EMPLOYMENT TRIBUNALS

Claimant: **Mr. R Pereira**

Respondent: **Ahauz Ltd.**

Heard at: **London Central** **On:** **2 February 2023**

Before: **Employment Judge Joyce**

Representation
Claimant: Mr. K Bhatt (Solicitor)
Respondent: Mr. G Anderson (Counsel); Mr. J Hockley (Solicitor) and Mr. T Mclaughlin (Solicitor)

RESERVED JUDGMENT ON REMEDY

The Judgment of the Tribunal is that:

(i) The respondent shall pay the claimant the gross sum of £49,992 for the compensatory element of the award of damages in relation to his claim for unfair dismissal.

REASONS

Claims and Issues

1. The claimant brought claims for unfair dismissal and breach of contract. The claim was undefended by the respondent in respect of liability. At an initial remedy hearing on 29 July 2022, the respondent again confirmed that it conceded liability. However, the claimant was located in Portugal at the time and, having applied the relevant guidance in relation to witnesses giving evidence from abroad the remedy hearing could not proceed.

2. I entered Judgment in the claimant's favour both for unfair dismissal and breach of contract. As to the breach of contract claim, on the invitation of the respondent, I awarded damages up to the statutory cap of £25,000. For avoidance of doubt, while the claimant had brought claims for remedies for

loss of entitlement to shares options under his contract of employment, I explained to him at the hearing that I was not jurisdictionally in a position to grant his claims, and in any event he had been awarded the statutory cap amount for breach of contract, in full.

3. As to remedy for the unfair dismissal claim, the claimant had already been paid the basic award by the respondent. As such, I set the matter down for a hearing on remedy to determine any additional compensation due to the claimant in respect of the claim for unfair dismissal.

4. The principal issue before me was to determine whether the claimant had taken reasonable steps to mitigate his losses.

Hearing: Procedure, documents and evidence heard

5. The Tribunal heard evidence from the claimant and, on behalf of the respondent, from Mr. Rocha, a founder and director of the respondent.

6. At the hearing, the respondent objected to the claimant's inclusion of pages 99-130 of a proposed new hearing bundle, and the inclusion of paragraphs 7 and 8 of the claimant's second witness statement dated 1 February 2023 (Claimant's Second Witness Statement"). This evidence essentially related to the claimant's status as an individual regulated by the Financial Conduct Authority, and the impact of that status on his willingness to 'risk' breaching a restrictive covenant in his contract of employment.

7. Having heard both parties, and applying in particular the overriding objective under Rule 2 of the Tribunal's Rules of Procedure, I denied admission into evidence of pages 99-130 of the proposed new hearing bundle and paragraphs 7 and 8 of the Claimant's Second Witness Statement. Full reasons for my decision were provided to the parties at the hearing, and written reasons were not requested.

8. There was a bundle of approximately 202 pages (minus pages 99-130, which as above, were denied admission). Both parties made closing submissions at the end of the hearing. Skeleton arguments were also provided to me by both parties.

Facts

9. The claimant was employed by the respondent on a full-time basis as Head of Investments from 18 October 2017 until he was dismissed on grounds of redundancy on 25 May 2021.

10. At the time of joining the respondent, the claimant was a Director of a company known as InProp Capital LLP ("InProp"). I find that he continued to be involved in the operations of InProp throughout his employment with the respondent, although on the evidence before me it is unclear to what extent this occupied him on a day-to-day basis.

11. The claimant's internet biography stated, amongst others, that he was 'working on launching an alternative finance program".[1] I accept the

[1] Remedy Bundle, p. 19.

claimant's oral evidence to the effect that he was considering the possibility of launching such a platform outside of the UK but had not put anything in place.

12. The claimant was also listed as a trainer at a company known as Cambridge Finance. While employed by the respondent, he would deliver courses on behalf of Cambridge Finance from time to time. On the evidence before me, it was not possible to discern the frequency of this work, or what share of the course fees he received for appearing as a trainer.

13. The claimant's salary for his role as Head of Investments was £50,000 per annum, gross. This was below the market rate given the claimant's qualifications and experience. On the evidence before me, it was not possible to discern exactly the degree to which the claimant's salary was below the market rate, but it appears to have been approximately one third of what the claimant would otherwise have been paid on the open market.

14. Schedule 1 to the claimant's contract of employment contained the following restrictive covenants ("Restrictive Covenants") which are of relevance:

> **1.2** You will not for a period of 12 months from the Relevant Date solicit or assist in soliciting, endeavour to entice away from the Company or any Associated Company the business or custom of a Restricted Customer or a Restricted Supplier with a view to providing goods or services to that Restricted Customer or receiving goods or services from that Restricted Supplier in competition with any Restricted Business or with a view to reducing the amount of business/custom between the Company or any Associated Company and any Restricted Customer or Restricted Supplier or to adversely vary or alter the terms upon which business is conducted with any Restricted Customer or Restricted Supplier.
>
> **1.3** You will not for a period of 12 months from the Relevant Date solicit or assist in soliciting endeavour to entice away from the Company or any Associated Company or contact a Restricted Customer or a Restricted Supplier with a view to adversely affect the provision or licensing of goods or services to that Restricted Customer by the Company or with a view to adversely affect the Company's receipt of goods or services from that Restricted Supplier.
>
> **1.4** You will not for a period of 12 months from the Relevant Date provide goods or services to or receive goods or services from or otherwise have any business dealings with any Restricted Customer or any Restricted Supplier in the course of any business concern which is in competition with any Restricted Business.

1.5 You will not for a period of 12 months from the Relevant Date provide the services provided by the Company whether directly or indirectly.

1.6 You will not for period of 12 months from the Relevant Date employ or engage or offer employment to or otherwise endeavour to entice away from the Company or any Associated Company any Restricted Employee whether or not such person would commit a breach of contract by reason of leaving service.

1.7 You will not for a period of 12 months from the Relevant Date be engaged in or concerned in any capacity in any business concern which is in competition with or is preparing to compete with or is the same as the Restricted Business in the Restricted Area.

1.8 You will not for a period of 12 months from the Relevant Date carry on business in competition with the Restricted Business in association with, whether as a partner, an employer, employee, joint venture or co-director or otherwise howsoever, any Restricted Employee.

1.9 You will not for a period of 12 months from the Relevant Date accept employment to or be engaged in the provision of services in competition with the Restricted Business with any person, firm, company or body and of which any employee, agent, director or partner is a Restricted Employee.

15. The following terms, as referenced above in the Restrictive Covenants, were also defined at Schedule 1 to the claimant's contract of employment:

"**Prospective Customer**" shall mean any person, firm, company or other organisation whatsoever to whom the Company or any Associated Company has made a specific offer in writing to supply goods or services or grant rights, or to whom the Company or any Associated Company has provided details of particular terms on which it would or might be willing to supply such goods or services or grant rights, or with whom the Company or any Associated Company has had negotiations or a course of discussions regarding the possible supply of goods or services or grant rights and with whom you or employees reporting directly to you had contact during the Reference Period.

"**Reference Period**" means the period of 12 months ending on the Relevant Date;

"**Relevant Date**" means the earlier of: (a) date of termination of your employment; or (b) the expiry of this Agreement; or (c) in the event that duties were not assigned to you in accordance with clause 12.5 of the Terms and Conditions of Employment, the last day on which you carried out any duties for the Company or any Associated Company;

"**Restricted Area**" means the United Kingdom and any other country or state in which the Company or any Associated Company is operating or planning to operate at the expiry of the Relevant Period. A business will be operating within the Restricted Area if either any such business in which you were involved at any time during the Relevant Period is located or to be located within the territory or it is conducted or to be conducted wholly or partly within the Restricted Area;

"**Restricted Business**" means the businesses of the Company and any Associated Company at the Relevant Date with which you were involved to a material extent during the Reference Period;

"**Restricted Customer**" means any firm, company or other person who, at any time during the Reference Period was a client or customer or licensee of or in the habit of dealing with the Company or any Associated Company or with whom the Company or any Associated Company were involved in negotiations with a view to such firm, company or other person becoming a client or customer or licensee of the Company or any Associated Company (including, but not limited to Prospective Customers) and in each case with whom you or employees reporting directly to you had contact during the Reference Period;

"**Restricted Employee**" means any person who, on or within the three months prior to the Relevant Date; either:

(a) was employed or engaged by the Company or any Associated Company in a managerial, financial, technical, programming, analytical, dealing, creative or publishing capacity; or

(b) was an employee or consultant of the Company or any Associated Company whose departure could materially damage the Restricted Business if he or she left the Company or any Associated Company; or

(c) was employed or engaged by the Company or any Associated Company and who had material contact with Customers or suppliers of the Company or any Associated Company in performing his or her duties of employment with the Company or any Associated Company; or

(d) was employed or engaged by the Company or any Associated Company and who possessed or was likely to possess confidential information during the course of his or her employment with the Company or any Associated Company; or

(e) was employed or engaged by the Company or any Associated Company and whose duties included research into or development of any product or services or the provision of any technical or product support;

and in each case with whom you had personal dealings or who reported to you during the Reference Period; and

"**Restricted Supplier**" means any firm, company or other person who, at any time during the Reference Period was a supplier of goods and/or services and/or licensor of rights to the Company or any Associated Company which were material to our business or Associated Company (including without limitation, any goods, services and/or rights supplied or licensed on an exclusive basis) or with whom the Company or any Associated Company were involved in negotiations with a view to such firm, company or other person becoming a supplier or licensor of ours or any Associated Company and in each case with whom you had contact during the Reference Period.

16. On 21 March 2020, the claimant was placed on the furlough scheme.

17. On 25 November 2020, the respondent received its Financial Conduct Authority authorization and the claimant became an Executive Director responsible for risk and liquidity management, regulatory reporting and finance.

18. Mr. Rocha, a Director of the respondent, stated that the claimant had approached him in March 2021 to inform him that he, the claimant, wished to "pause" his relationship with the respondent. The claimant denied that he had informed Mr. Rocha that this was the case.

19. On the evidence before me, I conclude that while the claimant is likely to have mentioned other business interests of his to the respondent, I prefer his evidence that he did not refer to a "pause" of his working relationship with the respondent. In reaching this conclusion, I note that the claimant remained on furlough, employed by the respondent until 25 May 2021, two months after he is alleged to have wished to pause his working relationship with the respondent. I also note that the letter of dismissal to the claimant on 25 May 2021 made no reference to the claimant having sought to pause his relationship with the respondent.

20. On 25 May 2021, the respondent dismissed the claimant on the grounds of redundancy with his contractual notice period of 3 months.[2] He was placed on garden leave for 3 months, until 25 August 2021.

21. On 26 May 2020, InProp issued a press release in which it claimed to have secured an investor.

22. On a date unknown, but shortly after the claimant's dismissal, he sought legal advice as to the application of the Restrictive Covenants in order to determine where he could apply for jobs and whether there were any restrictions on the roles for which he could apply.

23. The claimant's last day of work was 25 August 2021.

24. On 4 October 2021, the claimant's legal representative wrote to the respondent asking them to waive the Restrictive Covenants. The claimant's representatives stated that their understanding was that the period of operation of the Restrictive Covenants was for 12 months from the conclusion of the claimant's period of garden leave: that is from 25 August 2021 to 25 August 2022.[3]

25. In the same letter, the claimant's representatives expressed the view that the 12-month period that the Restrictive Covenants would remain in force seemed excessive. His representatives also stated that the scope of the Restrictive Covenants within Schedule 1 of his contract of employment was disproportionate in that it acted to prevent him from applying for a wide range of employment opportunities. The claimant objected to what he considered to be the wide definitions of terms such as "Restrictive Area", "Restrictive Business" and "Restrictive Customer".

26. On 18 October 2021, the respondent's legal representatives replied stating that they would not waive the Restrictive Covenants. The letter clarified that in the respondent's view the 12-month period of operation of the Restrictive Covenants ran from the "Relevant Date" as defined in Schedule 1 of the claimant's contract of employment. In the respondent's view this meant that the 12-month period ran from the date the claimant was placed on garden leave, namely 25 May 2021. This meant, according to the respondent, that the Restrictive Covenants would expire on 25 May 2022.

27. The letter from the respondent's legal representatives also stated "(…) in the event of a breach or anticipatory breach by your client [the claimant] of the Restrictions, it is [the respondent] that will bring proceedings for injunctive relief and/or damages against [the claimant]. You should note that the respondent would not hesitate to protect its business in this way and in this regard we strictly reserve all of our client's rights". The claimant decided, as a result of this communication from the respondent, that he would be very selective of the job opportunities for which he would apply for fear of breaching the Restrictive Covenants.

[2] Remedy Hearing Bundle, p. 94.
[3] Remedy Hearing Bundle p. 28, Letter of Claim of 4 October 2021, para. 45

28. During the months of November and December 2021, the claimant continued to seek waiver of the Restrictive Covenants by the respondent. These attempts were unsuccessful.

29. Also in November and December 2021, the claimant re-subscribed to job alerts on the LinkedIn platform and monitored daily e-mails that were sent out by other financial services careers websites, including eFinancial Careers.

30. When conducting job searches, the claimant used the following terms: (i) "Investment Management", (ii) "Portfolio management and portfolio manager", and (iii) "Real estate, property and quant." Terms (i) and (ii) represented functions that the claimant had performed while he was employed by the respondent. Term (iii) was related to the claimant's PhD qualification and his previous fund management experience.

31. There were more job openings related to searches conducted for terms (i) and (ii) above, than for term (iii).

32. On the evidence before me, I found that the claimant did not apply for any job roles from May 2021 to December 2021.

33. From the end of December 2021, as the claimant had been unsuccessful in obtaining work that was commensurate with his experience and qualifications, he decided to look for consultancy work.

34. On 28 December 2021, the claimant spoke to a Ms. Maria Wiedner who was the CEO of an entity called Cambridge Real Estate Finance and told her he was seeking consultancy work.

35. From 3 January 2022 to approximately 24 January 2022, having received the ACAS certificate in relation to the present proceedings, the claimant was occupied with preparing his case for submission to the Tribunal.

36. Towards the end of January 2022, Ms. Wiedner contacted the claimant and informed him that he could work for Cambridge Real Estate Finance as a consultant. The nature of the role was such that the claimant was confident that it would not breach the Restrictive Covenants and so he accepted the role.

37. On 11 February 2022, the claimant spoke directly with the client of Cambridge Real Estate Finance for whom he would be completing the project. He estimated that the project for that client would take three to four months to complete and determined that during that time he would not be able to take on any other full-time positions.

38. However, at the beginning of March 2022 the above-mentioned project was halted due to political events. On 8 March 2022, the claimant spoke with the client directly who advised him that a new scope of work would need to be determined for the project.

39. On 7 April 2022, the claimant attended a further meeting with the client to discuss the scope of the project.

40. Between 7 April and 26 April 2022, the client and Cambridge Real Estate Finance were negotiating the terms of the claimant's consultancy. On 26 April 2022, the claimant signed the terms of his consultancy agreement with Cambridge Real Estate Finance.

41. The claimant did not receive a fixed monthly salary. His consultancy fees were determined based on his achieving project milestones which were set. The projected dates for the milestones were: 10 May 2022 and 31 May 2022.

42. On 13 May 2022, Ms. Wiedner informed the claimant that his first milestone of 10 May 2022 had been postponed to 30 May 2022. On 30 May 2022, the claimant raised his first invoice in relation to the consultancy, which was for £3,000. This was the first income the claimant had received since termination of his employment with the respondent.

43. The claimant reached his second milestone in June 2022 and on 22 June 2022 submitted an invoice for 7,000. He submitted a third invoice for 7,000 on 1 August 2022 and another for 3,000 on 5 January 2023.

44. The claimant continued to apply for other available roles from July 2022 until approximately 30 September 2022.[4]

45. The claimant worked on another consultancy project also with Cambridge Real Estate Finance in October 2022 and received £7,700 for that work. As at the date of the remedy hearing, the claimant had not had any additional consultancy work. As such, by the date of the remedy hearing, the claimant had mitigated his losses by the sum of £27,700.

46. The claimant did not receive any income from his role as Director at InProp Capital LLP between the date of his dismissal and the date of the remedy hearing.

Legal Framework

47. Section 123(1) of the Employment Rights Act 1996 ("ERA") provides:

> **Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**

48. Section 124 ERA provides:

> **(1ZA) The amount specified in this subsection is the lower of –**
> **(a) £93, 878, and**
> **(b) 52 multiplied by a week's pay of the person concerned[5]**

49. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) provides:

[4] Remedy Bundle, pp. 138-195.
[5] The 'statutory cap' £93, 878 has, as of 6 April 2023, been increased to £105, 707. However, this new statutory cap only applies to claims where the effective date of termination is after 6 April 2023.

207A Effect of failure to comply with Code: adjustment of awards (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2. (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% (…).

50. Section 207A TULR(C)A applies to section 111 of the Employment Rights Act 1996, under which claims of unfair dismissal are brought.

51. The Foreword to the ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code") provides, amongst others:

The Acas statutory Code of Practice on discipline and grievance procedures is set out in paragraphs 1 to 47 below. It provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace.

52. The ACAS Code provides the following:

1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace. Disciplinary situations include misconduct and/ or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted. Grievances are concerns, problems or complaints that employees raise with their employers. The Code does not apply to redundancy dismissals or the nonrenewal of fixed-term contracts on their expiry.

53. In *Norton Tool Ltd v Tewson 1972 ICR 501, NIRC,* the National Industrial relations court set out the different heads of loss that are included in the compensatory award as follows:

(i) Actual loss of earnings being the loss between the date of dismissal and the remedies hearing;

(ii) Future loss of earnings;

(iii) Expenses incurred as a consequence of the dismissal;

(iv) Loss of statutory employment protection;

(v) Loss of pension rights.

54. As to mitigation of loss, in *Cooper Contracting Ltd v Lindsey 2016 ICR D3, EAT,* Mr Justice Langstaff set out the following principles regarding the approach to take for deductions for a failure to mitigate loss:

(i) the burden of proof regarding a failure to mitigate is on the respondent. A claimant does not have to prove that he or she has mitigated the loss;

(ii) if evidence as to mitigation is not put before the Tribunal by the respondent, it has no obligation to look for that evidence or draw inferences. This is how the burden of proof works in this context: responsibility for providing the relevant information belongs to the respondent;

(iii) the respondent must prove that the claimant has acted unreasonably. The latter does not have to show that what he or she did was reasonable — see *Ministry of Defence v Mutton 1996 ICR 590, EAT.* What is reasonable or unreasonable in this regard is a question of fact, to be determined after taking into account the wishes of the claimant as one of the relevant circumstances, although it remains the tribunal's own assessment of reasonableness — not the claimant's — that counts;

(iv) the tribunal should not apply a standard to the claimant that is too demanding. He or she should not be put on trial as if the losses were his or her fault, given that the central cause of those losses was the act of the respondent in unfairly dismissing the claimant;

(v) the relevant test can be summarised by saying that it is for the respondent to demonstrate that the claimant has acted unreasonably in failing to mitigate;

(vi) in a case where it might be reasonable for a claimant to have taken a better paying job, this fact does not necessarily satisfy the test: it is however important evidence that might assist the tribunal to conclude that the claimant has acted unreasonably.

55. According to *Johnson v Hobart Manufacturing Co Ltd EAT 210/89*, whether an employee has done enough to fulfil the duty to mitigate depends on the circumstances of each case and is to be judged subjectively. However, according to *Beijing Ton Ren Tang (UK) Ltd v Wang EAT 0024/09* this does not mean that the tribunal must accept the subjective view of the claimant. While this certainly has to be taken into account, the tribunal's task is to consider all the circumstances in deciding whether the claimant has acted unreasonably in failing to find fresh employment or some alternative means of mitigating his or her losses.

56. *Wilding v British Telecommunications plc 2002 ICR 1079, CA* provides that for a respondent to discharge that burden of proof, it is not enough for the respondent to show that there were other reasonable steps that the claimant could have taken but did not take. It must show that the claimant acted unreasonably in not taking such steps: there is usually more than one reasonable course of action open to the employee.

57. On behalf of the claimant, I was also referred to *Wardle v Credit Agricole Corporate & Investment Bank [2011] EWCA Civ 545* upon which the claimant seeks to rely in submitting that the Tribunal should assess what the claimant would have been likely to earn had he not been treated unlawfully compared to what he is now likely to earn.

58. The claimant also referred the Tribunal to the authority of *Q Qu v Landis and Gyr Limited UKEAT/0016/19/RN* in which a tribunal awarded a claimant

three years loss of net earnings and benefits from the date of the remedy hearing, after determining that it would take that claimant approximately this length of time to fully mitigate his loss. When reaching this decision the tribunal considered two essential factors: (i). The claimant's likely ongoing career and career prospects if the Respondent's dismissal had not occurred; and (ii). The point at which he was likely to obtain equivalent employment.

59. As to the issue of an ACAS uplift, the claimant referred to the authority of R*entplus UK Limited v Ms Susan Coulson [2022] EAT 81* in which a claimant was award a 25% uplift in a unfair dismissal claim on the purported grounds of redundancy.

Conclusions

Actual Loss

1. The starting point for any calculation of the compensatory award is to calculate the claimant's actual losses on a net basis between from the date of termination on 25 May 2021 to the date of the remedy hearing on 2 February 2023.

2. I concluded on the basis of the evidence before me that the claimant would have remained on the same salary of £50,000 at least until the remedy hearing. Indeed, I note that the claimant makes the same assumption.[6] In order to calculate a week's net salary, I have taken the claimant's net salary as £2,982 per month,[7] multiplying this by 12 gives a net salary of £35,784 and dividing it by 52 gives a weekly net salary of £688.15.

3. The period of 25 May 2021 to the date of the remedy hearing of 2 February 2023 totals 618 days, which amounts to 88 weeks and 2 days, or 88.4 weeks. Multiplying 88.4 weeks times the weekly net salary of £688.15 gives a total of £60,832.46.

4. During that period, the claimant earned a total of £27,700 from consultancy work, which would give approximately £23,022.45 net income after tax.[8] Subtracting that amount from gives an actual loss up to the date of remedy hearing of **£37,810.01**.

Future Loss

5. As the claimant did not have any additional paid work as at the time of the remedy hearing, I am also required to calculate his likely future loss.

6. In reaching this determination, I take account of the claimant's personal characteristics such as his age, and health. I note that as of the date of the remedy hearing the claimant was 47 years of age, and there are no known issues regarding his health.

[6] Claimant's skeleton argument paragraph 13.
[7] Per the claimant's ET1, p. 5
[8] https://www.employedandselfemployed.co.uk/tax-calculator. Applying the claimant's married status and assuming no expenses.

7. Applying 'Loss of a Chance' considerations, I consider, on the evidence before me, that there was effectively a 0% chance of his being dismissed fairly in any event following his unlawful dismissal.

8. I do not consider, based on the evidence before me, that the claimant would have had an opportunity for promotion. Nor did the claimant submit that he would have been promoted. I consider, again, based on the evidence before me that his salary would have remained the same. While the claimant made a reference to expecting a salary increase in pleadings, no evidence was provided in relation to whether such an increase was indeed likely and if so what the increase might have been.[9] As such, I consider there was a 0% chance of his being promoted or receiving a salary increase within a year of the effective date of termination.

9. On the above basis, I consider that the claimant's future loss would have likely been for a period of 12 months following the remedy hearing, in order to be in a position to fully mitigate his loss. As such, his future losses would have been £50,000 gross, which amounts to **£35,783.8**.

Mitigation of loss

10. The real issue of dispute in this claim is the extent to which the claimant has mitigated his losses. In short, the respondent's position is that the claimant did not take adequate steps to mitigate his losses. It was submitted to me in oral closing submissions that the claimant ought to have been in a position to fully mitigate his losses within 6 months of his effective date of termination – in other words, had the claimant taken reasonable steps to find work he could have done so, at the same or greater rate of pay, within 6 months of his termination. If correct, this would have the effect of reducing the award due to the claimant to the equivalent of 6 months of his salary.

11. The claimant submits that he took reasonable steps to mitigate his losses. Before addressing whether or not he did take such reasonable steps, it is necessary to make findings on (a) the time period, if any, during which the restrictive covenants had effect and (b) the scope, and effect of, those Restrictive Covenants on the claimant's ability to take reasonable steps to mitigate his loss. I remind myself that the respondent bears the burden of demonstrating that the claimant failed to take reasonable steps to mitigate his losses.

Period of operation of the Restrictive Covenants

12. There was both considerable dispute about the applicable period of the Restrictive Covenants, in addition to internal inconsistency in the parties' own positions as to the period of their applicability.

13. For example, while the claimant's first witness statement provides that he considered the Restrictive Covenants would be in place until May 2022, his representatives position was that the Restrictive Covenants ended 12 months following the expiration of his period of garden leave, that is on 24 August 2022.[10]

[9] Claimant's skeleton argument paragraph 21 c.
[10] Witness Statement of Ricardo Pereira, 21 July 2022, paragraph 23.

14. As to the respondent, on the one hand, in their letter of 18 October 2022, the respondent's legal representatives maintained that the Restrictive Covenants would expire on 25 May 2022 (that is on the expiry of 12 months after the date of termination of his employment), whereas in oral submissions counsel for the respondent maintained the Restrictive Covenants ceased to have effect from the date of termination, i.e. 25 May 2021.

15. The claimant's final position appears to be that, relying on the same provision (c) of the definition of "Relevant Date" in Schedule 1 to the contract of employment, is that he was still being "assigned duties" while on garden leave as he was required to be available for work. The argument seems to be that as his employment endured until the end of his garden leave, on 24 August 2021, the Restrictive Covenants ran for a period of 12 months after that date, to 24 August 2022. The respondent's final position appears to be, also in reliance on (c) above, as the claimant was placed on furlough from March 2020, he had not "carried out any duties" since then. As such, counting 12 months from the date of his placement on furlough, the Restrictive Covenants would have expired by March 2020, and certainly by the date of termination of 25 May 2021.

16. The wording of each of the clauses, from 1.2 to 1.9 of Schedule 1 to the contract of employment, commence with "[the claimant] will not for a period of 12 months from the Relevant Date (…)". The Relevant Date is defined as "(…) the earlier of: (a) date of termination of your employment; or (b) the expiry of this agreement; or (c) in the event that duties were not assigned to you in accordance with clause 12.5 of the Terms and Conditions of Employment, the last day on which you carried out any duties for the Company or any Associated Company".

17. I consider that the final positions adopted by both the claimant and respondent are erroneous. I find that (c) as contained within the definition of "Relevant Date" is inapplicable. This is because, in accordance with its wording, it only applies "in the event that duties were not assigned to [the claimant] in accordance with clause 12.5 of the Terms and Conditions of Employment (…)". However, clause 12.5 refers to the claimant not having any right to damages under the respondent's share scheme in the event of termination of his employment. It does not refer to the assignment of any functions to the claimant. Consequently, it is entirely unclear from what point in time the reference to "duties [not being] assigned" relates.[11] As such, I consider (c) a contained in the definition of Relevant Date to be unenforceable.

18. This leaves (a) within the same definition – the date of termination of the claimant's employment on 25 May 2021. As such, I find that the Restrictive Covenants expired 12 months after the date of termination of the claimant's employment, that is on 24 May 2022.

[11] I suspect that this is a typographical error and the intention was for (c) to refer to the preceding clause, 12.4, which relates to placing the claimant garden leave. However, this is merely supposition and I am bound by the words of the contract of employment.

19. This finding is also consistent with the initial position of the respondent's legal representatives in their letter to the claimant's legal representatives of 18 October 2021. Further, it is consistent with the claimant's own evidence as contained in his first witness statement, referenced above.

Scope of the restrictive covenants and impact on mitigation

20. The claimant maintains that following the letter of 18 October 2021 from the respondent's legal representatives, he was selective as to the jobs he applied for fear of breaching the Restrictive Covenants. The respondent maintains that the Restrictive Covenants were not as broad as the claimant now alleges and that his lack of job applications for full time employment until July 2022 means that he did not act reasonably in mitigating his losses.

21. While the respondent contends that the Restrictive Covenants were not broad and that the claimant could have applied for many opportunities without being in breach of them, I consider that the claimant's belief as to the scope of the Restrictive Covenants was reasonable.

22. In reaching this conclusion, I note the plain wording of the two key Restrictive Covenants: clauses 1.5 and 1.7 are, on any reasonable interpretation, broad. Clause 1.5 in particular refers to the claimant being prevented from providing any of the "Services" engaged in by the respondent. "Services" are not defined.

23. As to clause 1.7, I further find the reference to "Restricted Business" to be broad, without any examples of such 'Business' being provided in the definition of the term. In these circumstances, I find the claimant's explanation in his oral evidence that by raising funds from private debt investors he believed he would potentially have been in competition with the respondent's business as entirely reasonable.

24. I further consider the claimant's fear at breaching the Restrictive Covenants to be justified given the letter of 18 October 2021 from the respondent's legal representatives which conveyed a clear willingness to, if not enthusiasm at the prospect of, bring proceedings against the claimant in the event of even an anticipatory breach of the Restrictive Covenants.

25. Finally, on the issue of Restrictive Covenants, as to the 'geographical' element of clause 1.7, the respondent's position appears to be that the claimant could have, and should have, applied for positions outside of the UK. While, given the claimant's links with Portugal, there is some argument for him to have applied for positions in Portugal, I do not consider that his not doing so was unreasonable in light of his other efforts to find work and his explanations that there was very little if any private debt fund management industry in Portugal. I also do not consider it unreasonable of him not to have applied for positions outside of the UK or Portugal – indeed to expect him to have moved along with his family for a new job outside of the UK or Portugal would be to impose an unreasonably high standard to demonstrate mitigation of his losses.

The steps the claimant took

26. As noted above in the Facts section, during October, November and part of December 2021, the claimant was engaged in attempting, unsuccessfully, to have the respondent remove the Restrictive Covenants. He had also subscribed to job alerts and conducted job searches using key word terms.

27. Having realized that this exercise was not proving fruitful, he then obtained consultancy work. Due to circumstances outside of his control, the start date for that work and his payment for it were delayed. While the respondent points to the claimant's lack of job applications from May 2022 (following the expiration of the Restrictive Covenants) to July 2022, I do not consider that this amounts to a failure to take reasonable steps in light of the fact that the Claimant was working as a consultant for Cambridge Finance during that period.

28. As noted in the Facts section, the claimant applied for full time roles from July 2022 to September 2022, following which he engaged, in October 2022, in further consultancy work.

The claimant's other business interests

29. As to the assertion that the claimant told a Director of the respondent that in March 2021 he wished to "pause" his relationship with the respondent, as noted above I did not find this indeed occurred. Consequently, it has no impact on my assessment of the claimant's efforts to mitigate his loss.

30. Given my findings of fact in relation to InProp, the claimant's role as a trainer with Cambridge Finance and also the 'alternative finance platform', I do not consider that his limited degree of activity in these ventures impacted upon his ability to take reasonable steps to mitigate his loss. If anything, these were other potential avenues which were reasonable to pursue in attempting to mitigate his loss, but which unfortunately did not provide any additional revenue for him.

31. I find that the respondent has not shown that the claimant failed to take reasonable steps in attempting to mitigate his losses, and consequently I conclude that the claimant has taken reasonable steps to mitigate his losses.

Statutory Rights

32. The claimant has made a claim for £500 for loss of Statutory Rights. This was uncontested by the respondent and I consider it reasonable.

Loss of pension contributions

33. In the schedule of loss the claimant did not provide the respondent's percentage rate of contribution to his pension scheme, but stated that the respondent placed approximately £125.00 per month into his pension contribution scheme. This was also uncontested by the respondent. On the basis of actual loss for 618 days, equating to 20.26 months, x £125 =

£2,532.50. On the basis of future loss for 12 months this equates to 12 x 125 =. £1,500, giving a total pension loss of £4,032.5.

ACAS uplift

34. In order for the ACAS Code to apply, there must be a disciplinary or grievance situation in the workplace. The disciplinary situation may include misconduct and/or poor performance. In the authority of *Rentplus* cited by the claimant, the tribunal had found that sex discrimination was in part the cause of the employee's dismissal. On appeal, the EAT held that it was implicit in the tribunal's judgment on liability and remedy, that the tribunal had determined that the employer had decided to dismiss the employee because of dissatisfaction with her personally and/or with her performance.[12]

35. In the present case, as submitted by the respondent, the claimant did not claim an ACAS uplift in his ET1 claim form. While he did claim that the redundancy was a 'sham' as his work had not ceased or diminished, he did not assert that his redundancy was the result of a grievance (I note no grievance was filed) or disciplinary (including performance) situation. The respondent admitted liability without providing any basis for doing so, and the claimant did not enquire further as to the basis.

36. Moreover, on the available evidence, the respondent appears to maintain that redundancy was the real reason for the dismissal.[13] The claimant did not call any evidence at the remedy hearing to contradict this evidence, or in order to show that this was a disciplinary or grievance situation to which the ACAS Code applied.

37. As such, and on the evidence before me, I find that this was not a situation to which the ACAS Code applied and consequently an uplift is not permissible.

Total losses, grossing up

38. Combining the claimant's actual losses of £35, 783.80, with future net losses of £37, 810.01, compensation for loss of statutory rights of £500 and pension loss of £4,032.5. gives a total net loss of £78,126.31.

39. Grossing up that sum to account for tax provides the following result:

40. The claimant's basic award (already paid to him) was a taxable amount of £2,448, which must be subtracted from the tax-free element of the award of £30,000. This provides £27,552, which must then be deducted from the net compensatory award of £78,126.31. This provides a taxable award amount of £50, 574.31, divided by .8 (to reflect the marginal tax rate of 20%) in order to gross up = £63,217.89, adding this to the sum of £27,552 gives a total gross award of **£90,769.89.**

Application of the Statutory Cap

[12] Rentplus, Judgment para. 46.
[13] Witness Statement of Mr. João Rocha, para. 13.

41. As acknowledged by both parties the statutory cap of 52 weeks of a week's gross pay applies. On the basis of the claimant's gross monthly salary of £4, 166, this provides a weekly gross salary of £961. 38 x 52 weeks = £49,992.

Conclusion

42. I therefore make an award for the compensatory element of the claimant's unfair dismissal award in the amount of £49,992.

Employment Judge **Joyce**

Date: 04/05/2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.04/05/2023

FOR EMPLOYMENT TRIBUNALS