EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL BY CVP**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MR D CARTER**
MS P BRESLIN

CLAIMANT **Ms A Willis**

RESPONDENT **National Westminster Bank plc**

ON: **16 – 18 and (in chambers) 30th May 2023**

Appearances:

For the Claimant: Mr P Gilroy KC, counsel
For the Respondent: Mr C Crow, counsel

RESERVED JUDGMENT AS TO REMEDY

1. The Tribunal awards the Claimant her losses until 1 December 2020. After that date there is no loss. Simple Interest is awarded from the mid point to 12 July 2023. A calculation is set out in the reasons below.

2. The Tribunal awards £35,000 as injury to feelings to include an element of aggravated damages. Simple interest is awarded from 4th April 2020 to 12th July 2023 calculated as set out below.

3. The Tribunal awards £600 for loss of statutory rights.

4. The ACAS code did not apply to the circumstances of the Claimant's dismissal.

5. The Respondent is ordered to pay the Claimant a total of **£87,699.84** calculated as set out below.

6. A further amount should be awarded for grossing up. The Tribunal is unable to calculate this amount without further input from the parties as to the Claimant's tax position. The parties are invited to agree, (or failing which make to make submissions on) the amount of grossing up following which a further award will be made.

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REASONS

1. This was the second part of a remedy hearing, following the finding by the Tribunal that the Claimant had been unfairly dismissed and discriminated against contrary to section 15 of the Equality Act 2010. In the first part of the liability hearing the Tribunal dealt with issues relating to Polkey/Chagger as set out in that judgment.

2. In this hearing, the issues were as set out in paragraphs 2.2-2.13 of that list (reproduced in the schedule below).

3. The Tribunal heard evidence from the Claimant and also from Mr Baxter, appointed as an expert witness on behalf of the Claimant, and from Ms Cresswell, appointed as an expert witness on behalf of the Respondent. We had an extensive bundle of documents.

4. This has been unusual litigation in the extent of the parties disagreement on almost every matter or calculation. Both parties have complicated the issues in an unnecessary way. The parties have been unable to agree the Claimant's net remuneration while she was at the Respondent and the Tribunal was sent numerous late emails between the parties debating the issues.

Relevant law

5. Where a claimant has been subject to discrimination, section 124 of the Equality Act 2010, read with section 119, provides that compensation is to be assessed under the same principles as apply to torts. The central aim is to put the claimant in the position, so far as is reasonable, that she would have been in had the tort not occurred. There is a duty to mitigate loss. Losses flowing from discriminatory treatment are recoverable, whether or not they were foreseeable.

6. Section 119(4) provides that damages may include compensation for injury to feelings whether or not they include compensation under any other head. Compensation for non-financial loss may include an element of aggravated damages in particularly serious cases of discrimination. Aggravated damages

are part of compensation for injury to feelings, but they are not punitive. They should reflect the aggravation to the Claimant's injury to feelings and not the seriousness of the conduct itself. Care should be taken to prevent double compensation for the same loss.

7. In *Armitage, Marsden and HM Prison Service – v-Johnson* [1997] ICR 275 Smith J summarised the general principles applicable to awards of compensation for non pecuniary loss. These principles were approved by the Court of Appeal in *Vento-v-Chief Constable of West Yorkshire Police* [2003 IRLR 102.

> "(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
>
> (ii) 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 deemed to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham MR, be seen as the way to untaxed riches.
>
> (ii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.
>
> (iv) In exercising that discretion in assessing a sum, the Tribunal should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
>
> (v) Finally, the Tribunal should bear in mind Sir Thomas Bingham's reference for the need for public respect for the level of awards made".

8. In **Vento** (above) the Court of Appeal identified three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band is for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the grounds of sex or race. Awards in a middle band should be used for serious cases which do not merit an award in the highest band. Awards in the lower band were appropriate in less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Regard also needs to be had to the overall magnitude of the sum total of the award of compensation for non-pecuniary loss. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual

heads of damage. The extent of overlap will depend on the facts of each particular case.

9. Provisions relating to interest on awards for injury to feelings are dealt with under the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996. For injury to feelings interest is calculated from day to day from the date of the act of discrimination to the day on which interest is calculated by the Tribunal. For awards in respect of financial loss interest is awarded for the period beginning on the mid-point date and ending on the day of calculation. The mid-point date is the date half way through the period from the date of discrimination to the date of calculation. The interest rate is 8%.

10. The relevant statutory provisions relating to compensation for unfair dismissal are set out in Sections 118-124 of the Employment Rights Act 1996. Where an employee has been unfairly dismissed, Tribunals are required to make an award consisting of a basic award and a compensatory award. The compensatory award is such amount that the Tribunal considers just and equitable, having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as the loss is attributable to action taken by the employer.

Findings of fact relevant to financial loss.

11. The Claimant was dismissed with effect from 4th April 2020. She received an enhanced redundancy payment of £46,303.48 of which £3,412.50 was the statutory redundancy payment. £30,000 was tax free and the parties agree that the net value of the enhancement is £37,000.

12. After the Claimant left the Respondent's employment on 4 April 2020, she made extensive efforts to find alternative work. We make no finding that she has failed to mitigate her loss. Quite the contrary. In the main she has sought permanent positions. We accept her evidence that she made over 60 applications for employment between 4 April 2020 and August 2020 (ws para 34) despite, at the same time, undertaking chemotherapy. At the time the market for financial positions was significantly depressed because the first lockdown of the pandemic had begun.

13. Nonetheless, in October 2020, after initial interviews in July and August, the Claimant was made 2 offers to be engaged to work on a consultancy basis for different banks. One was with HSBC and the other with Credit Suisse, both for a one-year period. She accepted the role at Credit Suisse which started on 1 December 2020 and paid her £700 a day. (She was also offered a role with Lloyds for six months, but this was at a lower rate than the Claimant had been offered by Credit Suisse.) At this point she was engaged via a personal service company, HTL.

14. From April to end November 2020 the Claimant was out of work and in receipt of Job Seekers Allowance totaling £1,933. She started work again on 1st December 2020.

15. After the Claimant began working with Credit Suisse, she continued to look for permanent positions. She told the Tribunal that by November 2022 she had applied for over 300 roles. Since November 2022, the Claimant tells us that she has applied for a further 96 positions, 77 which were permanent and 19 of which were contract roles and had interviewed for two more permanent roles since November.

16. During her first engagement with Credit Suisse (from December 2020 to 31 March 2021) the Claimant was engaged by a personal service company Hearn Technologies Limited (HTL) which is owned (as to 90%) by the Claimant and (as to 10%) by her husband. The Claimant and her husband are the sole directors. Hearn Technologies invoiced emagine Consulting for the Claimant's services to Credit Suisse at £700 a day.

17. The Claimant's contract with Credit Suisse ended earlier than anticipated on 31 March 2021. In the 4 month period of her contract she had billed £54,950 (gross) . The Claimant seeks to give credit for only £5,700 in earnings by way of mitigation for the period to the end of that contract, being the dividends received from HTL-(see p 40). That is plainly not the correct measure of loss since the retained earnings in HTL are under her control. We also accept that not all the expenses which the Claimant has claimed for the purposes of her tax return reflect the additional expenses she incurred in providing her services via HTL as opposed to through direct employment. See below.

18. In April 2021 she accepted an eight week temporary contract at Bank of London Middle East, beginning on 5 May 2021, so that she was out of work for just over a month. During this contract the Claimant provided her services, via HTL, at £800 a day. Over the 8 week period of the contract she earned £30,000 (gross).[1]

19. The Bank of London contract ended on 30 June 2021. In July the Claimant was offered two six-month contract roles, one at Citi and the other at Credit Suisse. She accepted the role at Credit Suisse which began on 25 July 2021. In these two short periods of unemployment she received further sums in job seekers allowance/income support.

20. Since then the Credit Suisse role has been extended three times and, as at the date of this hearing, the Claimant is currently still there. The first extension was for a further 6 months to 26 July 2022 (681/683); and then to 26 January 2023 and then again to 26 July 2023. In her first remedy statement (dated 11 November 2022) the Claimant anticipated that this contract would not be renewed (and would come to an end before 26 January 2023); but in fact her contract has in fact been renewed for a further six months until 26 July 2023. As at the date of the hearing it had not been further renewed.

21. Since December 2020 the Claimant has worked continuously as a contractor apart from April, a week in May and part of July 2021

[1] (We note that in June 2021 the Claimant invoiced Nell Consulting Ltd for work done for the Bank of London in March 2021 (1382/1383) but assume that this was an error in her invoice as at that time she was working for, and invoiced, Credit Suisse)

22. Since the Claimant has been reengaged by Credit Suisse in July 2021 the Claimant has been employed by umbrella companies (PaystreamMax3 Ltd and Clarity Umbrella Ltd) who have in turn contracted with the recruitment agency and assigned her to Credit Suisse. As such she has paid PAYE and been in receipt of holiday pay (and pension contributions from Clarity). Her daily rate with Credit Suisse was £906.82 per day, rising to £916.48. in July 2022.

23. Exactly what the Claimant has earned since leaving the Respondent has been the subject of considerable dispute. Her schedule of loss has been extremely hard to follow and not set out in a straightforward way. Her witness statement does not clearly set out the dates of her engagements.

24. In her schedule of loss, as updated on 30th March 2023 (2177) the Claimant says that her net earnings from 6 April 2020 to 5th April 2021 are £7,700, but that figure is not explained.[2] In cross examination she says that, despite billing £59,959 to Credit Suisse in 4 months, her earnings were £7,770, which was the amount HTL paid in dividends. (The accounts of HTL show proposed dividends of £8,000). This takes no account of the retained earnings in that company, which remain under her control.

25. In her Appendix A the Claimant says that in the tax year 2021/2022 she earned £66,675 and in the tax year 22/23 she earned £93,115. These amounts are not explained. We also had trouble understanding the figures given by the Claimant as to mitigation to date,

26. Mr Crow spend a considerable time in cross examination going though the expenses that the Claimant deducted in her tax return while providing her services through HTL. We do not propose to go through these in detail, save only to say that many of the deductions (even if allowable for tax purposes) such as her husband's mobile phone bills do not accurately reflect the additional expenses she genuinely incurred in providing her services via HTL as opposed to being directly employed.

27. In respect of past loss her schedule of loss is broken down as follows;

a.	4 April to 31 December 2020-	84,123
b.	January 21-31 March 2023	152,011
c.	1 to 24 April 23	6,084
		26,3513.39
Less mitigation		£175,791
		87,722.09

We do not accept those figures. Our findings are set out below.

28. In the period from 4 April 2020 to December 1 2020 the Claimant's only income was JSA of £1,933 (1085)

[2] The revised schedule of loss sent on 15th May 2023 attached a revised Appendix B but no revised Appendix A

29. In the period 1 December 2020 to 25th July 2021 (nearly 8 Months) the Claimant worked for a total of 6 months: In the first contract, which lasted 4 months, HTL invoiced Credit Suisse £54,950. (1378/1381). In the 8 week period of her assignment to Bank of London, HTL invoiced £30,000. So from 1 December 2020 to the start of her second assignment to Credit Suisse on 25th July 2021 (just under 8 months) she invoiced £84,950**.** (She was also in receipt of JSA for the periods where she was not working amounting to £298 see 1086) We accept that there are some expenses which should be offset against these gross earning to allow for the costs of being self employed but we consider that £18,000 would be the (generous) maximum that could be said to be incurred in this way, giving a gross income of £66,950

30. Had the Claimant remained at NatWest she would have earned (gross) £13,333 in December 2020 (£160/12). In 2021, she would have been in a new role paying less than she had been earning as Head of OCiR. Assuming a salary of £97,000, pension contributions of £9,700, benefits of £9,700, and a bonus of £5,000 payable in February 2021 her annual gross earnings would be £121,400 (2,334.6 a week) equal to £67,703 over 29 weeks. This latter figure needs to be reduced by 25%to reflect our Polkey finding that there was a 75% chance that the Claimant would have secured a new job when her head of OCiR position came to an end i.e £50,777.88. Adding back 100% of her December earnings, she would have earned a total of £64,110 gross in the same period.

31. Even allowing for unemployment in April and July (and giving no credit for JSA) her earnings were higher than they would have been in the equivalent period, even allowing for the period of inactivity between the various contracts.

32. Using the net figures however, the gain to the Claimant is greater. Applying the same net to gross ratio as was applicable when she was at the Respondent (50%) her net earnings at the Respondent would have been £32,055 as against actual net earnings of £56,435. For these purposes we agree the calculation of net earnings undertaken by the Respondent at paragraph 17 of Mr Crow's written submissions. (Using the Claimant's disputed net figures for what she would have earned in 2021 at the Respondent the result is the same – the Claimant was earning more from December 2020 than she would have earned had she stayed at the Respondent allowing for the Polkey adjustment.)[3]

33. From 25th July 2021 until 12th May 2023 the Claimant has been working for just under 2 years and has earned £308,649 (gross).From August 2021 she worked 345 days out of a possible 447 working days so the Claimant took considerably more days leave that she would have taken off had she stayed employed at the Respondent

34. In the equivalent period, has she remained at Nat West she would have earned £121,400 per annum in the first 6 months for (£97,000 + 9,700

[3] The net amount would be £45,522 . December (4.5 weeks at 1937) =8716.5 . Add 36,805.5 for 2021. (29 weeks at 1606 per week, plus net bonus of 2,500 = 49074 x 75% = £36805.5). The total is 45,522

pension + 9,700 benefits) + a bonus of say, £5,000. Assuming a 10% pay rise the following year to £133,540, the Claimant would have earned rather less in those 22 months had she stayed at the Respondent, even without making a 25% Polkey deduction. Net figures are only likely to increase the difference.

35. It is apparent that from December 2020 the Claimant has been earning significantly more than she would have done had she remained at the Respondent, even allowing for some periods of inactivity.

Is there a future loss?

35. The Claimant's case. The Claimant's updated schedule of loss following the Tribunal's judgment of 12th May (dealing with Polkey/Chagger issues) claims a net loss to hearing of £87,722 (revised down from £195,339 in the schedule of loss which appears in the remedy bundle -at p 2173) and future losses of £1,070,824. As we have said we do not accept a net loss to the remedy hearing.

36. In essence the Claimant seeks a career long loss, inviting the Tribunal to consider what she would have earned had she remained at the Respondent until retirement at 67, against what she might earn with reasonable mitigation going forward. She says that there should be no slicing up of different periods. The Tribunal should consider what she would have earned had she stayed at Nat West till retirement against her anticipated earnings now until retirement.

37. It is the Claimant's case that had she stayed at the Respondent she would have remained until retirement at 67. Further she submits that:

a. there was a 75% chance that she would been promoted to D12 by age 45 (i.e. by 31st March 2023),
b. there was a 60% chance she would been promoted to D13 age 50 (by 31 March 2028) and
c. there was a 50% chance she would have been promoted to D14 aged 57 (by 31 March 2035).
d. her annual net earnings would have increased over time to £200,000 excluding pension and benefits.

38. Against that she applies a percentage reduction "to reflect the possibility that the she may mitigate her loss sporadically to her expected retirement date" thereby reducing the future loss from £2,860,178 to £1,070,824.:"

39. As to future earnings outside Nat West the Claimant says that she has continued to look for permanent roles but has not been offered a single interview for any permanent role she had applied for in 2022. She says that when applying for permanent roles she has to disclose that she is disabled and this may be a factor, together with the stigma of having taken the Respondent to the Employment Tribunal.

40. She says however very little about her prospects of obtaining future contract roles. Mr Baxter offers his opinion on this – see below.

41. In support of her position she relies on the report from Mr Baxter. Mr Baxter is a trustee of various pension funds, has worked in the financial services industry for 31 years and has experience as an adviser on compensation and benefits. Since 2003 he has been a consultant, mainly advising on remuneration for senior executives .

42. Mr Baxter in his report (prepared in November 2022) says that in his opinion

    e. If the Claimant not been dismissed on 4 April 2020 she would have continued to have been employed by the Respondent until 2045. She would have been appointed to Head of OCiR in January 2021 with a compensation package of £182,000

    f. The Claimant's salary would have continued to increase from a total compensation package in 2020 of £167,499, to a total compensation package 2 years later, in 2023 of £231,000 (£160,000 salary plus benefits).

    g. The most likely career path for the Claimant now (having left the Respondent) is that of a self-employed contractor. Her daily rates would be between £700 and £800 a day from which he would make a 50% deduction (20% for expenses and 30% for contract breaks).

    h. After adjustment, her annual gross earnings as a consultant would be in the range of £79,800 to £91,200 per annum (estimated net earnings in the range of £54,000 to £61,000 per annum).

    i. The Claimant's projected earnings, had she stayed at the Respondent, and set out in her schedule of loss were fair and reasonable,

    j. The Claimant would not obtain a permanent role because of the stigma of being disabled and having bought a Tribunal claim.

43. We did not find Mr Baxter's evidence convincing. He does not explain how he arrives at these figures. He told the Tribunal that in estimating what the Claimant would have earned in 2023 had she stayed at the Respondent. he did not look at how she had arrived at her current level of remuneration (i.e. if it had been protected) but said that it was "a thin" market for those with regulatory and compliance expertise and that individual working at banks were "up or out "and if people were not promoted they would leave.(It is an exceedingly generalized statement.) When pressed in cross examination, Mr Baxter simply said that his views were based on "experience and knowledge of the industry and pay scales". He offers nothing to back up his views.

44. We treat with some scepticism Mr Baxter's opinion that if the Claimant were to continue to work on a self employed basis her daily rate would be in the range of £700 to £800 from which one had to deduct 50% for expenses and contract breaks. She has already been earning over £900 a day. Mr Baxter did not identify what additional expenses the Claimant would need to cover if working as a contractor, as opposed to in a permanent job. In cross examination the Claimant said that as a contractor she worked partly from home and partly in the office, which was similar to her pattern when employed. She confirmed that all she really needed to fulfil her job as a contractor was a computer.

45. The Respondent's case . The Respondent's case is very different. On behalf of the Respondent Mr Crow submits that the overriding tortious compensatory principle is to place the Claimant, as best as can be assessed, in the position she would have been in, but for the proven discrimination. However, in this context the Tribunal must consider when it is more likely than not that the Claimant will obtain an equivalent level of remuneration to her previous job , as that fixes the point in time after which there should be no compensation. He refers in particular to the case of *Wardle v Credit Agricole Corporate and Investment Bank 2011 IRLR 604..*

46. Although Wardle refers to "an equivalent job", this was shorthand for "a job in banking at the same salary level as the Claimant would have enjoyed if promoted." It does not need to be a salaried or a permanent job. In this case, Mr Crow submits that the cut-off point should be 26 July 2021 when the Claimant began her (second stint of) contract work with Credit Suisse. He submits that since then the Claimant has been able to earn more, whilst working less, than she did while on her protected remuneration package at the Respondent and significantly more than she would have done in a potential new job at a salary (excluding benefit and pension) of £97,000.

47. He submits in particular that from 28 August 2021 until 12 May 2023 the Claimant's gross annualised earnings have been £186,857, significantly more than the Claimant would have earned had she remained with the Respondent. He submits that even if the Claimant had worked just 119 of the working days of the year (i.e. having significant breaks between contracts) she would still be able to earn £100,000 gross per annum.

48. As to the Claimant's future prospects, and without prejudice to his contention as to the cut-off point, he relied on the report (dated 4 November 2022) of Ms Cresswell, an expert appointed by the Respondent.

49. Ms Cresswell tells us that she has over 30 years experience in the recruitment business. She is currently the founder and director of a boutique search business operating within risk, compliance and finance, placing candidates in a broad range of risk positions. Her opinion is based on an examination of the Claimant's CV. She did not interview or meet the Claimant.

50. Ms Creswell's view of the Claimant's prospects for the future is markedly different to that of Mr Baxter. She considered that the Claimant's CV made her ideally suited to the professional contract market and that the Claimant could continue on a long term basis to earn as a contractor at the same level as she has enjoyed at Credit Suisse.

51. She told the Tribunal that in relation to permanent positions, while the pandemic had affected recruitment in 2020, by the summer of 2022, recruitment was back up to pre-pandemic levels.

52. Further, as of August 2021 hiring for contractors in the financial services industry had displayed rapid growth, with recruitment for consultants already over triple the total for 2020. (786). The APSCO Finance Vacancies Sector Trends Report for August 2021 commented that "*when broken down by roles within banking, the data shows that compliance specialists are in the first position in terms of volume*." She opines that most clients prefer to respond to specific regulatory directives with specialist interim/contract sill and then pass the business as usual element to permanent staff to manage on an ongoing basis. We prefer Ms Cresswell's evidence on these points to that of Mr Baxter.

53. Ms Cresswell was critical of the Claimant's approach to seeking a permanent role describing her approach as "scattergun". However, as we have said we make no finding that the Claimant failed to mitigate her loss.

54. Ms Cresswell's opinion (based on the review of the Claimant's CV) was that the Claimant was very comfortable with project based work and was ideally suited to the professional contract market. If she chose to seek employment in roles focused around OCiR compliance, the greater volume of roles would be available on a contract, rather than a permanent basis and that client demand outstripped the supply of suitably qualified candidates.

<u>Submissions and conclusions relating to future loss</u>

55. The first issue to consider, is <u>whether the Tribunal should apply a cut-off point to the assessment of loss; and if so what the appropriate cut-off point is.</u> The Claimant says there should be no cut-off point. Mr Gilroy submits that the Claimant is unlikely to ever obtain a permanent job earning a similar level to that which she would have earned had she remained at the Respondent.

56. The Respondent says that the Claimant has already considerably exceeded what she might have earned had she remained at the Respondent and that the cut-off point occurred on 26 July 2021. The Claimant, on the other hand says that she is already out of pocket and her loss to the hearing is £87,772**.**

57. In response to Mr Crow's submission as to the applicability of a cut-off point for the assessment of loss, Mr Gilroy submits that Wardle is authority for the proposition that it is normal to assess loss up to the point when the employee would be likely to obtain an equivalent **job** on equivalent terms. He submits

that Wardle does not apply unless the Claimant has obtained a permanent job. What the Claimant has achieved on the contractor market is not the same as obtaining an equivalent job on equivalent terms – and therefore it is appropriate to continue to assess loss until retirement.

58. In Wardle the Claimant was dismissed but had obtained, some three months later, a new permanent job which involved a significant reduction in remuneration. The Tribunal found that the new job qualified him well for a return to banking and that there was a 70% chance that ,after about three years, he could return to a job which was equivalent to that which he had enjoyed previously. At first instance the Tribunal awarded career long loss reducing the compensation to take account of its finding that there was an 80% chance he would have left the bank if he had not been lawfully dismissed.

59. The Court of Appeal overturned the decision of the Employment Tribunal. It held that the tribunal was wrong to assess loss on a career long basis*. "It will be a rare case where it is appropriate for a court to assess compensation over a career lifetime, but that is not because the exercise is in principle to speculative. If an employee suffers career loss, it is incumbent on the tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation…..However, the usual approach, assessing the loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases (and they are likely to be the vast majority) where it is at least possible to compute conclude that the employee will in time find such a job."…."*

60. The Court of Appeal also held that the Tribunal had been wrong to assess compensation after the date when the prospects of obtaining an equivalent job would have been greater than 50%.

61. The ratio in Wardle, refers to the Claimant obtaining an equivalent job. Mr Gilroy submits that the principle in Wardle is confined to cases where the Claimant had got, or can be expected to, obtain a permanent job as an employee. In this case, he submits that the Claimant has not yet obtained a permanent job, despite extensive efforts to mitigate, and is unlikely to ever obtain an equivalent job on equivalent terms, so that loss should be assessed on a career long basis. "Contract hopping is by no means an equivalent job on equivalent terms" (per Mr Gilroy's submissions)

62. Mr Crow, says that, and as a matter of common sense in the context of an assessment of financial compensation the issue is when will the Claimant achieve a means of earning equivalent remuneration to that which she had or would have enjoyed at the Respondent.

63. We agree with Mr Crow. In the banking industry many individuals choose to work as contractors, rather than as permanent employees, trading security of employment for the greater flexibility and (usually) higher rates of pay. (In the past there were also considerable tax benefits though these have diminished since the introduction of IR 35.) Being a contractor is not a lesser

option than a permanent job. Many contractors stay with the same company for many years, as was the case with Ms Lambourne. Being a contractor does, however, necessarily bring with it a degree of uncertainty.

64. The cut off point is the point at which the Claimant can expect to have achieved a similar level of remuneration going forward than that she would have achieved had she stayed at the Respondent. Where an individual is working as a contractor this requires factoring in the degree of uncertainty that contracting positions engender, and some periods when an individual will be between contracts.

65. When is that point? Here again the parties are at odds. The Claimant says she has a continuing loss so that point has not been reached. Mr Crow says that this point has already been reached. He says that the cut off point is 25th July 2021 when the Claimant began her second assignment with Credit Suisse and that since July 2021 the Claimant's annualized gross earning (assuming 30 days annual leave) were £176,274 for the first month and £186,857 thereafter. He submits that on this basis even if she were out of work for nearly half a year she would still be earning sums equivalent to her projected loss.

66. The Claimant points to the fact that she remained out of work until December 2020, despite significant efforts. That period, however, coincided with the start of the pandemic and all the uncertainty that the lockdown caused within the financial sphere. It is not a period which is representative of the general long term market for those with regulatory expertise. Since 1 December 2020, however, the Claimant has been out of work for only 2.5 months (April and May 2021 and part of July 2021. Before she began her first job with Credit Suisse she received three offers and in 2021 she received a further four offers.

67. The Tribunal concludes that the cut off date is 1st December 2020. Applying the 75% Polkey deduction she has been in receipt of more income since that date than she would have been had she stayed at the Respondent. See para 17 -22 above. This is despite there being gaps between her engagements where she did not earn, and despite the fact that the Claimant worked fewer days even while on contract, than she would have done had she stayed at Nat West.

68. It is to the Claimant's credit that notwithstanding the effects of the pandemic and her ongoing treatment for cancer she was able to find well paying contract work as early as December 2020 and has worked almost continuously since then.

69. We note in passing that If we had taken the cut off point as July 2021 (as contended for by Mr Crow), it is likely that this would have resulted in a lower award as the sums to be offset as having been earned in mitigation exceeded the sums she would have earned had she stayed at the Respondent.

70. It follows that a consideration of future/career long loss is not appropriate as the Claimant had, by December 2020 achieved better levels of remuneration than she would have had had she remained at Nat West and was operating well in the contractor market.

71. It is however worth recording our view that in any event, had we considered potential loss to the Claimant's 67th birthday it is unlikely that the award would be any different. The work the Claimant has been doing to date, combined with the evidence of Ms Cresswell, leads us to conclude that the Claimant is likely to earn considerably greater sums going forward as a contractor than she would have done had she stayed at the Respondent. We do not accept that it is more likely than not that she would have stayed at the Respondent till 67, or that she would have progressed through the various stages of promotion in the way that she describes.

Injury to feelings

72. in our liability judgment we found a number of acts of unlawful disability discrimination these were:

a. the decision to change the Claimant reporting line
b. being asked to leave the Monday morning meeting on 28 October 2019
c. the failure to complete the year in review
d. dissuading the Claimant from applying for the roles
e. dismissing her.

73. At the time that the these acts happened the Claimant had cancer and was vulnerable. At the time the Claimant found out that her contract would not be renewed beyond one month she was in hospital undergoing treatment for cancer.

74. The Claimant gave evidence that she suffered and continues to suffer from significant stress and sickness symptoms (see para 9 of her witness statement). It is of course difficult to extrapolate symptoms which are a result of her diagnosis and the resulting treatment, and all the uncertainty and stress that comes with that, and the effects of the injury to her feelings caused by the Respondent's unlawful treatment of her. It is unlikely that all of the symptoms which the Claimant seeks to a attribute to the Respondent's treatment of her arose from her injured feelings as opposed to her cancer. On the other hand, it is clear that the Claimant was and remains an ambitious professional and that her professional and personal pride was extremely hurt by the treatment which she received.

75. In respect of claims presented after 6 April 2020 the Vento bands were a lower band of £900 – £9000 for less serious cases, a middle band of £9,000 to £27,000 and an upper band of £27,000 - £45,000 applicable for the most serious cases.

76. Mr Gilroy submits that this is an upper band case and seeks £37,450 together with aggravated damages of £7,860. Mr Gilroy submits that this is a case where the discrimination was made worse by being done in an exceptionally upsetting way and that the Respondent's actions in this case were thoroughly high-handed and or oppressive (Cassell v Broome 1972 1AER 801) For the Respondent, Mr Crow, contends that it is a mid band case and an award should be made of between £10,000 and £15,000. He submits that there is no sufficient basis for a separate award of aggravated damages and that there cannot be double counting.

77. Awards are for injury to feelings are compensatory. It must compensate for the injury caused by the unlawful act of discrimination and not for any injury caused by acts which the Claimant considered were discriminatory but which we have found were not.

78. There were some aspects of the Claimant's claims that she did not succeed on. On the other hand, she succeeded on many. We are satisfied that she was extremely hurt by those actions which we have found to be discriminatory. As we have said the Claimant was ambitious and had been led to believe that she might get a permanent role within the Respondent. In this case her stress and injury were significantly compounded/aggravated by the fact that she was, at that time, going through life events which were extremely difficult in themselves. At a time when she might have expected support and sympathy from those at the Respondent, management were representing that her job no longer existed.

79. Taking everything together we consider that an award in the middle of the top band is appropriate. We do not make a separate award for aggravated damages, but the level of the award, which is high at £35,000, takes into account the fact that the discrimination occurred at a particularly difficult point in the Claimant's life which would have compounded the feelings of hurt and injury.

ACAS Code

80. The Claimant contends that the ACAS code uplift is engaged. Mr Gilroy submits that there should be a 25% uplift to any award. He relies on *Rentplus UK Ltd v Coulson 2022 IRLR 64*. He submits that it is authority for the proposition that when an employer contemplates an action because it considers that there are issues of misconduct or poor performance, the ACAS code is engaged. He submits that the reason for the Claimant's dismissal was not redundancy, but was grounded in doubts about her capability to do the job long-term. As such it was, for the purposes of the ACAS code, a disciplinary situation and/or a situation in which her capability to do the job was being questioned. There was a failure to follow the code and there should be a 25% uplift.

81. However, as Mr Crow submits, the ACAS code does not apply to incapacity due to ill health. (*Holmes v QinetiQ 2016 ICR 1016*.) As was said by the EAT in that case "*The code applies to cases where an employee's alleged*

actions or omissions involve culpable conduct or performance on his part that require correction or punishment….. Where there is no conduct or performance on the part of an employee that requires correction or punishment giving rise to a disciplinary situation, and most obviously that will be when no culpability is involved, disciplinary action ought not to be invoked and would be unjustified if it were…. For those reasons the Code of Practice does not apply to internal procedures operated by an employer concerning an employee's alleged incapability to do the job arising from ill health and sickness absence and nothing more. "

82. There was no culpable conduct or performance conduct in issue in this case. The Code did not apply.

83. Accordingly we make the following award.

Compensation for discrimination		
Financial loss		
Loss to 31 December 2020		£
Net remuneration including pension and benefits[4]		
£1937.64 x 38.71 weeks		75,006.
Bonus		
5000 gross x 9/12 = 3,750, (net £1,875)		1875
		76,881
LESS net value of enhanced redundancy pay	£ 37,000	
JSA	£ 1,933	
Total		37,948.
Interest from the mid point		
20 November 2021 to 12th July 2023		4990.42
Injury to feelings		35,000
Interest		9,161.42
grossing up tba		
Compensation for unfair dismissal		
Basic Award		
(The Claimant received statutory redundancy pay of £3,412)		nil
Compensatory Award		600
This represents loss of statutory rights. No award is made for financial loss to avoid double recovery.		

84. A further amount should be awarded for grossing up. The parties are invited to agree this amount and write to the Tribunal within 14 days of receipt of

[4] The parties disagree as to the Claimant's net remuneration with the Respondent .(The Claimant says it was £1,973.37 per week including the value of pension and benefits . The Respondent argues for £1,910.9. We have spilt the difference and used £1,937.63)

this Judgment. If they are unable to agree written submissions should be exchanged and sent to the Tribunal within the same time frame.

_____
Employment Judge Spencer
18 July 2023

JUDGMENT SENT TO THE PARTIES ON

19/07/2023

FOR THE TRIBUNAL OFFICE

THE SCHEDULE

2.2 Is there a real prospect of the Claimant ever obtaining a role with equivalent remuneration? If yes:

(a) When is the cut-off date, beyond which the Claimant would be likely to secure a role with equivalent remuneration to that which, she would have held with the Respondent at that same point in time?

(b) What will the Claimant's earnings in the future be?

Mitigation

2.3 What have been the Claimant's actual earnings from the effective date of termination of her employment to date?

2.4 Has the Respondent proved that the Claimant has failed to take reasonable steps to mitigate her losses since the effective date of termination of her employment? If so, what would the Claimant's earnings have been if she had taken such reasonable steps?

2.5 What have the Claimant's expenses been to date and what should be awarded in respect of this head of loss?

2.6 What compensation in respect of financial loss should be awarded?

2.7 What should be the amount of the injury to feelings award?

2.8 Should there be an aggravated damages award? If so, in what amount?

2.9 Did the ACAS Code(s) apply? In particular:

(a) If so, did the Respondent fail to comply with the Code?
(b) If so, was such failure unreasonable?
(c) If so, is it just and equitable in all the circumstances to increase compensation?
(d) If so, by what percentage?
2.10 What interest should be awarded?
2.11 What is the effect of grossing up?

Unfair Dismissal
2.12 The Claimant received a statutory redundancy payment equal to the basic award. There is, therefore, no claim to a basic award.

2.13 The Tribunal has found that the Respondent unlawfully discriminated against the Claimant, and that the Claimant was unfairly dismissed. Given the statutory cap on the compensatory award, the Claimant's entitlement to such an award will overlap with her entitled to compensation for discrimination, rendering her entitlement to a compensatory award academic, save in respect of loss of statutory rights. What should the Claimant be awarded in respect of loss of statutory rights?