EMPLOYMENT TRIBUNALS

REMEDY JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR R HALPIN	**V**	**EVERBRIGHT SUN HUNG KAI (UK) COMPANY LIMITED**

HELD AT: LONDON CENTRAL (BY VIDEO) **ON: 28 & 31 OCTOBER 2022**

EMPLOYMENT JUDGE: MR M EMERY

REPRESENTATION:
For the claimant: Mr N Bidnell-Edwards (Counsel)
For the respondent: Mr A Rhodes (Counsel)

REMEDY JUDGMENT

The claimant is awarded the sum of **£179,124.00**

Compensatory award

1. Past loss of earnings
   1.07.20 - 31.10.22 – 28 months
   Net salary pcm: £5,850 x 28 = £163,800
   Less sums earned (102,664)

Total £61,136

2. Interest on past loss of earnings
   425 days – 61,136 x 425 x 8% £5,694.86

3. Future loss of earnings
   1.11.22 – 31.03.23 – 5 months £6,259

Damages for whistleblowing detriment

4. Injury to feelings award £17,000

5. Aggravated damages award £2,000

6. Interest
   20.09.19 - 31.10.22 = 1,136 days
   19,000 x 8% / 365 x 1136 = £4,730.74

   Total £23,730.74

ACAS Uplift – at 20%

7. Loss of income
   £73,089.86 x 1.2 £87,707.83

8. Injury and aggravated damages
   £23,730.74 x 1.2 £28,485.29

Grossing up – loss of earnings

9. 40% rate on £58,141 x100/60 = £96,901.67

10. 45% rate on £29,566.83 x100/55 = £53,5757.87

TOTAL AWARD:

Grossed up earnings: £150,639
Damages for detriment £28,485

TOTAL £179,124

REASONS

The Remedy Issues

1. The claimant's position on remedy is in summary:

    a. He was not motivated by malice in making his public interest disclosures, he believed that he was required to do so, and he did so when opportunity presented itself.
    b. He attempted to mitigate his loss by applying for several roles; he secured one role but he says this offer was rescinded, he believes this as due to the respondent's finding of gross misconduct becoming known in the market.
    c. He concluded he would not be able to secure a role in an FCA regulated entity because the FCA had been informed he had committed an act of gross misconduct, and this would be reflected in any reference given by the 1st respondent.
    d. By February/March 2020 he believed he had no option but to become self-employed, because of the pandemic he found it difficult initially to generate work; it took him two years to build his income to a comparable level.
    e. Had he not suffered a whistleblowing detriment he contends his salary would now be far higher.
    f. While he has not sought medical help, he has suffered significant and long-term injury to feelings.

2. The respondent's position on remedy is in summary:

    a. The claimant's public interest disclosure was made after the claimant had been notified his role was at risk, and was made in bad faith, to obstruct and delay the redundancy process.
    b. Mr Egan denies being contacted for a reference from any prospective employer
    c. The claimant's financial losses cannot be referrable to the finding of gross misconduct and being reported to the FCA as these are private matters not in the public domain.
    d. The claimant has not done sufficient to mitigate his financial losses.
    e. Any injury to feelings award should be limited as the respondent was not deliberately acting unreasonably towards the claimant.

Witnesses and tribunal procedure

3. The claimant gave evidence. For the respondent I heard from Mr Patrick Egan the respondent's CEO, who also gave evidence at the liability hearing.

4. The hearing was conducted remotely on the CVP platform. We arranged regular breaks. The evidence and questions were presented effectively and without difficulties for all participants. A bundle and witness statements were made available for the press.

5. The Tribunal spent the first morning of the hearing reading the witness statements and the documents referred to in the statements.

6. This judgment does not recite all of the evidence I heard, instead it confines its findings to the facts relevant to the issues in this case. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The facts

7. The respondent argues that the claimant's public interest was made in bad faith. Mr Egan's evidence was *"… I felt the timing of the disclosure would make it incredible to believe otherwise"*. Mr Egan argued that the claimant had training in compliance issues, *"… so it did not make sense that it's credible"* that he made a whistleblowing disclosure *"… when management takes someone aside and says to them 'redundancy', and the next thing he says is 'there's a whistleblowing issue'".* Mr Egan argued "… *it's incredible that there could be another interpretation".* He said that a motivation for the claimant could be that this would *"complicate"* or *"delay"* the redundancy process, perhaps to *"extract money"* through this process.

8. The respondent argues that the claimant must have known in March 2019 that there was a regulatory compliance issue. The claimant's case was no, that he was only aware of this retrospectively, after he had received compliance training in August 2019. The respondent's case was that he had undergone previous compliance training, the claimant's response was that previous compliance training had covered different scenarios. He says that he told Mr Egan on the first occasion he met with him after this training, 17 September 2019. He says he was *"flat out"* before this meeting and he did not have time to tell Mr Egan before, he denied their being any advantage to him in making the disclosure when he did. He said there was no financial benefit in any way to him in making this disclosure; he denies he did so to frustrate the redundancy process.

9. The claimant's case put to Mr Egan was that the claimant has a *"very high level of attention to detail",* that Mr Egan's criticism of the claimant in delaying making the disclosure was in fact a manifestation of his attention to detail. Mr Egan accepted that the claimant had this attribute, saying he admired this in the claimant. He argued that the correct approach, per the claimant's training would not have been to further investigate, but to go straight to the compliance officer.

10. The claimant argued in his evidence that the gross-misconduct issue may not have been formally in the public domain when he was applying for roles*, "but that's not how it works…".* He argued that employees and ex-employees of the respondent were aware, *"… and this would be discussed in the market".* His area of expertise was niche, *"… so it was in the public domain".* He argued that prospective future employers would have found out had they asked his employer or the FCA.

11. The claimant's evidence was that he was in advanced discussions with a prospective employer, that the discussions suddenly ceased without explanation. He believes that the reason why the discussions ceased was because this prospective employer was in regular contact with Mr Egan and *"he regularly interacted with the respondent's staff."* The claimant believes that the gross misconduct finding was the reason why the discussions ceased. The prospective employer had been discussing salary with him, and then stopped taking his calls or answering emails he sent, *"it was clear he did not want to take it further…"*.

12. Mr Egan's evidence was that he *was "sure"* that he had not had contact with this prospective employer since June 2019; the respondent's position is that the claimant's salary demands were maybe a factor in this role not being taken forward. The claimant's case is that this does not explain why the prospective employer stopped communicating without any explanation: *"… I struggle with why he cut off communication about this… my only explanation is that he found out about the gross misconduct, there would be an awkward conversation which he did not want to have so he cut off communications."*

13. The respondent criticises the amount of job applications made by the claimant – 11 between November 2019 and March 2020. The claimant's case is that these were the only suitable roles, for example requiring Chinese market expertise. *"I applied for all available roles",* including roles with a lower salary.

14. The respondent informed the FCA in November 2019 of the gross misconduct finding. His role was one which required certification under the FCA Senior Manager Certification Regime. The claimant accepted that the respondent was required to inform the FCA of issues which brought his fitness in the role into question.

15. By March 2020 the claimant concluded the only realistic option available to him was self-employment. By then he had found out about the respondent's referral to the FCA. While he continued to apply for employed roles, he did not believe there was a realistic chance of him getting these roles; he characterised the later applications as desperation on his part.

16. The claimant accepted that not all the roles he applied for required an FCA regulatory reference, but he argued that he would have to disclose to all prospective employers the gross misconduct finding as part of a fit and proper person assessment. He did not accept the respondent's contention that the reason for dismissal was redundancy, which meant he could work for an FCA regulated company. It was his view that the gross misconduct finding – effectively of theft from the company – meant that he would find it impossible to get a job.

17. The claimant started working on a self-employed basis in February/March 2020, he gained his first paid work in July 2020. He said that his efforts to gain clients *"gained traction"* in May 2020, this took a couple of months to translate into paid work.

18. On 27 July 2022 Mr Egan sent an email to a generic FCA address stating that the Tribunal had found *"… that part of the disciplinary process which led to the Gross Misconduct finding amounted to some [pid] detriments. In light of that judgement, we would like to notify you that we are withdrawing the finding of Gross Misconduct … and clear the Gross Misconduct finding from his record."*

19. It was put to Mr Egan that this was a grudging and partial withdrawal, that the judgment specified further detriments including the referral to the FCA. Mr Egan accepted that this email *"reads"* that he was not happy with and did not agree with the judgment. This he said was and remains his view.

20. Mr Egan accepted that he had not and was not going to apologise to the claimant. It was also suggested that his witness statement tried to minimise the harm done, suggesting incorrectly that only 4 of 20 detriments were upheld, Mr Egan said that if this was an error he apologised.

21. The respondent's case is that the claimant has not adequately mitigated his loss, that there must have been other roles available. The claimant's case is that his income trajectory was good, and this has been proven as he is now earning the same as he did for the respondent *"… this is a better way of mitigating my loss than applying for roles with the misconduct finding hanging over me. … I could not justify going down this path when self-employment was building up."*

22. The respondent disputes the claimant's entitlement to a commission bonus – the respondent's position is that the bonus arrangement applicable to the claimant's early employment was withdrawn after two pay rises. The claimant accepts it was withdrawn, but argues it was reinstated as in June 2019 he was given a new commission arrangement – 15% of net revenue of sales he achieved (154-5). Mr Egan accepted this but argued that there was no commission due to him as he had not made sales prior to his dismissal for redundancy.

23. The claimant's evidence was that he suffered depression as a consequence of his treatment by the respondent, that he had significant symptoms for around 2 years. He relates the stress he suffered trying to build a business while also fighting his claim through the ET, he says he was unable to take more that 5 days paternity leave on the birth of twins because of the need to gain contracts and income. *"I was looking for work, then I was found guilty of gross misconduct and reported to the FCA, I had my career obliterated, it was an extremely difficult situation…"* He describes feeling helpless, that the first year of self-employment was *"pretty rough … also absolutely exhausting…".* He says that his stress and depression improved as his business progressed.

Legislation and case law

24. I had regard to the following general principles:

    a. Employment Rights Act s.49 Remedies

        (1) Where an [employment tribunal] finds a complaint .. well-founded, the tribunal—

(a) shall make a declaration to that effect, and
(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to
(a) the infringement to which the complaint relates, and
(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

….

(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

…

(6A) Where—
(a) the complaint is made under section 48(1A), and
(b) it appears to the tribunal that the protected disclosure was not made in good faith,

the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%.

b. Street v Derbyshire Unemployed Workers Centre [2004] EWCA Civ 964: a that lack of good faith does not just include an act of dishonest by the employee – it includes cases where there is 'ulterior motivation'. A disclosure made because of a personal grudge was not made in good faith, even though the information disclosed was in fact true.

<u>Injury to feelings</u>

c. Ministry of Defence v Cannock [1994] IRLR 509, EAT: Where compensation is awarded, it is on the basis that 'as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer]'. …. 'Tribunals [should] … not simply make calculations under different heads, and then add them up. A sense of due proportion and look at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed.'

d. Olayemi v Athena Medical Centre [2016] ICR 1074, EAT: The 'eggshell skull' principle of the law of tort also applies in cases of unlawful discrimination: a discriminator must take their victim as they are. That means that the wrong doer takes the risk that the wronged may be very much affected by an act of sexual harassment, say, by reason of their own character and psychological temperament. Provided the losses

claimed can be shown to be causally linked with the unlawful act, the respondent must meet them, even if the claimant is predisposed to the disorder. If the employer's acts were a material cause of the claimant's psychiatric condition, it was no defence for the respondent to show that she would not have suffered as she did but for a vulnerability to that condition. The Tribunal can discount the compensation to take account of the risk that she might have suffered from the condition in any event. If there is a material cause, which goes beyond mere vulnerability, and the resultant harm was truly divisible, the tribunal should estimate the degree of the respondent's responsibility and make an award for that.

e. Ministry of Defence v Hunt [1996] ICR 554: It is for the respondent to adduce evidence to demonstrate that the loss could have been mitigated. The employer must provide the evidence to support the argument that the complainant could have mitigated their loss; vague assertions of a failure to mitigate, unsupported by any evidence is unlikely to succeed. If there is such evidence then the question for the employment tribunal is not simply whether the complainant acted reasonably but whether by taking the course they did, they took all reasonable steps to mitigate their losses.

f. BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188. The case confirmed the following propositions:

1. Where the harm has more than one cause, a respondent should only pay for the proportion attributable to their wrongdoing unless the harm is truly indivisible.

2. The burden is on the employer to raise the issue of apportionment. Tribunals should try to 'identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong, and a part which is not so caused.' The Tribunal should see if it 'can identify, however broadly, a particular part of the suffering which is due to the wrong'.

3. Where such a 'rational basis' can be found, the Tribunal should apportion accordingly, even if the basis for doing so is 'rough and ready'.

4. Any such assessment must consider any pre-existing disorder or vulnerability, and account for the chance that the claimant would have succumbed to the harm in any event, either at that point or in the future.

5. In cases of psychiatric injury, careful evidence should be obtained from experts, particularly in relation to the likelihood of suffering the harm in any event.

g. Sadler v Filipiak [2011] EWCA Civ 1728: The tribunal must consider totality of the pain, suffering and loss of amenity experienced.

h. De Souza v Vinci Construction UK Ltd [2017] EWCA Civ 879: The Simmons v Castle 10% uplift should apply to employment tribunal awards in respect of non-pecuniary losses.

i. Essa v Laing Ltd [2004] EWCA Civ 02: There is no need to show that the personal injury in respect of which the claim is made was reasonably foreseeable, provided a direct causal link between the act of discrimination and the loss can be made out.

j. Scott v Comrs of Inland Revenue [2004] IRLR 713: When looking at non-pecuniary loss, whilst the total sum awarded must be borne in mind, it remains important not to conflate different types of awards for the purposes of the Vento guidelines.

k. Alexander v Home Office [1988] IRLR 190: "Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or mind which may persist for months, in many cases for life."

Aggravated damages

l. Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291, EAT Aggravated damages are an aspect of injury to feelings and tribunals should have regard to the total award made (i.e. for injury to feelings and for the aggravation of that injury) to ensure that the overall sum is properly compensatory and not excessive.

m. HM Land Registry v McGlue UKEAT/0435/11, [2013] EqLR 701: tribunals should '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”'. Aggravated damages may be awarded in circumstances where the employer has acted 'In a high-handed, malicious, insulting or oppressive way''; by subsequent conduct: e.g. where there has been a failure to apologise. A tribunal considering making such an award should look first as to whether, objectively viewed, the conduct is capable of having aggravated the sense of injustice and having injured the complainant's feelings yet further.

n. Tameside Hospital NHS Foundation Trust v Mylott UKEAT/0352/09: An award of aggravated damages should not be made merely because an employer acts in a brusque and insensitive manner towards an employee and/or is evasive and dismissive in giving evidence.

Section 3 Employment Act 2008 – Trade Union and Labour Relations (Consolidation) Act 1992

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) (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%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.

o. Kuehne and Nagel Ltd v Cosgrove UKEAT 0165/13: The tribunal must make an express finding that a failure to follow the Code was unreasonable before making an adjustment. Merely not following the Code is not sufficient in and of itself.

p. Lawless v Print Plus (Debarred) UKEAT/0333/09: The focus when deciding upon whether to make an adjustment needs to be upon the failures to comply with the Code (as opposed to unfairness or conduct generally). The circumstances to be considered should always include: whether the procedures were applied to some extent or were ignored altogether; whether the failure to comply with the procedures was deliberate or inadvertent; and whether there were circumstances which mitigated the blameworthiness or the failure to comply.

q. Rentplus UK Ltd v Coulson [2022] EAT 81, [2022] IRLR 66: should an uplift be ordered? A 4-stage test:

i. Is the claim one which raises a matter to which the ACAS Code applies?
ii. Has there been a failure to comply with the ACAS Code in relation to that matter? This can apply to cases of non-existent or poorly conducted internal procedures; where there is an issue about conduct which is tainted by a discriminatory assumption; where it is held that an apparently competent procedure was actually a sham, not carried out in good faith.
iii. Was the failure to comply with the ACAS Code unreasonable? This is an integral part of the section's scheme and must always be considered.
iv. 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%? See Slade v Briggs below.

r. Slade v Biggs and Stewart [2022] IRLR 216 – A 4 stage test on quantifying the uplift:

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. The EAT must be reluctant to second guess the ET's decision either to adjust or not adjust the percentage in this respect, or the amount of any adjustment, because it is quintessentially an exercise of judgment on facts which can never be as fully apparent on appeal as they were to the fact-finding tribunal. The EAT will certainly not substitute its own view for the judgment of the ET in the absence of an obvious error
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?

Conclusions on the evidence and law

Good faith

25. Mr Rhodes for the respondent argues that the claimant's actions when he was informed of redundancy was to do several acts with *"malicious intent"* – deleting files, contacting clients, making an allegation of a regulatory breach. Mr Yeung found this at the appeal stage, that the claimant was determined to frustrate the redundancy process, and he made up whistleblowing to do so.

26. Mr Rhodes argued that the timing was an issue – the claimant raised an issue which had occurred on 29 March 2019 on 17 September 2019, an issue he was aware of for several months, including a month after his training; *"An usually long period of time … the timing is too close to be coincidental …."*. He then refused to provide information when asked, instead waiting until the meeting on 20 September to provide more information. This was to *"use it as leverage"* the redundancy process.

27. Mr Bidnell-Edwards argues that the claimant was a diligent and technical individual, that after his compliance training he wanted to check what had occurred in March, he was busy, he went on holiday, and the 17 September was his first chance to mention the issue to Mr Egan. In essence, the timing was coincidental.

28. Of importance argues Mr Bidnell-Edwards, after raising the whistleblowing disclosure on 17 & 20 September 2019, the claimant does not raise it again until 28 October 2019; there were several calls between Mr Egan and the claimant in-between. The claimant *"cannot be using these disclosures as a weapon if he does not mention them".* Mr Egan did not delay the redundancy process and the claimant did not ask for it to be delayed, *"… so it would be an error of fact or law to say the disclosures were a delaying tool."*. During the redundancy process, the claimant seeks to remain in post on a discounted salary, again not someone with the motivation to frustrate or disrupt the process.

29. Mr Bidnell-Edwards argued that for there to be bad faith it must amount to an impropriety, for example it is being used to further a campaign. It can have a mixed motive, but *"as long as the dominant reason is to give information, it's clearly in good faith".*

30. I concluded the following: At liability stage I accepted that the respondent believed that the claimant was acting in bad faith, and that this was a significant reason why it decided to go through with the disciplinary process; that this was *"intrinsically linked to his view that the whistleblowing was malicious"* (paragraph 164). I also found that the respondent did not investigate the electronic files issue properly because of Mr Egan's negative view of the claimant, which was in turn in part because of the fact he had whistleblown (paragraph 171).

31. Did the claimant hold a genuine belief at the time he made the disclosure that it was in the public interest to do so? I considered Mr Bidnell-Edwards characterisation of the claimant's character, which I found to be accurate based

in part on my observations of him as a witness and as his own advocate at the liability hearing. The claimant is an analyst and I agreed that he will want to research something and satisfy himself of its accuracy before he releases this information. He is strong-willed and pedantic. I found that he concluded after his regulatory training in August 2019 and after a further investigation that it had been a regulatory error to withdraw the March 2019 report. He genuinely believed that doing so was a regulatory breach.

32. I also accepted that the claimant did not regard the issue as very urgent in August 2019. It was an issue he wanted to raise as he believed withdrawing the report was wrong, but he did not prioritise doing so. I accepted that the claimant may have decided to raise the issue at the moment he did because he had been informed he may be made redundant. But I also accepted that he intended to do so in any event.

33. I did not accept there was bad faith or any impropriety in this decision; the fact he felt shocked and a degree of resentment about his redundancy at the time he made the disclosure does not mean that he was not intending to make the same disclosure in any event.

34. I concluded that the significant motive for making the disclosure was because the claimant had recently completed compliance training which gave an example which struck a chord for him about the March 2019 report critical of a group company being withdrawn. I accepted that this was an issue on his mind, he believed he needed to raise it. I did not accept that the claimant had an ulterior motive for raising the issue, that there was no bad faith or impropriety in his decision.

Financial loss claim

35. The claimant accepts that there is a period in which he would have suffered a loss of income because of his redundancy dismissal before he gained a new role. He argues that the gross misconduct finding had a significant impact on his gaining a role thereafter. Mr Bidnell-Edwards invited me to find that Mr Egan was not a reliable witness, that *"he clearly had a dislike"* of the claimant because of his disclosures, and it is likely that Mr Egan spoke to the prospective employer meaning the role was withdrawn in January 2020. But for this the claimant would have started work and mitigated his loss by February 2020. He acted appropriately by becoming self-employed as there is likely continuing stigma.

36. Mr Rhodes argues there is no evidence there was a leak of this information occurred, no reference was requested. There is no evidence why the claimant failed to secure a role, but he only made 11 applications. The covid pandemic had an impact, also new regulatory rules affecting brokerage's ability to offer research services. But there were roles available and it was not reasonable to go self-employed. The allegation that the gross misconduct finding leaked out is speculative at best. There is no continuing stigma because the respondent has withdrawn its finding of gross misconduct.

37. I concluded that there was no evidence that Mr Egan leaked details of the claimant's gross misconduct findings to a prospective employer, and there is no evidence why the claimant's contact with this prospective employer ceased. The covid pandemic was rapidly developing; it may be that the claimant's salary suggestions were too high for this prospective employer. I accepted that at the beginning of the pandemic hires generally were put on hold.

38. I did not accept that in the longer-term the claimant would have been disadvantaged in his specialist job market. The claimant has specialist knowledge which would be of value to employers in the China market.

39. I concluded that following the claimant's redundancy, but for the finding of gross misconduct he would or should have gained a new role by 1st July 2020 in the same or roughly similar role at roughly the same salary. The respondent raised his pay shortly before his redundancy, I considered that this salary was likely to be the market rate for the claimant's skills.

40. I accept also that the reason why the claimant decided to go self-employed is that he was aware by March 2020 that an employer's reference would state he had been found to have committed an act of gross misconduct. This fact would be in a regulatory reference or in a reference for a non-regulated role within the same sector.

41. I accept that given this, the claimant believed the prospects of him gaining any kind of comparable role – regulated or otherwise – was virtually non-existent. I accept that the claimant believed that knowledge of the gross misconduct finding had leaked and he believed the prospective employer was aware of this.

42. I accept that the claimant was therefore faced with moving out of this field completely, and still facing the difficulty with a reference, or going self-employed. I accept that in going self-employed he acted reasonably. I accept that he believed, reasonably, that his only realistic option to regain anything like his old salary was to start his own business. I found that the respondent has not shown that the claimant has failed to mitigate his loss.

43. The claimant has steadily increased his income since he started his business. It appears based on his average income calculated from the schedule of loss that he will achieve parity with his income from the respondent by 31 March 2023. From July 2020 to March 2021 he earned £29,258 net. In 2021-22 he earned £51,239. From April to end October 2022 he earned £52,859. I concluded based on his average monthly income in this financial year he will have a further financial loss to the end of the year of £6,259.

<u>Injury to feelings & aggravated damages</u>

44. The claimant's case is that the injury merits an award in the upper-band Vento, including aggravated damages and an increase in rpi on the Vento upper band (on which more below): £40,000.

45. Mr Bidnell-Edwards argued that the effect on the claimant was severe and over a number of years, that *"regard should be had to the kind of employment…",* that he was in a regulated role, that the finding of gross misconduct *has "permanent consequences and a permanent stain"*. The evidence is the claimant was depressed and in a low mood over a long period of time, he describes deteriorating mental health, being mentally and physically exhausted, *"… and he has in mind that through no fault of his own he has a FCA judgment.."* This role *"part of his identity"* in a niche and complex area.

46. The starting point of the injury is the gross misconduct process after his disclosure, being reported to the FCA and having to discover this, to the process of the litigation to the fact that the litigation is now widely known and can been seen by a google search, *"… all created a burden on the claimant, he will always be affected by this, the effect will be for ever. So this makes it an upper band award"*. Aggravated damages is merited because of the conduct of the respondent in the ligation, the grudging and partial withdrawal of the allegations to the FCA, and the failure to apologise.

47. Mr Rhodes argued that an award should be at the "top of the bottom" band, an award of £10,000. Any ongoing impact on the claimant ended when the respondent withdrew its reference to the FCA. The respondent accepts an impact on the claimant, but he did not seek medical retreatment, so there is limited evidence. Given this this cannot be a case in the highest bracket.

48. Mr Rhodes argues there is no basis to award aggravated damages, there was no high handed, malicious, or oppressive conduct. Mr Egan believed there had been wrongdoing; even if the investigation was inadequate there was a genuine belief and he was therefore obliged to report under FCA requirements.

49. Mr Rhodes accepted that in withdrawing the gross misconduct allegations to the FCA the respondent *"may not have included everything from the judgment, but this is not intended".* They were also acting on advice. Also, the main concern is to withdraw the record of gross misconduct *"and the manner of withdrawal is by the bye".* While this was a *"difficult process for all, including some mutual animosity, this is not sufficient for aggravated damages".*

50. There was a significant dispute about whether an increase should be made to a Vento award to reflect the increase in the rpi since the relevant Presidential Guidance. Mr Bidnell-Edwards refers to paragraph 44 of Da'Bell v National Society for Prevention of Cruelty to Children [2010] IRLR 19, and further discussion of this case in Bullimore v Pothecary Witham Weld Solicitors & Anor UKEAT/0189/10.

51. I found that in Da'Bell a decision was taken by the EAT in 2010 to update the 2002 Vento bands by inflation to reflect the rpi increase since 2002. In Bullimore this principle was affirmed (although the EAT did not interfere with the ET's decision not to update the award by the increase in rpi since 2002). But, each year since 2017 the Presidential Guidance - Employment Tribunal awards for injury to feelings and psychiatric injury has updated the Vento bands by rpi. For this calculation the Second Addendum is applicable, the claim was issued on 2

February 2020. The Second Addendum states it *"takes into account changes in the RPI All Items Index released on 20 March 2019. … In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows …"* (my underline).

52. I concluded that Guidance is mandatory – that the Vento bands shall be as specified for that financial year. To add rpi during the year would be to inflate the bands, clearly impermissibly. The effect of the Presidential Guidance is to remove any uncertainty as to the Vento bands in any financial year, it also removes discretion from employment tribunals to take account of factors such as inflation.

53. The downside for the claimant is that in a period of high inflation it is the date of claim which determines the Vento band; to which the answer may be that this is the purpose awarding of interest, in part to compensate for late receipt.

54. The relevant bands are:

    a. a lower band of £900 to £8,800 (less serious cases);
    b. a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and
    c. an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

55. I determined that an award within the middle of the middle-band Vento was appropriate. I concluded that the claimant suffered a long term and significant injury of stress and depressive symptoms as he describes in his statement and evidence. The stress of the FCA referral impacted on him as he knew he had little chance of gaining employment in the industry, at least if and until he was able to clear his name. There was an impact on his family and personal life. I accepted that the claimant was in an incredibly difficult and stressful time at a period when his family was growing – I accepted as accurate his description of lost time with his family.

56. This stress and injury lasted for around 2.5 years, from the date of the gross misconduct allegations in November 2019 to the date the FCA was contacted by the respondent to withdraw the gross misconduct allegations in July 2022.

57. I also took into account the respondent's belief that the claimant had committed an act of gross misconduct, albeit that this was based on a misguided view that the claimant was acting maliciously in making a disclosure.

58. I concluded that an award for £17,000 for injury to feelings was appropriate for the length and seriousness of the injury to the claimant.

59. In deciding to award a further £2,000 as aggravated damages for the injury suffered since July 2022, I noted the respondent contacted the FCA in grudging and misleading terms, albeit it withdrew the gross misconduct allegation. The respondent refuses to apologise, maintaining it has done nothing wrong – but it did not appeal this decision. I accepted that these factors were high-handed and

insulting, and impacted the claimant further, causing him stress and concern in particular about continuing stigma in the market. I concluded that an award of £2,000 was appropriate.

60. In making these awards, I considered the overall size of the award for injury and I concluded that overall an award of £19,000, in the middle of the middle-band Vento was appropriate considering the overall impact on the claimant to the date of the remedy hearing.

ACAS Uplift

61. The claimant contends there was an egregious breach of the ACAS disciplinary code, the failure to separate the investigation and disciplinary stages to two managers, in circumstances where Mr Egan had a personal animus against the claimant.

62. Had a proper investigation been undertaken Mr Bidnell-Edwards argues the claimant *"would have been found innocent"* The ACAS failure *"goes to the core"* and its failure had caused the claimant harm. The claimant seeks a 25% uplift.

63. Mr Rhodes argued that it may have been *"wrong"* for Mr Egan to conduct the process, and *"ideally"* someone else should have conducted the disciplinary, but the claimant was allowed an appeal, Mr Egan did what he felt was necessary in a small organisation without an HR team. Also, the impact of the gross misconduct finding is limited because the claimant was dismissed for redundancy.

64. I concluded at the liability stage that Mr Egan considered the claimant was acting with malice when he made his disclosure. This was even more reason for a different person consider the disciplinary allegations. It was impossible for the claimant to have his defence against the allegations properly considered given Mr Egan's settled opinion.

65. I concluded that had a fair process been undertaken the claimant's defence – that the documents he had deleted where in the main his spreadsheets and Mr Egan knew he had brought these into the company – would have been considered.

66. This is therefore far more than a technical breach of a process, or a mistake made in good faith. I found that Mr Egan chose to undertake the disciplinary hearing because he believed the claimant was acting in malice. This meant that the investigation was undertaken without a proper consideration of what he knew about the claimant creating his own spreadsheets and bringing them into his employment when he started, and the claimant's contention that the spreadsheets and documents did not belong to the respondent. I accepted that the respondent is a small organisation; but it has a large parent. There are sources of advice available, a call to ACAS would have been enough to find out that the investigator should not also undertake the disciplinary process.

67. I concluded that this was a serious failure to abide by the code, with serious consequences as it meant the claimant's defence was not considered at all in the disciplinary process. In the circumstances it was an unreasonable failure to comply with the ACAS Code.

68. This failure had serious consequences for the claimant and his career. I concluded that it was just and equitable to award an uplift. Given the seriousness of the breach, the fact that it was a deliberate decision of Mr Egan to undertake the disciplinary and the investigation, and the seriousness of the consequences, I concluded that an award of 25% would be a just and equitable percentage.

69. I reduced this percentage to 20%. I am required to balance the seriousness of the breach with the overall sum being awarded, a sense check. I considered that an increase of 25% would be disproportionate; in my balancing exercise I concluded that 20% was an appropriate uplift. This increases the financial loss award by just over £14,500 and the injury award by nearly £5,000. Considering the overall losses, I did not consider that this was a disproportionate sum. The injury to feelings award remains well within the middle-band Vento and does not double-compensate him for the harm he has suffered. Similarly while there is a significant increase in his income loss claim, I did not consider that this was a disproportionate sum to award, bearing in mind the effect this breach had on the claimant's ability to work within the industry, that he is likely to remain self-employed for the foreseeable future.

Interest

70. There was a dispute between the parties on the rate of interest. Mr Rhodes argued that applicable rate should be 2% if interest is awarded. The claimant argued interest must be awarded at 8%.

71. I concluded that while I had a discretion whether to award interest, I did not have a discretion of the rate, at 8%. If there was any discretion, given the inflation rate I would have in any event have made an award of interest at 8%.

72. Once I had stated that the applicable interest rate was 8%, the parties agreed the interest calculations set out in the judgment calculation above.

Request for reconsideration

73. Following the hearing the claimant's representative applied for reconsideration on the basis that there was a *'slight miscalculation'* in the figures for injury to feelings, giving the following calculation.

"Interest at 8% from 20 September 2019 to 31 October 2022 = 1,126 days

ACAS Code uplift of 20%

Applying the maths to this, would be as follows:
(8% of 19,000.00)/365 x 1136 = 4,730.74
4,689.09 + 19,000.00 = 23,730.74
ACAS Code uplift - 23,689.09 x 1.2 = 28,476.88

The figure referred to yesterday in respect of injury to feelings, ACAS Code uplift, and interest was £26,832.90. Based on the above calculations, the Tribunal is invited to vary the judgment so that a total of £28,476.88 is awarded in respect of injury to feelings."

74. I agreed with this calculation, save that the correct figure to be uplifted under the ACAS Code is £23,730.74 (and not £23,689.09). I have revised the figure for injury to feelings after interest and ACAS uplift in the calculation above.

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EMPLOYMENT JUDGE EMERY

Dated: 19 January 2023
13 July 2023

Judgment sent to the parties
On: 13/07/2023

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For the staff of the Tribunal office

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