80. We have found that the claimant lost confidence in himself, both personally and in his work role as a result of his dismissal. We consider the appropriate award to be broadly in the middle Vento band. We award **£12,000** for injury to feelings.

Aggravated damages

81. We award an additional **£3000** for aggravated damages. The claimant's distress was increased by the insulting and exceptionally upsetting way in which the dismissal was carried out on 10 December 2019 and the manner in which the respondent has approached these proceedings. In its evidence over the course of the last 4 years the respondent falsely stated in defence that it had never employed the claimant, and maintained this approach, rather than conceding at an earlier date when the legal test is clear, until Employment Judge Tynan determined that the claimant's employment did transfer with the company under TUPE provisions. The manner in which the respondent was dismissed also calls for aggravated damages after 13 years of diligent service.

82. We have had regard to the total of the awards for injury to feelings and aggravated damages to ensure that we do not doubly compensate under this head of loss.

83. The claimant does not claim an award for personal injury.

ACAS adjustment

84. The respondent was in significant breach of the ACAS Code regarding the dismissal. There was no process at all in the manner in which he was dismissed. The respondent is not a small employer. As this Tribunal noted at the liability hearing, it employs about 170 employees and has its own Human Resources Manager. It is reasonable for us to conclude that someone with the title HR manager would have knowledge of ACAS and the provision of the ACAS code. Furthermore, the respondent does not seek to argue there should not be any ACAS reduction.

85. We award a **25% uplift.** We consider that this applies as the claimant raised his grievance in writing by letter dated 16 December 2019, 6 days after his

dismissal. He did not receive a response from the respondent. We apply the uplift as follows:

85.1. Past loss of earnings: £49,149.45 +25% uplift of £12,287.36 to give an uplifted past loss of earnings of £61,436.81.

85.2. Future loss of earnings: £18,931.64 with a 25% uplift of £4,732.91 to give an uplifted future loss of earnings of £23,664.55.

85.3. Injury to feelings: £12,000 with a 25% uplift of £3000 to give an uplifted injury to feelings of £15000.

85.4. Aggravated damages of £3,000 with a 25% uplift of £750 to give uplifted aggravated damages of £3,750.

Interest for discrimination

86. We make the compensatory award under the provisions of the Equality Act 2010. This permits us to award interest at 8% on those heads of loss arising under the EQA.

87. Interest is award from the mid-point date is the date halfway through the period between the date of the discrimination complained of and the date the tribunal calculates the award (Reg 4 IT(IADC) Regs 1996). We calculate the midpoint of 10 December 2019 to 9 March 2023. In the relevant period there are 593 days, which equates to 593 days of interest as follows: £61,436.81 divided by 365 days gives a daily rate of £13.47. £13.47 x 593 days totals interest of £7,987.71, which give a total award for past earnings of £69,426.52 (£61,436.81 plus £7,987.71).

88. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see Reg 6(1)(a) IT(IADC) Regs 1996). On the award for injury to feelings, we have calculated this from the date of dismissal, 10 December 2019 until today, 9 March 2023, a period of 1186 days. We calculate the daility rate as £18,750 divided by 365 x 8% which is £4.11 per day. This is incurred for 1186 days which totals £4874.46 resulting in an injury to feelings award inclusive of interest of £23,624.46.

89. The total compensation to the claimant (before deductions and grossing up for tax) is **£125,254.33**, comprised as follows:

89.1. A basic award for unfair dismissal of £8,088.80;

89.2. Loss of statutory rights £450;

89.3. A compensatory award for past losses of £69,426.52;

89.4. A compensatory award for future losses of £23,664.55; and

89.5. Compensation for injury to feelings and aggravated damage of £23,624.46.

Deductions

90. We must deduct the amount the claimant received from the government's insolvency service of £11,707.12. The balance on the award is **£113,547.21**.

Grossing up

91. As our calculation of the claimant's losses exceeds the tax-free threshold of £30,000 in section 401 of the Income Tax (Earnings & Pensions) Act 2003, it is necessary to gross up the excess to take account of the fact that it will be taxed as income in the claimant's hands.

92. There is no evidence that the claimant has used any part of the £30,000 allowance previously and we are satisfied, therefore, that he can apply it in full to our award: £113,547.21 less £30,000 is £83,547.21. The claimant pays income tax at basic rate (20%). The calculation is, therefore £83,547.21 x 20%. The tax liability is £16,709.44, which is added to £113,547.21 to account for the tax liability.

93. Accordingly, the final award is **£130,256.56.**

Employment Judge Hutchings

Date: 13 March 2023

REASONS SENT TO THE PARTIES ON

21 April 2023

FOR THE TRIBUNAL OFFICE