



EMPLOYMENT TRIBUNALS

Claimants: Mr M Crowley (1)
Mr E Witney (2)
Mr S Rolls (3)

Respondent: Sterling Thermal Technology Ltd

Heard at: Watford **On:** 11, 12 & 13 October 2023
23 October 2023 (Panel only)

Before: Employment Judge Maxwell
Mr D Wharton
Mr D Sutton

Appearances

For the Claimants: (1) Ms Linford, Counsel
(2) Mr Griffiths, Counsel
(3) in person

For the Respondent: Ms Duane, Counsel

RESERVED REMEDY JUDGMENT

1. The First Claimant is entitled to:

Unfair Dismissal

1.1 Loss of statutory rights £350;

Discrimination

1.2 Injury to feeling £12,000;

1.3 Loss of earnings £44,808.29;

1.4 Additional sum for grossing-up £1,092;

Interest on Discrimination Award

1.5 Interest £7,497.25

Total £65,747.54

2. The Second Claimant is entitled to:

Unfair Dismissal

2.1 Basic award £4,035;

2.2 Compensatory award:

2.2.1 Loss of statutory rights £500;

2.2.2 Loss of earnings and pension £36,714.22;

2.2.3 ACAS uplift £9,303.55

Total £50,552.77

3. The Third Claimant is entitled to:

Discrimination

3.1 Loss of earnings £70,560.26;

3.2 Injury to feelings £12,000;

Interest on Discrimination Award

3.3 Interest £4,989.93

Total £87,550.19

RESERVED REASONS

Law

4. On well-established principles, a Tribunal may reduce the compensation payable to an unfairly dismissed claimant where there is a prospect they would have been fairly dismissed in any event; see **Polkey v AE Dayton Services Limited [1988] ICR 142 HL**. The correct approach to determining whether a **Polkey** reduction is appropriate and the amount of the same was considered in **Software 2000 Limited v Andrews [2007] ICR 825 EAT**; per Elias P, as he then was:

54. The following principles emerge from these cases. (1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have

given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. [...]

5. Similar considerations can arise in discrimination cases. In **Abbey National Plc v Chagger**, [2010] ICR 397 the Court of Appeal considered the correct approach to assessing compensation for future loss in a case where the claimant has suffered a discriminatory dismissal; per Elias LJ:

66. [...] We would accept that, in many cases, the starting point in the case of a discriminatory dismissal will be the period for which the employee would have been employed by the discriminating employer. For example, if the employer can show that the dismissal would have occurred in any event after a specific period of time, for example because of redundancies or the closing down of the business, then this will normally set the limit to the compensation payable. If there is a chance as opposed to a certainty of this occurring, that should be assessed and factored into the calculation of future loss as the answer to the first question indicates. In such a case, the employee would have been on the labour market in any event once the employment had ceased, and the usual effect of the discriminatory dismissal would simply have been to put him on the labour market earlier than would otherwise have been the case.

67. Similarly, there may be circumstances—although in practice they will be rare—where the evidence is that the employee would voluntarily have left in the near future in any event, whether or not he had another job to go to. This could occur, for example, if the employee is dismissed shortly before he was due to retire, or if he had already given notice of resignation when the discriminatory dismissal occurred. It would be wrong to award compensation beyond the point when he would have left because there would be no loss with respect to any subsequent period of employment.

[...]

69. [...] The task is to put the employee in the position he would have been in had there been no discrimination; that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination. The reason is that the features of the labour market are not necessarily equivalent in the two cases. The fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances

which are not of his own choosing. It does not follow therefore that his prospects of obtaining a new job are the same as they would have been had he stayed at Abbey. For a start, it is generally easier to obtain employment from a current job than from the status of being unemployed. Further, it may be that the labour market is more difficult in one case compared with another. For example, jobs may be particularly difficult to obtain at the time of dismissal and yet by the time they become more plentiful, when in the usual course of events Mr Chagger might have been expected to have changed jobs had he remained with Abbey, he will have been out of a job and out of the industry for such a period that potential employers will be reluctant to employ him. In addition, he may have been stigmatised by taking proceedings, and that may have some effect on his chances of obtaining future employment.

First Claimant

Unfair Dismissal

6. The only sum sought with respect to unfair dismissal is **£350** for loss of statutory rights, which is agreed. The remainder of his losses are claimed and awarded as flowing from his discrimination claim.

Prospect of Dismissal

7. If the evidence shows there was a realistic chance of the Claimant having been dismissed anyway, without age discrimination, then that is something which should be factored into the assessment of his compensation with respect to his ongoing losses.
8. We begin by noting there was a genuine redundancy exercise underway. The Respondent was looking to make a substantial reduction in headcount. As part of this, it had been decided the number of Application Engineers would be reduced from 3 to 2.
9. Ms Duane said Mr Crowley would have been dismissed in any event. To this end, she made observations about the effect on the Claimant's scoring in the redundancy selection exercise, if points he had made during the process were taken into account. There were at least two difficulties with this approach. Firstly, much of the same ground had been covered by Mr Munro during the liability hearing and we had already made findings of fact about it. Secondly, our conclusion with respect to the Respondent's selection process was not limited to problems with particular scores. On the contrary, we found the entire process had been manipulated so as to ensure Mr Crowley was dismissed.
10. Ms Linford said the Claimant was the most well-qualified Application Engineer and would certainly have been retained.
11. Our conclusion is this selection process would have been a very difficult exercise for Mr Zeoli to carry out. He had only been with the business for a relatively short period of time. He had some direct knowledge of the work done by Mr Kuen and Mr Siddiqui. He had little or no experience of working with Mr Crowley. In assessing the Claimant, Mr Zeoli would have needed to rely to a very large extent on the information he gleaned from others or documentary evidence.

12. Looking at the evidence we received and that would have been available to Mr Zeoli, it is difficult to reach any firm conclusion about the respective merits of the three individuals, as judged against the selection criteria for expertise with respect to the three main products used by the Respondent. This would have been the key determinant. Given our liability findings, absence is likely to have been neutralised as a material factor in a non-discriminatory exercise. Our impression is that the three candidates were all fairly closely matched, being stronger in some areas and weaker in others, but all at a relatively good level. Doing our best, we have come to the conclusion there was a 1/3 risk of the Claimant having been dismissed in any event, fairly and without discrimination.

Health

13. Following his dismissal, Mr Crowley suffered with moderate depression and a loss of confidence. He sought advice from his GP and was referred for online cognitive behavioural therapy. The outcome of the treatment was described in a letter of 15 June 2021 from Healthy Minds:

You scored in the moderate range on the questionnaires that you completed prior to the start of treatment. After completing treatment, your scores were in the normal range subclinical for depression.

14. In his witness statement, Mr Crowley has described sleep disturbance and violent nightmares, accompanied by physical thrashing of his arms or legs. He says these became 'night terror attacks' as his depression deepened and in his witness statement, the Claimant quoted from a book he has read on the subject.
15. Our conclusion is Mr Crowley suffered with moderate depression and a loss of confidence as a result of his dismissal and the manner in which this was carried out. He has also experienced sleep disturbance, nightmares and physical thrashing. Mr Crowley was assisted by undergoing the online CBT course and by June 2021, the frequency and severity of ongoing symptoms was reduced and manageable, without the need for support from his GP or other medical practitioner.
16. Mr Crowley harbours a strong sense of injustice at the treatment he has received. Having worked hard to create financial stability for himself and his family, Mr Crowley believes the Respondent undermined this by taking his employment away and forcing him into early retirement.
17. In re-examination, Ms Linden adduced evidence from Mr Crowley to the effect that he had recently redone one of the online CBT modules. On reflection, we are not sure the question asked on this arose from cross-examination. In any event, we would not be surprised if the Claimant had some anxiety and apprehension at the prospect of a further hearing in the Tribunal. We noted he was tearful at one point when giving his evidence. This is a not unexpected reaction. Succeeding at the Tribunal can prompt both positive and negative feelings, a sense of vindication in the decision made accompanied by renewed anger at the injustice suffered. This is not at all an uncommon reaction. Mr Crowley will no doubt welcome and benefit from being able to put these proceedings behind him.

Mitigation

18. We are not persuaded the Claimant's health prevented him from applying for employment at any point following his dismissal. There is no medical evidence to suggest this was so. The test, however, is not whether the Claimant has done all that was practicable, rather the Respondent has the burden of proving the Claimant failed to do that which was reasonable in the circumstances.
19. The Claimant was suffering with moderate depression and a loss of confidence following his dismissal. Whilst this did not operate as an absolute bar to him making job applications, we are not persuaded that his immediate failure to commence a search for new employment was unreasonable. Dismissal in these circumstances was a very significant life event, which undoubtedly knocked him back.
20. By June 2021, following the completion of his online CBT course, the Claimant was then suffering with low mood only to a modest extent not requiring intervention. The Claimant did not, however, then or since commence a meaningful search for new employment. Asked by Ms Duane to describe a typical day, Mr Crowley said he fired up his laptop and looked for work. This struck us as most unrealistic. Had Mr Crowley undertaken that activity, at least in any serious way, he would have been able to put forward some fruits of that endeavour, namely evidence of job applications, rejections and correspondence with agencies. There was a complete absence of such material.
21. The Claimant said that many of the job adverts he read referred to a "career" or "career opportunity" and his wife, who works in a job centre, suggested this meant the employer was looking for a much younger person. Whilst the prospect of age-related prejudice against older job applicants is real, we are not satisfied it provides a good reason for the Claimant to refrain from applying for employment.
22. We are satisfied a failure on the part of the Claimant to make a reasonable effort to mitigate his losses has been shown from June 2021. Whilst Mr Crowley's depression and loss of confidence in the months immediately following his dismissal may have operated as something of an obstacle (not an insurmountable one) to searching for new employment, by 15 June 2021 there was no significant health barrier. He could then have begun to make a concerted effort and to the extent that he seeks to recover ongoing losses from the Respondent, it was an unreasonable failure on his part not to. The Claimant has specialist skills which are transferrable. He does not say there are no job opportunities for those possessing the same. His inactivity is, therefore, very surprising and we are satisfied that he did fail from that point to make reasonable efforts to mitigate his losses.
23. The next relevant questions would be, if Mr Crowley had made a reasonable effort to seek new employment would he have found it, if so when and at what level of remuneration. Having commented on the lack of evidence of Claimant seeking new employment, it is also appropriate to observe the Respondent's failure to put forward evidence of vacant positions the Claimant might have applied for. The Respondent, as an employer of those with specialist engineering skills, would seem to be well placed to have sourced evidence of

relevant vacant positions and put copies of such vacancies in the remedy hearing bundle. That simple action does not, however, appear to have been carried out. This does not assist the Respondent in seeking to show whether and when the Claimant might have been likely to fully mitigate his losses by obtaining a similar job.

24. Whilst we have little to go on with respect to engineering roles, we can say with confidence that if the Claimant had broadened his job search and been willing to consider a reduction in pay, both of which with the passage of time would have been reasonable steps to take, then it is likely he would have found alternative employment. Taking into account his age, this is likely to have taken longer than for a younger person in similar circumstances, Our conclusion is that if the Claimant had undertaken and broadened his job search in this way, then he is likely to have found new employment by the point of 12 months after June 2021 (i.e. 15 June 2022) at no less than 50% of his previous earnings

Retirement

25. Mr Crowley's schedule of loss is predicated on him working to the age of 75, which he explained on the basis it would align with his wife's retirement. In cross-examination the Claimant said he decided upon this when he was aged 65. A lot can, of course, change over a period of 10 years, especially when that spans mid-60s to mid-70s. We take judicial notice of the fact that only a relatively small proportion of the working population continue past age 70. Whilst it is not easy to reconstruct the world as it might have been had the Claimant not been dismissed and we take into account the reality that it will often be much easier to continue in existing employment than start something new, we were struck by the Claimant's inactivity in the job market following his dismissal. This approach appears inconsistent with it being likely the Claimant would, absent dismissal, have continued in the workplace until 75. Had the prospect of the Claimant working for another 7 years been a realistic one, then we think he would have gone back into the job market in a serious way following his dismissal. We note his wife's retirement is still a long way off but this has not prompted him to apply for new employment himself.
26. The Claimant was still in work at the age of 68, we accept he had no imminent retirement plans. Nor could we say with confidence that he would have chosen to leave at the age of 70, which was a little more than a year away. Doing our best to take into account the inconsistent factors, in particular the Claimant's intended retirement age on the one hand and failure to seek new employment on the other, we find he would have retired in any event by age 72. The Claimant was dismissed on 28 December 2020, when he was aged 68. His 72nd birthday would have been 4 February 2024. This would have resulted in a further period of employment of 3 year and 3 months.

Injury to Feeling

27. What was done to the Claimant was a one-off event. We do, however, accept that it has had ongoing consequences for the Claimant. Furthermore, whilst the Vento guidelines focus on the extent of the wrong done by the Respondent, the correct approach is to assess the Claimant's injury. The description of how the wrongdoer has behaved is merely intended to indicate the injured feelings that

might be expected to have been provoked by conduct of that kind. Different individuals may suffer hurt feelings to a greater or lesser extent in response to similar wrongs.

28. We have set out our findings as to the impact on the Claimant's health, his sense of injustice and heightened feelings on returning to the Tribunal. All of this appears to call for an award at the lower end of the middle band. This one off act has had ongoing consequences for the Claimant feelings, albeit at a moderate or low level. An award of **£12,000** is appropriate in this regard.

Loss of Earnings

29. Gross salary £44,808, net salary £31,860.
30. Loss of earnings from EDT 28 December 2020 to 15 June 2022:
- 30.1 Period 1 year 5 months and 18 days (534 days);
- 30.2 $534/365 \times £31,860 = £46,611.62$.
31. Loss of earning 16 June 2022 to 4 February 2024:
- 31.1 Period 1 Year 7 months and 19 days (598 days);
- 31.2 50% gross earnings £44,808 = £22,404;
- 31.3 Net income £19,258.92 (based on www.gov.uk tax calculator);
- 31.4 Net differential £31,860 - £19,258.92 = £12,574.08;
- 31.5 $598/365 \times £12,574.08 = £20,600.82$.
32. Total loss of earnings £67,212.44
33. Less 1/3 for chance of non-discriminatory dismissal = **£44,808.29**.

Grossing Up

34. The balance of the award over £30,000, namely £14,808.29 is likely to be subject to tax as income in the year. In order to be left with a sum in this amount after deduction of tax and NI, per the www.gov.uk tax calculator he is likely to need to receive a gross income of circa £15,900.
35. $£15,900 - £14,808 = \mathbf{\underline{£1,092}}$

Interest

36. For his injury to feelings award, the Claimant is entitled to interest at 8% from the date of injury to the date of award:
- 36.1 Period 28 December 2020 to 23 October 2023;
- 36.2 2 years 9 months 25 days (1,030 days);

36.3 Interest $1,030/365 \times 0.08 \times \text{£}12,000 = \text{£}2,709.04$;

37. For his loss of earnings flowing from discrimination, the Claimant is entitled to 8% from the midpoint to today:

37.1 Midpoint $(1,030 / 2) = 515$ days;

37.2 Loss of earnings to today only:

37.2.1 28.12.20-15.06.22 = $\text{£}46,611.62$;

37.2.2 16.06.22-23.10.23 is 494 days - $494/365 \times \text{£}12,574.08 = \text{£}17,018.07$;

37.2.3 Sub-total $\text{£}63,629.69$

37.2.4 Less $1/3 = \text{£}42,419.79$

37.3 Interest $515/365 \times 0.08 \times \text{£}42,419.79 = \text{£}4,788.21$

38. Total interest **£7,497.25**

Second Claimant

Unfair Dismissal

39. Mr Witney's losses are all assessed as flowing from his unfair dismissal.

40. The basic award is agreed, in the sum of **£4,035**.

41. Loss of statutory rights is agreed in the sum of **£500**.

Mitigation

42. Mr Witney's employment with the Respondent came to an end on 14 January 2021 and he started in new employment on 10 May 2021. He did, however, have to accept a significant cut in pay. There can be no serious suggestion of an unreasonable failure to mitigate losses in his case. On the contrary, we are satisfied that he made a very good effort, demonstrating considerable flexibility, consistent with an intention to mitigate his losses and despite suffering from symptoms of PTSD at the time.

Health

43. Having experienced a most traumatic event and PTSD early in his adult life, Mr Witney was vulnerable to its return. Unfortunately, he did begin to feel unwell in this regard in October 2020 and he sought assistance from his GP. We were referred to an entry in Mr Witney's GP records referring to PTSD on 29 October 2020, which was the day the Claimant was told of his suspension from work. We pause to note, this resurgence did, therefore, begin prior to the Claimant's dismissal.

44. Subsequent to his dismissal, Mr Witney made a subject access request. Whilst his claim in the Tribunal may be the reason for that request, it is no part of

proceedings in this jurisdiction. The right for data subject to make requests is subject to a separate statutory regime. In replying to his request, the Respondent copied Mr Witney's data to Mr Rolls, along with the password to decrypt this. Mr Witney was very upset by this data breach and brought separate proceedings against the Respondent, which have been settled. As part of that claim, a medico legal report was obtained from Dr Harvey, Forensic Psychologist, following an assessment on 3 May 2022. This included:

INJURY DETAILS

Mr. Witney reported that he was previously the IT manager at a company. They put him on furlough during the Covid-19 pandemic. He later discovered they had in fact made him redundant because he was over the age of 60. As part of the tribunal process he put in a subject access request - the information received was incomplete. The remainder of the information was sent to him via an email link. The password to the files was sent in a separate email. The same information was emailed to one of his colleagues. His colleague then had access to all of his personal information.

3 TREATMENT RECEIVED

CURRENT SITUATION

Cognitive, Emotional, Social, Physical

The index incident prompted him to feel vengeful against the company. It has re-triggered symptoms of his existing PTSD diagnosis including vivid nightmares, flashbacks, and disrupted sleep. He considered giving up his new job because he did not feel able to function properly.

At the time, he withdrew from social interactions and would become irritable and "blow up" at the slightest inconvenience.

5 CONSEQUENTIAL EFFECTS

In my opinion, the above-mentioned symptoms are reasonable and are attributable to the index incident.

Dr Harvey recommended CBT and her prognosis was for a recovery within 8-10 months.

45. Separately from PTSD, the Claimant is in good physical health. He told us he can run 5 miles "comfortably" and is keen on DIY, having carried out his own kitchen refit.

New Employment

46. Mr Witney continued in his new employment from 10 May 2021 until 28 July 2023, when it terminated on expiry of notice given by him. His witness statement included:

The delays in this case have caused me further anxiety and I am again suffering symptoms of PTSD but to a much lesser degree. This has

however caused me to give up work with effect from 28th July 2023, as I can no longer function at the level I would expect.

Causation

47. Whilst we do not doubt Mr Witney has given an honest account of his own assessment, we are not satisfied his resignation with effect from July 2023 can be attributed to dismissal by the Respondent in January 2021. We note the resurgence of PTSD preceded his dismissal and was, subsequently, not attributed by Dr Harvey to dismissal but rather to the data breach. Her prognosis was for a recovery in 2023 and this is, broadly, consistent with Claimant's own account of much lesser symptoms at present. There is also some illogicality in his symptoms having improved and yet now causing the Claimant not to be satisfied with his performance at work. The Claimant's long period of new employment would appear to be a supervening event. Indeed, he was with this new employer long enough to reacquire unfair dismissal protection.

Retirement

48. Our conclusion is that Mr Witney would have been likely to have retired at the time he did, namely July 2023, in any event. As we have already observed, intentions with respect to retirement can change. The Claimant was 69 in July 2021 and continuing at work past 70 is very much the exception rather than the rule. He is physically fit and has interests outside of work.

ACAS Uplift

49. The Respondent substantially departed from the requirements of the ACAS Code. Paragraph 5 with respect to investigations was defaulted upon by reason of the multiple inadequacies and malign intent, to which we referred in our liability decision. The incomplete and/or misleading provision of information contravenes paragraph 9. Paragraph 18 requires, unsurprisingly, that a disciplinary decision be made after the disciplinary hearing, whereas we found this decision had already been made and the process amounted window-dressing. The treatment of Mr Witney was abysmal and his decision not to appeal entirely reasonable. The maximum uplift of 25% is appropriate.

Notice Period

50. The Claimant's employment by the Respondent was subject to a 3 month notice period. Whilst his earlier terms and conditions included only statutory notice, these were subsequently varied both to increase his rate of pay and the period of notice required on both sides. We accepted Mr Witney's evidence on this point. At this hearing as before, he was entirely straightforward and if anything, a little overeager to answer questions. We noted the Respondent has changed its position on his notice period. In the counter schedule, the 3 month period was agreed. Counsel at the hearing took a different approach. Whilst no revised contractual document was produced in evidence, we did not consider this to be conclusive. The Respondents' approach to disclosing documents has left much to be desired. It also appears, at least prior to the arrival of Mr Gozturk, that the Claimant was well regarded by the Respondent. It is entirely credible that an important officer of the company, such as the IT manager, should be subject to a

notice period of this length. This would not merely be for his benefit but also to ensure the Respondent had a reasonable period of time which to source a replacement, when this became necessary.

Pay and Pension

51. Weekly net pay and employer's pension contrib = £759.92 + £46.85 = £805.85.
52. Annualised figure for net pay and pension (i.e. x 52) = £41,904.

Loss of Earnings and Pension

53. Notice period 14 January to 14 April 2021:
53.1 12.8 weeks x £805.86 = £10,326.66.
54. 15 April 2021 to 9 May 2021:
54.1 Period of 3 weeks and 3 days (24 days);
54.2 $24/365 \times £41,904 = £2,755.34$;
55. 10 May 2021 to 28 July 2023:
55.1 Period of 2 years 2 months and 18 days (809 days);
55.2 Lost earnings with the Respondent $809/365 \times £41,904 = £92,877.63$
55.3 credit new employment 10 May 2021 to 30 April 2022 - £25,767.77;
55.4 credit new employment 1 May 2022 to 6 February 2023 = £23,845.90:
55.5 credit new employment 7 February to 28 July 2023:
55.5.1 period 5 months 3 weeks (171 days);
55.5.2 $171/365 \times £41,904 = £19,631.74$.
55.6 $£92,877.63 - £25,767.77 - £23,845.90 - £19,631.74 = £23,632.22$
56. Total loss of earnings and pension £36,714.22

ACAS Uplift

57. Compensatory award before uplift £36,714.22 + £500 = £37,214.22
58. 25% uplift £9,303.55

Breach of Contract

59. The Claimant was entitled to 3 months' notice:
59.1 Period from 14 January to 14 April 2021:
59.2 12.8 weeks x £805.86 = £10,326.66.

60. He cannot, however, receive this sum twice and it already accounted for in his compensatory award for unfair dismissal.

Third Claimant

Prospect of Dismissal

61. Absent age discrimination, the Claimant would have been put in a pool of two with Mr Dunne for redundancy selection. This position was reflected in an earlier iteration of the Respondent's restructuring document and we find, would have remained the position where it not for age discrimination.
62. The question then is what prospect Mr Rolls had of retaining his employment, if a selection of then being made as between him and Mr Dunne, without any consideration of the Claimant's age. Mr Rolls rejected the suggestion put to him in cross examination that there would have been a 50% prospect. He said that was an irrelevant statistic. The basis for his position was a belief that he was more qualified than Mr Dunne to carry out the quality inspection role. We noted in our findings at the liability stage, the requirement for someone else to discharge this role was brought about by the Claimant himself, wishing to go on furlough. Reluctantly, the Respondent acceded and Mr Dunne was required to take up this activity. Given, not very long thereafter, the Respondent decided to dispense with the Claimant and retain Mr Dunne, it is difficult to avoid drawing the inference the Respondent was satisfied by Mr Dunne's performance in this new (for him) role. The evidence does not, therefore, obviously point to the retention of the Claimant by virtue of great experience. The Respondent did not in the other exercises to which we have been referred, rely upon last in first out as a criterion and there is no reason to suppose they would have done so in this instance. There was, therefore, a very real risk the Claimant would have been dismissed in any event and without discrimination. The 50% prospect put to the Claimant reflects the evidence we have seen.

Mitigation

63. Mr Rolls has gone to considerable lengths to mitigate losses. He has taken on employment in a wholly unrelated field, at much reduced pay and subject to a zero hours contract. We are not sure he has gone about this exercise in the wisest manner but that does not enable the Respondent to show a failure on his part to reasonably mitigate his losses.

Retirement

64. The Claimant say he intended to work until his wife reached retirement age, in September 2026. Given he is still working now and in far less convenient employment, we have accept his account as being realistic.

Injury to Feelings

65. Mr Rolls has suffered with low mood, anxiety and sleep disturbance, as a result of his discriminatory dismissal. This continued for many months. His GP record for February 2021 includes a diagnosis of stress-related problem and:

- **Been on furlough since April 2020 - was told in November 2020 that will be made redundant**
- **Since then has been feeling stressed ++ and occasionally waking in night with panic attack sx- heart racing, sweaty etc. - sx usually last a few minutes and settle if he walks around, has a cup of tea**
- **States feels slightly low in mood but more stress ed/worried for the future**

66. The Claimant was referred to Healthy Minds and another local source of mental health support. He saw his GP with the same problem and the end of April 2021, albeit his symptoms appeared to have abated somewhat.
67. In his witness statement the Claimant described a loss of confidence and weight (two stones) having never suffered with poor mental health previously. He has ongoing worries as a result of financial distress.
68. We could not help noting the similarity in the symptoms suffered by Mr Rolls and Mr Crowley. Whilst it was suggested in cross-examination that Mr Rolls had copied the position of Mr Crowley in certain respects (such as retirement age) the answer would appear to be that they have experienced a similar (not identical) reaction to a discriminatory dismissal late in their working lives. We find that an award at the lower of the middle band is appropriate in his case also and consider **£12,000** to be the appropriate sum.

Loss of Earnings

69. Although the Claimant's employment terminated on 10 December 2020, he received 1 months' PILON and so his losses began on 8 January 2021.
70. Period of loss, 8 January 2021 to 1 September 2026 is 5 years 8 months and 22 days (2,091 days).
71. Lost earnings with Respondent $2,091/365 \times £19,745.40 = £113,116.80$
72. Credit for earnings in new employment:
- 72.1 Temporary employment 3 January to 28 February 2022 = £3,442
- 72.2 Ongoing employment:
- 72.2.1 Net monthly pay £1,450 less travel and parking £648 = £802;
- 72.2.2 Annualised pay less travel and parking £9,624;
- 72.2.3 Period 1 April 2022 to 1 September 2026 - 4 years 5 months (1,614 days);
- 72.2.4 $1,614/365 \times £9,624 = £42,556.54$
73. Total loss of earnings $£113,116.80 - £42,556.54 = £70,560.26$
74. Less 1/2 for chance of non-discriminatory dismissal **£35,280.13.**

Grossing Up

75. The balance of the award over £30,000, namely £5,280.13 is likely to be subject to tax an income in the year.
76. The Claimant is earning £13,050 in his new employment. His taxable income is likely to be £13,050 + £35,280.13 = £48,330.13.
77. Per www.gov.uk the Claimant is likely to need to receive circa £68,000 in order to be left with circa £48,000 after tax and NI.
78. £68,000 - £48,000 = **£20,000**

Interest

79. For his injury to feelings award, the Claimant is entitled to interest at 8% from the date of injury to the date of award:
- 79.1 Period 10 December 2020 to 23 October 2023;
- 79.2 2 years 10 months 13 days (1,048 days);
- 79.3 $1,048/365 \times 0.08 \times £12,000 = £2,756.38$;
80. For his loss of earnings, the Claimant is entitled to 8% from the midpoint:
- 80.1 08.01.21-23.10.23 is 1,018 days and the mid-point is 509 days
- 80.2 Lost earnings with Respondent $1018/365 \times £19,745.40 = £55,070.73$
- 80.3 Credit for earnings in new employment:
- 80.3.1 03.01.22- 28.02.22 = £3,442
- 80.3.2 01.04.22-23.10.23 (570 days)
- 80.3.3 $570/365 \times £9,624 = £15,029.26$
- 80.4 Total loss of earnings to today $£55,070.73 - £15,029.26 = £40,041.47$
- 80.5 Less 1/2 for chance of non-discriminatory dismissal £20,020.74
- 80.6 $509/365 \times 0.08 \times £20,020.74 = £2,233.55$
81. Total interest $£2,756.38 + £2,233.55 =$ **£4,989.93**

Employment Judge Maxwell
Date: 23 October 2023

Sent to the parties on:
31 October 2023

For the Tribunal Office: