EMPLOYMENT TRIBUNALS

Claimant: Mr J Mullen

Respondent: Melian Dialogue Research Limited

Heard at: London Central (by CVP) **On:** 5, 6, 7, 8, 9, 12, 13, 14, 15 & 16 February 2024

Before: Employment Judge Professor A C Neal

Members: Ms S Campbell
Mr R Baber

Appearances

Claimant: Ms L Veale (Counsel)

Respondent: Mr A Williams (Solicitor Advocate)

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is that:

(1) The Claimant was unfairly dismissed for having made protected disclosures [ERA 1996 s.103A] and the Respondent is ordered to pay to the Claimant the sum of £25,546.90p. by way of a compensatory award.

(2) The Claimant was subjected to detriments by the Respondent done on the ground that the Claimant had made protected disclosures [ERA 1996 s.47B] and the Tribunal declares that the Claimant's complaint under Section 48(1) of the Employment Rights Act 1996 is well founded. However, the Tribunal considers that it would not be just and equitable to make any further award on that account.

(3) The Claimant suffered injury to feelings in respect of his unfair dismissal and the Tribunal orders the Respondent to pay to the Claimant the sum of £3,500.00p. The Tribunal does not consider that it would be just and equitable to make any further award for injury to feelings in relation to the detriments to which the Claimant was subjected on the ground that he had made protected disclosures.

(4) By consent it was agreed that the Claimant's claim for unpaid holiday pay is made out (less credit for overpayment of wages and/or notice pay made in March 2023) and the Respondent is ordered to pay to the Claimant the sum of £562.31p.

REASONS

1. On 14 February 2024 (Day 8 of this hearing) the Tribunal handed down its judgment on liability in this case.

2. The unanimous judgment of the Tribunal was that (1) The Claimant was unfairly dismissed for having made protected disclosures [ERA 1996 s.103A]; (2) The Claimant was subjected to detriments by the Respondent done on the ground that the Claimant had made protected disclosures. [ERA 1996 s.47B]; (3) The Claimant's claim alleging unlawful deduction from wages by reference to a bonus payment was dismissed; (4) It was agreed that the Claimant's claim for unpaid holiday pay was made out and the Respondent was ordered to pay to the Claimant the sum of £954.00p less credit for overpayment of wages and/or notice pay made in March 2023; (5) The Claimant's claim alleging unlawful deduction from wages by reference to outstanding salary due was dismissed upon withdrawal; and (6) The Claimant's claim alleging breach of contract by reference to notice money due was dismissed upon withdrawal.

3. Further to submissions made by the respective representatives on Day 6 of the hearing and supplemented by clarificatory submissions made on the morning of Day 9, the Tribunal sat for a further two days in chambers to consider their judgment on remedy.

UNFAIR DISMISSAL (SECTION 103A EMPLOYMENT RIGHTS ACT 1996)

4. **Section 112 of the Employment Rights Act 1996** provides:

> **The remedies: orders and compensation.**
>
> (1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.
>
> (2) The tribunal shall —
>
> (a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and
>
> (b) ask him whether he wishes the tribunal to make such an order.
>
> (3) If the complainant expresses such a wish, the tribunal may make an order under section 113.
>
> (4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.

The Claimant in this case does not seek reinstatement or re-engagement and seeks only an award of compensation.

5. In relation to the award of compensation **Section 118 of the Employment Rights Act 1996** provides:

> **General.**
>
> (1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of —

(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).

The Claimant in this case recognises that he does not qualify for a basic award and seeks a compensatory award.

6. **Section 123 of the Employment Rights Act 1996** provides:

Compensatory award.

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include —

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) ...

(4) In ascertaining the loss referred to in subsection (1) 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.

(5) …

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

(6A) Where —

(a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and

(b) it appears to the tribunal that the 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 complainant by no more than 25%.

(7) ...

(8) ...

7. **Section 124 of the Employment Rights Act 1996** provides:

Limit of compensatory award etc.

(1) The amount of —

(a) …), or

(b) a compensatory award to a person calculated in accordance with section 123,

shall not exceed the amount specified in subsection (1ZA).

(1ZA) The amount specified in this subsection is the lower of —

(a) £93,878, and

(b) 52 multiplied by a week's pay of the person concerned.

(1A) Subsection (1) shall not apply to compensation awarded, or a compensatory award made, to a person in a case where he is regarded as unfairly dismissed by virtue of section 100, 103A, 105(3) or 105(6A).

8. The Tribunal places on record that the quality of evidence produced in relation to submissions on remedy has been generally poor. Although a so-called "Claimant's Mitigation Bundle" was produced on Day 1 of the hearing, this was very limited. The material was subsequently supplemented with some documentation produced for the Tribunal at the request of the Employment Judge on Day 9 of the hearing, although that, too, was limited.

9. In particular, and by way of example:

(a) Apart from a single bank statement from the Santander Bank for the period 23 August 2022 to 21 September 2022 (heavily redacted) no information was produced in relation to the Claimant's personal financial situation. There were no other bank statements, nor was there any HMRC self-assessment tax return or any other documentation relating to the Claimant's income during the relevant period. While Counsel for the Claimant submitted that it would have been disproportionate to furnish detailed information about "the ins and outs of bank accounts and the nature of contracts secured", it is noted that provision of such material is normal practice to enable the Tribunal to fulfil its function in relation to remedy – a task which was made more difficult in this case by reason of the approach adopted on behalf of the Claimant;

(b) Instead, some material was produced which purported to reflect financial circumstances together with selected Companies House records relating to "Laurel Research Consulting Limited". The Tribunal was told that this was a limited company formed by the Claimant's mother on 12 August 2022 (electronic application for registration at Companies House having been submitted on 11 August 2022) and to which the Claimant had been appointed sole director (upon the withdrawal of his mother) on 1 September 2022;

(c) Documents which purported to reflect "Profit and Loss (Cash Basis) 1 September 2022 – 6 February 2024" relating to "Laurel Research Consulting Limited" in the "Mitigation Bundle" furnished at the start of the hearing did not come on headed paper or with any indication of their provenance or the basis of their computation. There were, however, some further documents produced which appeared to reflect VAT returns submitted electronically on behalf of "Laurel Research Consulting" itemising "Net value of sales" for the period 1 January – 31 March 2023 as £4,871.12p; for the period 1 April – 30 June 2023 as £38,883.42p; for the period 1 July – 30 September 2023 as £13,605.01p; and for the period 1 October – 31 December 2023 as £26,703.29p.

(d) An entry labelled "Legal and professional fees" in the sum of £3,589.55p was not broken down or explained. Amongst the documents produced as part of the "Additional Mitigation Bundle" on Day 9 of the hearing an entry under that heading for the period "September 2022 – August 2023" is put at £2,076.96p, with a further figure for "As of August 31, 2023" being given as £1,963.55p;

(e) In the same document there is an entry labelled "Director Loan – James Mullen" in the sum of £22,700.00p. During the course of clarifications given by the Claimant's Counsel on the morning of Day 9 it was explained that there had been a "Start-Up Loan" provided by the British Business Bank in two instalments to a total of £22,500.00p. The Claimant was unclear about the precise sums – at first suggesting an initial instalment of £9,000.00p and a second payment of £10,500.00p, but then revising this to a first instalment of £10,000.00p and a second instalment of £12,500.00p. It was not made clear to whom those payments had initially been made but it was inferred that the Claimant had received the payments from the British Business Bank and then put the money into the company in the form of a "Director Loan";

(f) When the Tribunal was told that the Claimant had been appointed as a director of "Laurel Research Consulting Limited" on 1 September 2022, it was represented that he was the sole director of that company. Background documentation said to have derived from Companies House was produced on Day 9 of the hearing following a request from the Tribunal. That documentation made no mention of the appointment of any director other than the Claimant. However, in the document entitled "September 2022 – August 2023" which was included with the Claimant's "Additional Mitigation Bundle" there is an item entitled "Director Loan – Lindell Cumes" in the sum of £810.00p. No explanation of that has been forthcoming.

10. Such evidence relating to economic loss and alleged injury to feelings as was given was delivered orally by the Claimant in the form of responses to supplementary questions put by his Counsel on Day 3 before the Claimant was tendered for cross-examination. There was no relevant evidence set out in the prepared witness statement for the Claimant. In relation to alleged injury to feelings there was no medical evidence produced and no impact statement was produced for the Tribunal.

11. Various iterations of a Schedule of Loss were produced on behalf of the Claimant. The first of these was dated 6 February 2024. Following the announcement on the afternoon of Day 8 of the Tribunal's decision on liability a revised Schedule of Loss was drawn up and produced for the Tribunal. This was dated 15 February 2024. An "Additional Mitigation Bundle" was produced for the Tribunal at the same time. During the course of clarification about the additional materials the Tribunal was told that the revised Schedule of Loss was not agreed between the parties but the Respondent's representative indicated that the "base reference figures" for computing loss of earnings were not disputed.

12. In the light of what evidence (both documentary and oral) has been received during the course of the hearing the Tribunal makes the following findings:

(1) It is common ground that the Claimant commenced employment with the Respondent on 3 January 2022 under a contract which he signed on 20 January 2022 [B/63-75]. The arrangements for remuneration were set out at paragraph 8 of that "Research Consultant Agreement".

(2) Thereafter the Claimant entered into an "Employment Contract" [B/77ff] with effect from 1 February 2002. Paragraph 3 of a section entitled "Getting Started" provided that "All the terms of your employment are in this contract" [B/77]. The arrangements for remuneration were set out in the section headed "Pay and Expenses" [B/78-9] which provided that "We will pay you £34,000 per year by monthly instalments in arrears".

(3) The Tribunal has found, for reasons set out in its judgment delivered in open Tribunal on Day 8 of the hearing, that the Claimant had no contractual or other right to any additional "bonus" payment in addition to the annual salary of £34,000 provided for at page 78 of the Bundle. The Claimant accepted during the course of his cross-examination that, even if he had enjoyed any right to payment of a "bonus", that would have been subject to the exercise of a discretion on the part of the Respondent.

(4) It is common ground and the Tribunal finds that the Claimant's gross loss of earnings from the effective date of termination (which the Tribunal has found to have been 18 August 2022) – reflecting dismissal on one week's notice) until the date of remedy computation (namely 15 February 2024) amounts to £51,012 gross [being 78 weeks at £654 gross].

(5) The Tribunal has been told that no application was made by the Claimant for State benefits and no such payments have been received in the relevant period. The recoupment provisions in the **Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (SI 1996/2349)** therefore do not apply.

(6) The Tribunal has also been told that the Claimant has made no applications for other jobs during the eighteen month period since his dismissal. Instead, the Claimant is said to have devoted the entirety of his time to developing the activities of a limited company which was incorporated by his mother on 12 August 2022 and to which he was appointed sole Director with effect from 1 September 2022.

(7) The Claimant told the Tribunal that in September 2022 he had invited a number of "people who had resigned or been fired by the Respondent" to join his new venture (which he described as a "boutique consultancy") and that some of these had joined him in January 2023. It is common ground that there has been no "non-compete" restriction operating to limit the scope of the Claimant's activities. Dr Coke, when giving evidence on behalf of the Respondent, also acknowledged that the approaches made by the Claimant to persons who had previously undertaken work for the Respondent did not constitute "poaching" as had earlier been alleged. When asked about the progress made with the company the Claimant suggested that it was "going well", that it had "survived its first year as a new company" and that it had "broken even for Year 1".

(8) The Claimant produced four documents which were said to be pay slips for the four months between October 2023 and January 2024. These showed payments to the Claimant in each of those four months of £458.33p. It was submitted that these payments reflected a "salary" payable to the Claimant by "Laurel Research

Consulting Limited", which it was said "is expected to continue until mid-2025", when the Claimant "hopes to increase his salary to £1,000 per month up to January 2026 when he expects to receive £2,000 per month and by 1 March 2026 have reached the level of monthly income (£2,800 approximately) that he enjoyed with the Respondent". No documentary basis for the four payments or for the anticipated income was provided to the Tribunal. There was no contract of employment, or other contractual document, produced by the Claimant.

(9) The nature of the four payments of £458.33p was not challenged and the Tribunal accepts that these reflected payments to the Claimant which it was conceded should be considered as constituting mitigation of his financial loss.

(10) The Claimant's submission that he "has no other income and although he used some of his savings prior to October 2023, he manages to live on his current salary of £458.33 due to having no rent nor bills to pay and keeping his expenses to a minimum" was not challenged. The Tribunal has already made mention of the absence of evidence in relation to the personal financial circumstances of the Claimant.

(11) The Tribunal has noted the evidence given by the Claimant, at paragraphs 8 - 23 of his prepared witness statement, about his capabilities and performance while in the employment of the Respondent. Note has also been taken of the terms under which the Claimant initially worked for the Respondent in January 2022 and the basis for remuneration by reference to designated acts performed as set out in the "Research Consultant Agreement" signed on 20 January 2022.

(12) In particular, the Claimant makes mention of his project management [Claimant witness statement paragraph 6], where he "continued to deliver directly alongside Dr Maria Armaou" for a Local Government Association project (revenue approx. £20,400); a project for the Arts and Humanities Research Council [Claimant witness statement paragraphs 10 – 11] in respect of which he "prepared the proposal and engaged with the AHRC procurement team and successfully won the project. It was the largest public contract won by Melian Dialogue at £43,400 (gross revenue £52,080)"; and a further instance [Claimant witness statement paragraph 22] where "in July 2022 the Company was awarded a contract to produce a housing guide for Anglesey. This had a value of about £6,000. I took part in the meeting with Menter Mon and other stakeholders to discuss the project and on this basis, it was awarded to the Company".

(13) The Tribunal has also had regard to the figures submitted on behalf of the Claimant in relation to the income generation of his "boutique consultancy" ("Laurel Research Consulting Limited").

ECONOMIC LOSS: LOSS OF EARNINGS

13. From the material indicated above the Tribunal finds that the Claimant's gross loss during the 78 weeks up to the date of computation was £51,012 (taking the gross weekly pay to be £654). The basis for coming to this figure is not in dispute between the parties.

14. During that period the Tribunal finds that the Claimant has received payments in the last four months totalling £1,833.32p (4 months x £458.33p).

MITIGATION

15. In closing submissions made on behalf of the Claimant it was submitted that the full loss of income in the 78 weeks to date should be awarded with mitigating credit given for the recent four months of payment. This would amount to a gross award of £49,178.68p (a total reached by deducting £1,833.32p from £51,012.00p). It was further submitted that the Claimant would endure continuing losses for a further period of two years (up to March 2026).

16. The Respondent challenges that position. During the course of cross-examination of the Claimant on the morning of Day 3 the circumstances relating to the new "boutique consultancy" were explored along with the steps said to have been taken to recruit the services of "a number of people who had resigned or been fired by the Respondent". In further submissions on the morning of Day 9 the Claimant's newly-disclosed additional materials were addressed and it was pointed out that the documents purporting to demonstrate the financial position of "Laurel Research Consulting Limited" did not say anything about the personal financial circumstances of the Claimant – other than in relation to the "director loan" and the "start-up loan" said to have been obtained from the British Business Bank. There had already been cross-examination and challenge in relation to the Claimant's picture of his performance while in employment (as painted by his prepared witness statement), as well as in respect of the matters raised between Dr Coke and the Claimant at their meeting on 10 August 2022 (as revealed from the transcript of the Claimant's covert recording of that meeting).

17. **Section 123(4) of the Employment Rights Act 1996** provides that:

> In ascertaining the loss referred to in subsection (1) 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.

The Tribunal has therefore had regard to what steps the Claimant has taken to mitigate his loss and has applied the common law approach to mitigation in the light of those circumstances. Regard is had to the basic principle that an award is to be "compensatory" and not "penal".

18. Recent and helpful guidance on the basic principles relating to the duty to mitigate has been offered by the Employment Appeal Tribunal in the case of **Edward v Tavistock and Portman NHS Foundation Trust, [2023] EAT 33** (a case concerning alleged race and age discrimination under the **Equality Act 2010**). It was there confirmed that the general approach to mitigation is that set out by the then President of the Employment Appeal Tribunal in the case of **Cooper Contracting Ltd. v. Lindsay, [UKEAT/0184/15]** to the effect that:

> (1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.

(2) It is not some broad assessment on which the burden of proof is neutral. […(comment on the decision in **Tandem Bars Ltd v. Pilloni, UKEAT/0050/12**)…] If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable.

(4) There is a difference between acting reasonably and not acting unreasonably (see **Wilding**).

(5) What is reasonable or unreasonable is a matter of fact.

(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer.

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

In the course of setting out that approach the Employment Appeal Tribunal had drawn upon earlier decisions in **Banco de Portugal v. Waterlow & Sons Ltd., [1932] AC 452**, **Wilding v. British Telecommunications plc, [2002] ICR 1079**, **Ministry of Defence v. Mutton, [1996] ICR 590** and **Fyfe v. Scientific Furnishings Ltd., [1989] ICR 648**.

19. The Claimant's position is, essentially, that he is entitled to continue with devoting the entirety of his efforts to turning his "boutique consultancy" into a profitable going concern – which has not yet been achieved, but which is "expected" to meet that ambition some time in the Spring of 2026. The Tribunal is satisfied that evidence has been adduced – both by way of reliance upon (the very limited) documentary materials and through cross-examination on Day 3 (forming the basis for extended comments on Day 9 in the light of further newly-disclosed financial material in relation to "Laurel Research Consulting Limited") – upon which the Respondent is entitled to rely when seeking to resist the proposition that the Claimant has mitigated his loss.

20. It is common ground that, to date, the Claimant has not sought any position other than that of piloting his start-up "boutique consultancy". The Tribunal has also been told that no State benefit payments have been sought or paid in the period since the Claimant's dismissal.

21. For fourteen of the last eighteen months the Claimant has told the Tribunal that he has had no income whatsoever. This is in spite of the picture of himself which he has drawn in his prepared witness statement, of a talented entrepreneur with an impressive skill-set and project-bidding skills capable of landing significant contracts (with their associated revenue) and delivering on those projects. The Claimant has robustly challenged the less flattering picture of his performance and potential painted by Dr Coke in the covertly recorded transcript of the meeting on 10 August 2022 and

which formed one of the reasons (although not the principal reason) for the dismissal on the following day.

22. This raises the question of whether the Claimant has acted "reasonably" in adopting that position and maintaining it to date (and, as the Claimant has made clear is his intention, into the future). That question has to be considered *inter alia* in the light of the economic progress demonstrated by the Claimant's efforts to earn his living solely through his commitment to the new "boutique consultancy".

23. The Tribunal has formed the unanimous view that, looking at the developing picture in the round, the Claimant has not acted reasonably in adopting the stance which he has taken.

24. In the view of the Tribunal that judgment has developed and changed as time has gone on.

25. At the outset, and taking into account the views and wishes of the Claimant as one of the circumstances, the Tribunal does not consider the Claimant to have acted unreasonably in seeking to establish, develop and grow a "start-up" business. That business operates in a market which the Claimant has said he knows well. There has been no restriction (for example by way of a "non-compete" provision in his earlier contract with the Respondent) upon calling upon already-known experienced consultants to give their services in the framework of the new venture. It was therefore initially reasonable for the Claimant to devote the entirety of his efforts to getting the new venture off the ground.

26. However, in spite of the Claimant's answer to a question put in examination-in-chief about the health of the new venture that it was "going well", it is clear, notwithstanding what has previously been noted about the poor quality of the available evidence, that the new venture has been barely managing to meet its overheads. The Tribunal was told (in the course of responses to supplementary questions put orally on the morning of Day 3) that "Laurel Research Consulting Limited" had "survived its first year as a new company" and that it "broke even for year one". That situation must have been clear to the Claimant on a day-to-day basis from the financial documentation produced for the Tribunal on Day 9.

27. In the light of the continuing failure to generate any income for the Claimant personally, the Tribunal considers that it eventually became not reasonable for him to continue relying solely upon the hope that one day in the future this new venture might generate sufficient income to provide him with a salary sufficient to make up for what he had enjoyed previously in the employment of the Respondent. The Claimant has chosen not to set out (either in his grounds of claim in the Claim Form ET1 or in his prepared witness statement) his employment history and level of earnings prior to his engagement with the Respondent. However, it is common ground as to the basis of his engagement in January 2022 as a "Research Consultant" (with "main duties" as set out in Clause 5.B. of his contract) and the basis for remuneration (as set out in Clause 8 of the same document). The Tribunal is satisfied that the Claimant possessed the necessary skill-set to undertake the kinds of income-generating activities set out in the 2022 "Research Consultant Agreement" on his own behalf, and not just on behalf of "Laurel Research Consulting Limited". Such passing (largely anecdotal)

comments as were made (by both the Claimant and Dr Coke) about the current state of the relevant consulting market indicate that there was a "market" for the Claimant's personal skill-set and experience.

28. Having considered the way in which matters developed in the eighteen months since the Claimant's dismissal, the Tribunal has formed the view that for the first six months the Claimant acted reasonably in devoting the entirety of his efforts to the new "boutique consultancy". The Tribunal therefore finds that for the period from the effective date of termination until the end of February 2023 the Claimant discharged his duty to mitigate as required by **Section 123(4) of the Employment Rights Act 1996**.

29. Thereafter, however, the Tribunal is of the view that the Claimant did not act reasonably in his insistence that only personal income generation through some contractual arrangement (no evidence of which has been produced to the Tribunal) with "Laurel Research Consulting Limited" should continue to be the appropriate and only course for him to take. While recognising – as has been pointed out in numerous earlier cases – that this exercise is not "scientific" in the sense of reaching "exact" figures – the Tribunal is of the view that it was not reasonable for the Claimant not to look to exploiting his skill-set, in what was for him a familiar market, in a manner which would be complementary to the aspirations harboured in relation to the success of the new venture.

30. While it was not reasonable to devote the entirety of his time to that venture, the Tribunal finds that it would have been reasonable to continue with the devotion of efforts to the new venture while also expending a proportion of the Claimant's efforts on generating personal revenue as a research consultant in much the manner of his previous activity in January 2022. The Tribunal also finds that the developing picture of income generation – which continued to be zero – called for regular reappraisal of the situation and the appropriate course of action over time.

31. In consequence, the Tribunal finds that for the three months between 1 March and 31 May 2023 the Claimant did not act reasonably in devoting his activities entirely to "Laurel Research Consulting Limited". An appraisal of the financial situation at that time called for some "complementary" action and there was a complete failure to make any effort to address that problem. The Tribunal makes a deduction of 50% of the loss for that period to reflect its view that devotion of half of the Claimant's efforts to nurturing the new venture would have been reasonable, but no more.

32. In the view of the Tribunal a further reappraisal was called for at the end of that period, and a deduction of 75% of the loss between 1 June and 31 August 2023 is made to reflect its view that devotion of 25% of the Claimant's efforts to nurturing the new venture would have been reasonable, but no more.

33. Finally, with effect from 1 September 2023 and onwards the Tribunal finds that the Claimant did not act reasonably in relying exclusively, or at all, upon his relationship with the start-up "boutique consultancy" project to provide him with income to mitigate his loss following his dismissal by the Respondent. No award is therefore made for the period from 1 September 2023 or for claimed "future loss".

34. In summary, therefore: (1) The Tribunal finds that the Claimant's gross loss during the 78 weeks up to the date of computation was £51,012 (taking the gross weekly pay to be £654); (2) The Claimant fully mitigated his loss during the period between the effective date of termination (18 August 2022) and 28 February 2023. The amount of that loss is £18,308.00p; (3) The Claimant acted unreasonably in not fully mitigating his loss between 1 March 2023 and 31 August 2023 and the Tribunal makes a deduction of 50% in the award. The amount of that loss is £4,250.00p; (4) The Claimant acted unreasonably in not fully mitigating his loss between 1 June 2023 and 31 August 2023 and the Tribunal makes a deduction of 75% in the award. The amount of that loss is £2,125.00p; (5) The Claimant acted unreasonably in not mitigating his loss from 1 September 2023 onwards and the Tribunal makes no award in respect of the loss from that date onwards.

35. The total award for loss of income, subject to the deduction reflecting failure by the Claimant to mitigate his loss, is therefore £24,683.00p.

"POLKEY" DEDUCTION

36. Submissions have been made in relation to a so-called "Polkey" reduction to reflect the chance (if any) that the Claimant would have been dismissed in any event had the Respondent acted fairly. This is a reference to the opinions of Their Lordships in the House of Lords case of **Polkey v. A.E. Dayton Services Ltd, [1988] ICR 142.** The Tribunal has also had regard to observations in the case of **Gover v. Propertycare Ltd, [2006] EWCA Civ 286** – particularly the observations of Buxton LJ at paragraphs 18 and 19 of his judgment, setting out his views on the propositions advanced by the Appellant and set out in paragraph 16 of the judgment, which led to dismissal of the appeal.

37. The submissions on the "Polkey" point as put forward by Counsel for the Claimant were summarised at paragraphs 119 and 120 of her Skeleton Argument. In particular, she submits that:

> R has not proven that C would have been fairly dismissed in any event. There was no fair reason for dismissal. Further, JC's evidence made it clear that he had little knowledge of what a fair process for dismissal looked like, and in any event R had no disciplinary policy or procedure let alone a performance management procedure. Therefore even if in the remote hypothetical future a fair reason for dismissing C did appear, there is no evidence to suggest a fair process would have been followed. There is no basis for a Polkey reduction in this case.

38. With all due respect to Counsel for the Claimant the Tribunal disagrees.

(1) There were potentially "fair reasons" to dismiss in the mind of the Respondent in the lead up to the dismissal. Those included the Claimant's performance (in particular, as regards "money" and "research that comes in") as evidenced by the transcript of the meeting on 10 August 2022 which was covertly recorded by the Claimant [B/203-4]. The Claimant has accepted during cross-examination that there was also "an issue relating to the French consultant" addressed at that meeting and that two "complaints" had been received about the Claimant (one of which was a complaint by reference to the protected characteristic of race). The Tribunal has found, for reasons set out in its judgment on liability delivered on

the afternoon of Day 8, that those potential reasons were overtaken by the impact of the Claimant's disclosures contained in his email of 8 August 2022, and that the principal reason for the eventual dismissal of the Claimant was the making of the protected disclosures.

(2) The evidence – most notably the transcript of the covertly recorded conversation on 10 August 2022 – does not support the proposition that Dr Coke "had little knowledge of what a fair process for dismissal looked like". It is clear from the content of that transcript (in the last paragraph at page 203 of the Bundle) that Dr Coke had raised a number of "concerns", and that he was expressing to the Claimant that "we've come to the end of the road". The reasons for that were put explicitly to the Claimant: "it's a no-show in terms of money in terms of research that comes in, it's 5 months and you've produced 4100 pounds in billings". It is also clear from the language used that Dr Coke was then undertaking what he described as "a protected conversation" – agreed by both parties to be an apparent reference to the provisions of **Section 111A of the Employment Rights Act 1996**. The expression "without prejudice" is then used. The Tribunal has no direct evidence of what was then discussed between Dr Coke and the Claimant, since the recorded content between "05:05:01" and "18:50:32" have been omitted. The only indication about that is a comment inserted into the transcript reading "Everything related to dismissal". This has already been commented upon by the Tribunal in their judgment on liability, given that **Section 111A of the Employment Rights Act 1996** only applies to cases of "Section 94 unfair dismissal", and does not apply in the case of "whistleblowing dismissal" under **Section 103A of the 1996 Act**. However, everything – including the terminology adopted – points to Dr Coke having been prepared (including in respect of procedural requirements) for the meeting on 10 August 2022 by an adviser with knowledge in the field of employment law.

(3) While it is not denied by the Respondent that there was "no disciplinary policy or procedure let alone a performance management procedure", that fact, taken together with the matters set out above, cannot in the view of the Tribunal be said to lead inevitably to the conclusion that "there is no evidence to suggest a fair process would have been followed".

39. The Tribunal has sought to draw assistance from the "principles" set out by Elias P. in the case of **Software 2000 Ltd. v. Andrews and others, [2007] UKEAT 0533 06 2601**, which, in turn, were derived after consideration of significant judgments in cases such as the Scottish decision in **King v. Eaton (no. 2), [1998] IRLR 681**, the judgment of Pill LJ in **Scope v. Dr Carol Thornett, [2006] EWCA Civ 1600**, and the **Gover** case already referred to, in addition to the House of Lords opinions in **Polkey** itself. These were set out at paragraph 54 of the judgment:

> 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) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
>
> (6) The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.
>
> (7) Having considered the evidence, the Tribunal may determine
>
> (a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).
>
> (b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
>
> (c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.
>
> (d) Employment would have continued indefinitely.
>
> However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

40. In the view of the Tribunal there is evidence before them on which it can be said that the Claimant would or might have ceased to be employed in any event had fair procedures been followed. Having regard, in particular, to the matters set out above at paragraph 38, and taking into account what Dr Coke said in the course of his cross-examination, the Tribunal is of the view that there is a real, albeit relatively small, prospect that the Claimant in this case might have ceased to be employed in any event had fair procedures been followed. The Tribunal does not consider that the already mentioned poor quality of much of the evidence in this case renders their task “so riddled with uncertainty that no sensible prediction based on that evidence can properly be made”. In undertaking that task, this Tribunal recognises that there are limits to the extent to which the Tribunal can confidently predict what might have been.

It follows, therefore that – as recognised by Elias P in **Software 2000 Ltd** – a degree of uncertainty is an inevitable feature of the exercise.

41. Having regard to those warnings, therefore, the Tribunal has formed the view that the "real, albeit relatively small, prospect that the Claimant in this case might have ceased to be employed in any event had fair procedures been followed" should be reflected in the award of compensation. The Tribunal is of the view that it would be just and equitable to reduce the award of compensation to the Claimant by 10% to reflect that finding. This has the consequence of reducing the gross award of £24,683.00p. by £2,468.30p, leaving a revised figure of £22,214.70p.

DEDUCTION FOR CONTRIBUTORY FAULT

42. The Tribunal is unanimously of the view that there is nothing which leads it to find that the Claimant contributed to his dismissal such as to engage the provision in **Section 123(6) of the Employment Rights Act 1996**.

INJURY TO FEELINGS

43. In cases of unfair dismissal by virtue of **Section 103A of the Employment Rights Act 1996** there is power for the Tribunal to make a separate and additional award to the Claimant in respect of injury to feelings. As is underlined in the **Presidential Guidance – General Case Management** (updated on 23 March 2018), such an award is designed to compensate the injured Claimant and not to punish the Respondent. It is well established that each case is fact specific, and any award will depend upon the impact on the Claimant in this particular case.

44. Consideration of an award under the heading of "injury to feelings" inevitably calls for consideration of the so-called "Vento bands" (named after the approach laid down by the Court of Appeal in the case of **Vento v. The Chief Constable of West Yorkshire Police (No.2), [2002] EWCA Civ 1871**). Since that decision over two decades ago, regular **Presidential Guidance** has been issued by the Presidents of the Employment Tribunals in England & Wales and Scotland, seeking to address the problem of reducing value for awards by reason of inflation (a problem subsequently identified by the Court of Appeal in the case of **De Souza v. Vinci Construction (UK) Ltd. [2017] EWCA Civ 879**). The relevant version of that Guidance for the purposes of this claim, which was presented by the Claimant on 9 December 2022, is **Presidential Guidance: Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v. Vinci Construction (UK) Ltd. [2017] EWCA Civ 879* – FIFTH ADDENDUM TO PRESIDENTIAL GUIDANCE ORIGINALLY ISSUED ON 5 SEPTEMBER 2017**.

45. The relevant "bands" are set out as follows:

> In respect of claims presented on or after 6 April 2022, the Vento bands shall be as follows: a **lower band of £990 to £9,900** (less serious cases); a **middle band of £9,900 to £29,600** (cases that do not merit an award in the upper band); and an **upper band of £29,600 to £49,300** (the most serious cases), with the most **exceptional cases capable of exceeding £49,399**.

46. The original guidance on application of the "three broad bands of compensation for injury to feelings" is to be found at paragraph 65 of the Court of Appeal's decision in **Vento (No.2)**, per Mummery LJ. A reminder was also given that:

> There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. (paragraph 66)

and that:

> Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. 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. (paragraph 68)

46. Counsel for the Claimant in this case has submitted that the appropriate "Vento band" is "within the middle of the middle Vento band" – leading to a proposed figure of £15,000.

47. Oral evidence was received from the Claimant in the form of responses to supplementary questions put to him by Counsel before he was tendered for cross-examination on the morning of Day 3. He spoke of being "angry" and "in shock" on learning that he was to be out of a job. He described his feeling as "almost unbelieving". Later, when invited to re-state his description of the impact upon him, he used the expression "angry, confused, frustrated".

48. It has already been noted that no more detailed account of alleged "injury to feelings" was included in the Claimant's prepared witness statement. It was also acknowledged that there had been nothing by way of an "impact statement" prepared by him and that no medical evidence (even in the form of a GP note) had been produced.

49. The Tribunal accepts that feelings of "anger", "shock", confusion" or "frustration" may well have been occasioned by the Claimant's dismissal. That, however, is the extent of the impact to be drawn from the available oral evidence. There is no suggestion of psychiatric injury and no evidence has been adduced to support that or any other medical condition.

50. Regard has also been paid to the summary of "general principles" indicated by the Employment Appeal Tribunal in **Prison Service v. Johnson, [1997] ICR 275**, at 283B-D (per Smith J):

> We summarise the principles which we draw from these authorities: (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 seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches." (iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think 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 their discretion in assessing a sum, tribunals 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, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made.

51. Looking at the specific circumstances of this case, the Tribunal is unanimously of the view that the Claimant is entitled to an award in respect of injury to his feelings. The appropriate level by reference to the "Vento bands" is at the lower end of the "lower band" (less serious cases). In the view of the Tribunal it would be just and equitable to award a sum of £3,500 to reflect the injury to this Claimant's feelings. It is noted that interest cannot be awarded on this sum since for "whistleblowing" cases there is no equivalent provision in the **Employment Rights Act 1996** to the provision in **Section 139 of the Equality Act 2010** and the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996** (SI 1996/2803).

AGGRAVATED DAMAGES

52. Counsel for the Claimant has made a variety of submissions in support of the proposition that so-called "aggravated damages" should be awarded in this case. Those submissions are summarised in her Skeleton Argument at paragraphs 98 – 111. The award of aggravated damages is generally regarded as constituting an aspect of (or sub-heading within) injury to feelings and is therefore considered here. Taken overall, the unanimous conclusion of the Tribunal is that none of the matters raised by Counsel for the Claimant crosses the threshold for such an award.

53. The Tribunal has reminded itself of the approach adopted in the Court of Appeal case of **Alexander v. Home Office, [1988] ICR 685**, to the damages regime for the then "relatively new tort of unlawful racial discrimination", drawing upon earlier comments of Lord Diplock in **Broome v. Cassell & Co. Ltd, [1972] AC 1027** to the effect that:

> The three heads under which damages are recoverable for those torts for which damages are 'at large' are classified under three heads. (1) Compensation for the harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value upon physical hurt, as in assault, upon curtailment of liberty, as in false imprisonment or malicious prosecution, upon injury to reputation, as in defamation, false imprisonment and malicious prosecution, upon inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation. (2) Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. This Lord Devlin calls 'aggravated damages.' (3) Punishment of the defendant for his anti-social behaviour to the plaintiff. This Lord Devlin calls 'exemplary damages.' (at 692G – 693B)

It has also been noted that the Employment Appeal Tribunal has confirmed that such "aggravated damages" may be available in relation to "whistleblowing" claims such as those in this case. This has been established in cases such as **Virgo Fidelis Senior School v. Boyle, [2004] ICR 1210** and confirmed in **Commissioner of Police of the Metropolis v. Shaw, (UKEAT/0125/11)**. However, in the **Shaw** case, Underhill P, the then President of the Employment Appeal Tribunal delivered a detailed historical

overview of the origins of the notion and sounded a number of important warnings about the dangers of seeking to separate out a category of "aggravated damages". It is also noted that such awards are said to be rare, and that there can easily arise a danger of "double counting" in employment cases.

54. The authorities make it clear that the threshold for any such award is high. In **Alexander** May LJ gave an example of where "the defendant may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination" (at 692F), and Counsel for the Claimant adopts a modified version of that quotation in her submissions at paragraph 98.

55. The Claimant relies upon five matters which it is submitted should give rise to an award of "aggravated damages": (1) The Respondent's failure to respond to a "subject access request" made by the Claimant; (2) The drawing up of particulars of claim and other preparation by the Respondent for a potential claim in the Durham County Court against the Claimant; (3) The Respondent's making of allegations of negligence and racism in the Respondent's "Grounds of Resistance" in the present proceedings; (4) The reporting to the South Yorkshire police force of a criminal allegation against the Claimant under **Section 1 of the Computer Misuse Act 1990**; and (5) Comments made by Dr Coke during the course of his cross-examination.

Alleged Failure to Respond to Subject Access Request

56. In relation to the first of those matters, the Tribunal notes that remedies for failure to comply with a Subject Access Request are provided for and that the Claimant appears to have approached the Information Commissioners' Office (ICO) in relation to this matter. The Tribunal has been furnished with no details of any such ICO involvement, although it is submitted (at paragraph 101 of the Skeleton Argument) that Dr Coke had made reference to "proportionality". In the absence of sufficient information in relation to this issue, and particularly where it may be open to a party to claim that a particular Subject Access Request is "manifestly unfounded or excessive", the Tribunal is unable to comment further. In any event, this does not appear to come anywhere near the kind of behaviour which might give rise to an award of "aggravated damages", and the Tribunal further considers that it would not be just and equitable to make any further award having regard to the nature of the alleged behaviour and the consequences of that for the Claimant.

Preparation of Civil Claim in the Durham County Court

57. Documentary evidence in relation to this matter was only disclosed to the Tribunal during the course of the hearing, following allegations made on behalf of the Claimant that Dr Coke had demonstrated "outright dishonesty" which was said to be evident "by his forging of a document that he claimed was an official court document submitted to the High Court in Durham" (Claimant witness statement paragraph 49). It was also said in the same paragraph of the Claimant's witness statement that Dr Coke had sent "fabricated court proceedings" to the Claimant and others. In addition to those allegations, the "Claimant's Suggested Reading List" provided to the Tribunal on Day 1 of the hearing listed document 18 as: "p.407-408 False High Court particulars of claim". The Claimant's Schedule of Loss dated 6 February 2024 speaks of "the fact that the Claimant was provided with a fraudulent copy of civil court proceedings". It is

noted that the revised Schedule of Loss dated 15 February 2024 states that "C no longer describes the Durham County Court claim as 'fraudulent'".

58. A "Statement of Claim" setting out particulars in relation to (1) "Employing an illegal worker" and (2) "Breach of Fiduciary Duty" can be found at pages 405-6 of the Trial Bundle. A "Claim Form (CPR Part 8)" is included in the "Respondent's Additional Disclosure" served on Day 3 of the hearing prior to the commencement of witness evidence. This bears the seal of the Durham County Court, is given a Claim Number K000H059 and is dated 10 February 2023 (that is to say, a month in advance of the Case Management Preliminary Hearing before Employment Judge Glennie on 16 March 2023).

59. The Tribunal is in no position, not least given the quality of the evidence before it, to undertake any assessment of the authenticity of the documents produced in relation to potential proceedings in the Durham County Court. It is merely noted that an allegation of "fraud" or "forgery" in the course of judicial proceedings is a particularly serious matter. In this case, there appears to have been little or no supporting evidence to underpin the allegations made by and on behalf of the Claimant.

60. In any event, if a party is minded to embark upon civil proceedings for alleged wrongs (such as, for example, alleged breach of fiduciary duty) that is a matter for them. It is not for this Tribunal to even comment on the strengths/weaknesses of some putative cause of action, let alone to impute the motives of any potential claimant in such proceedings.

61. The Tribunal is unanimously of the view that there is nothing in this submission which even begins to bring into play a prospect of "aggravated damages" being awarded.

<u>Allegations of Negligence and Racism in the Respondent's Ground of Resistance</u>

62. Little needs to be said about these submissions.

63. "Negligence" on the part of the Claimant was alleged in relation to a problem concerning a French-based research consultant. The Tribunal have found that this was one of the matters in the mind of Dr Coke when he held his (covertly recorded) meeting with the Claimant on 10 August 2022, but that it had not constituted the principal reason for the Claimant's dismissal. The Claimant himself agreed when it was put to him in cross-examination that "there was an issue relating to the French consultant".

64. In relation to the raising of what the Claimant describes as "racism", it was agreed by the Claimant during his cross-examination that complaints had been made about him and that, of the two complaints which he mentioned, one had concerned the protected characteristic of race. It is clear from the relevant documents in the Hearing Bundle [in particular, B/118] that the Claimant was aware of the "allegation of victimisation or discrimination due to race" having been raised by Imoh Ukpong, one of the research consultants, and commented in his email of 5 May 2022 to Dr Coke (headed "Response to IU Complaint"): "I am concerned that my ethics, integrity and competence are being attacked".

65. Once again, the Tribunal is of the view that there is nothing in these matters to suggest that an award of "aggravated damages" would be appropriate, even if "improper conduct" on the Respondent's part could be established. The issues concerned formed part of the legitimate response by the Respondent to the claims brought by the Claimant – however much the Claimant may dispute the accuracy of their content.

Police Involvement in relation to Section 1 of the Computer Misuse Act 1990

66. Information concerning this matter also came to light on the morning of Day 3 (after the 10-day listed hearing had already commenced). The Claimant's case is that the Respondent acted maliciously in reporting an incident of unauthorised access to material held on their computer system and that this resulted in the Claimant being interviewed at a police station under caution. The Claimant gave evidence that the experience was "absolutely terrifying" and warrants an award of "aggravated damages" in this case. According to the Claimant a message was received on the evening of Day 2 informing him that the South Yorkshire police force were "intending to take no further action" in relation to the matter. However, no documentary or other material was produced for the Tribunal by way of support for that version of events.

67. Included with the "Claimant's Mitigation Bundle" produced for the Tribunal on Day 3 were screenshots of what appeared to be exchanges between the Claimant and PC 1219 Ede relating to the provision of legal representation for a police interview to be conducted with the Claimant. The Claimant told the Tribunal that he had attended his interview under caution, had read out a pre-prepared statement (included with the "Claimant's Mitigation Bundle"), and then, under advice from his solicitor, had answered "No comment" to all of the questions thereafter put to him.

68. It was not disputed that an incident or incidents of unauthorised access to the email account used by the Claimant during his employment with the Respondent was discovered in the course of data checks by computer engineers on behalf of the Respondent. The Claimant accepted that the email sent to him at 14:32 on 11 August 2022 (in which he was informed of the termination of his employment) stated [B/193]:

> Your email account has been locked, and you no longer have access to the research portal.
> If you need anything from there, please let me know.

Notwithstanding that, the Claimant does not deny that he accessed his old email account without authorisation. He told the Tribunal that the reason for doing that was to obtain documentary material needed for preparation of his case before the Tribunal. In the Claimant's view the Respondent had not properly discharged its duty of full disclosure, and this gave rise to a concern that documents might be destroyed. However, the Claimant also accepts that he did not approach Dr Coke as invited in the email of 11 August 2022. It appears that the Claimant undertook this course of action at his own initiative, and there is no suggestion that his legal advisers were aware of what he was doing. The Claimant told the Tribunal in cross-examination that, having accessed his old email account, he had then forwarded some 40 emails to his private email account.

69. When the data breach and unauthorised access were discovered the police were informed. Dr Coke was challenged in cross-examination about having made the report to the police, and it was put to him that such action was "disproportionate". His response was: "What am I supposed to do?"; "I owe a duty as a corporate director"; "You go to the police". Dr Coke maintained that he only discovered the matter "by accident", that the Claimant was accessing records and that what he was doing was "a criminal act".

70. The prepared statement which the Claimant says he read out at his police interview under caution, before responding "No comment" to all of the subsequent questions put to him, was as follows:

> **Summary**
>
> I wish to present a clear and factual account of the events leading up to and including the access in question, to demonstrate that my actions were not only reasonable and lawful but also necessary under the circumstances.
>
> I was appointed Head of Research at Melian Dialogue in February 2022. During my tenure, I became increasingly concerned about several potentially unlawful practices within the company, including the treatment of interns and consultants.
>
> Between May and August 2022, I observed and reported various issues, including the unlawful handling of interns, questionable payment practices, and non-compliance with the ICO registration requirements. My concerns were consistently ignored or dismissed by the director, Jim Coke.
>
> Following my attempts to address these issues internally and seeking advice from ACAS and HMRC, my employment was terminated by Jim Coke. The termination email stated my access to the company portal was revoked, but that my email was simply locked. I discovered that my session remained active, allowing me access to the email system.
>
> I made a SAR for my personal data, including emails, under GDPR. This request was repeatedly ignored by Jim Coke, hindering my ability to gather evidence for an employment tribunal.
>
> Under the terms of my contract and GDPR, I believed I retained the right to access information necessary for legal proceedings that aimed to prove the validity of my protected disclosure. This belief was reinforced by the company's failure to comply with my SAR and the urgent need to gather evidence for the tribunal. The sole purpose of accessing the email account was to retrieve personal data and evidence pertinent to the tribunal proceedings. No other data was accessed, used, or disclosed beyond what was necessary for this legal mater.
>
> Given the circumstances, including the ignored GDPR request and the urgent need for evidence in the tribunal, I had a reasonable belief that accessing the email account was necessary and lawful. The contract and GDPR provisions, in my understanding, allowed for the use of confidential information for legal proceedings, which I believed applied in this situation. My actions were taken in good faith, with a limited scope, with no deception or concealment, without any intention of causing harm or gaining unauthorised advantage and to overcome the withholding and potential destruction of evidence by Jim Coke.
>
> In light of the above, I respectfully submit that my actions were reasonable, lawful, and necessary under the circumstances. I did not cause any computer or device to perform a function that would enable access to data, I accessed the email account with a genuine belief in my right to do so for the specific purpose of legal proceedings. Therefore, I contend that no offense under the CMA 1990 has been committed.

71. **Section 1 of the Computer Misuse Act 1990** provides:

> **Unauthorised access to computer material.**

(1) A person is guilty of an offence if —

(a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, or to enable any such access to be secured;

(b) the access he intends to secure, or to enable to be secured, is unauthorised; and

(c) he knows at the time when he causes the computer to perform the function that that is the case.

(2) The intent a person has to have to commit an offence under this section need not be directed at —

(a) any particular program or data;

(b) a program or data of any particular kind; or

(c) a program or data held in any particular computer.

(3) A person guilty of an offence under this section shall be liable —

(a) on summary conviction in England and Wales, to imprisonment for a term not exceeding the general limit in a magistrates' court or to a fine not exceeding the statutory maximum or to both;

(b) …

(c) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

72. Once again, the Tribunal needs to say very little about this submission. If an "absolutely terrifying" experience was suffered by the Claimant in his police interview under caution the reason for that lay entirely at his own door. The Claimant stated in the course of his cross-examination that: "I accept that under normal circumstances that would be improper". However, he then went on to justify his action because "there was no alternative left open".

73. The Tribunal is unanimously of the view that there is nothing in this submission which would justify an award of "aggravated damages".

Comments made by Dr Coke during the course of his cross-examination.

74. The Claimant's final submission in support of his claim to an award of "aggravated damages" relates to the tenor and content of responses given by Dr Coke during the course of cross-examination by Counsel for the Claimant. This submission, which is very limited, is set out at paragraph 110 of the Skeleton Argument prepared on behalf of the Claimant.

75. The Tribunal can deal with this shortly. It has already been observed in the reasons given for the judgment on liability delivered on the afternoon of Day 8 that relations between the parties have been consistently fraught, to the point where the Tribunal regards both parties as having been in serious breach of their obligations under **Rule 2 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (as amended). That Rule provides:

Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

76. The Tribunal has noted a disturbing failure on the parts of the parties to "co-operate generally with each other and with the Tribunal" in the preparation for this hearing. That attitude has manifested itself in late additional disclosure by both sides, incomplete documentation being produced, and various accusations being made against parties and individuals.

77. So far as the cross-examination of Dr Coke is concerned, while the Tribunal noted the forthright views forcefully expressed by the witness, it is of the view that these did not go beyond the normal "cut and thrust" which is to be expected in the adversarial world of the English Employment Tribunals. There is nothing in the Claimant's submission to warrant an award of "aggravated damages".

UNLAWFUL DETRIMENTS (SECTION 47B EMPLOYMENT RIGHTS ACT 1996)

78. The Tribunal has also found that the Respondent was in contravention of Section 47B of **the Employment Rights Act 1996**. That claim was presented by reference to **Section 48(1A) of the 1996 Act** which provides that:

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

79. In the event of the Claimant being successful in that claim **Section 49 of the Employment Rights Act 1996** provides:

Remedies.

(1) Where an employment tribunal finds a complaint under section 48(1), (1XA), (1ZA), (1A) or (1B) 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.

(1A) …

(2) Subject to subsections (5ZA), (5A) and (6) 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.

(3) The loss shall be taken to include —

(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and

(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.

(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.

(5) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(5ZA) …

(5A) …

(6) …

(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%.

(7) …

80. The detriments to which the Claimant was subjected on the ground that he had made a protected disclosure were (1) Not acknowledging or responding to the Claimant's appeal dated 17 August 2022; (2) Delaying paying him his salary for the period between 27 July and 11 August 2022; and (3) Delaying paying him notice pay. A further alleged detriment (not fully paying the Claimant his April 2022 bonus) has fallen away because the Tribunal has found that the Claimant had no entitlement to a "bonus" as alleged.

81. In relation to the first detriment (not acknowledging or responding to the Claimant's appeal dated 17 August 2022) the Tribunal finds that there was no acknowledgement or response to the Claimant's appeal dated 17 August 2022.

82. However, the Tribunal has formed the view that this should be addressed in conjunction with the decision on uplift for failure to comply with the **ACAS Code of Conduct No.1**. For the reasons set out below the Tribunal considers that it would be just and equitable to increase the compensatory award to the Claimant by reason of the Respondent's unreasonable failure to comply with the provisions of the **ACAS Code of Practice No.1** in relation to appeal against the decision to dismiss the Claimant. That effectively addresses the consequences that flow from the first

detriment and the Tribunal is of the view that it would not be just and equitable to make any further award in that regard.

83. The second and third detriments relate to delayed payment of salary and notice money due. The Tribunal finds that there was a delay in payment until March 2023, when, immediately prior to a listed Case Management Preliminary Hearing before Employment Judge Glennie, a payment was made in the sum of £2,134.00p.

84. The Tribunal notes that none of the Claimant's money claims was withdrawn – either during the course of the Preliminary Hearing before Employment Judge Glennie or subsequently – until Day 3 of this 10-day hearing. No explanation has been offered as to why claims which apparently had no reasonable prospect of success should have been maintained until such a late stage.

85. Having regard to all the circumstances of this particular case, and in particular noting that payment of the sums in question was made almost a year ago, the Tribunal makes a declaration that the Claimant's complaint under Section 48(1) is well founded but is unanimously of the view that it would not be just and equitable to make any further award in respect of those matters.

FAILURE TO COMPLY WITH ACAS CODE OF CONDUCT

86. Counsel for the Claimant submits that there should be an uplift in the award by reason that the Respondent failed to comply with the provisions of an ACAS Code of Practice – in this case **The Acas Code of Practice on disciplinary and grievance procedures** (Code No.1, most recently revised and published on 11 March 2015). The submissions are set out in paragraphs 112 – 115 of her Skeleton Argument and it is submitted that a 25% uplift (i.e. the maximum possible) in the Claimant's award would be warranted.

87. **Section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992** provides:

> **Issue of Codes of Practice by ACAS.**
>
> (1) ACAS may issue Codes of Practice containing such practical guidance as it thinks fit for the purpose of promoting the improvement of industrial relations or for purposes connected with trade union learning representatives.
>
> (2) …
>
> (3) …
>
> (4) ACAS may from time to time revise the whole or any part of a Code of Practice issued by it and issue that revised Code.

88. **Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992** provides:

> **Effect of failure to comply with Code.**
>
> (1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.

(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

(3) In any proceedings before a court or employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by the Secretary of State shall be admissible in evidence, and any provision of the Code which appears to the court, tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

89. **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992** provides:

Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

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

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

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

(3) 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 employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

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

(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.

(6) …

(7) …

(8) …

(9) …

90. Schedule A2 includes in the list of jurisdictions to which Section 207A applies both **Section 48 of the Employment Rights Act 1996** (detriment in employment) and **Section 111 of that Act** (unfair dismissal).

91. **Section 124A of the Employment Rights Act 1996** provides:

> **Adjustments under the Employment Act 2002**
>
> Where an award of compensation for unfair dismissal falls to be —
>
> (a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards), or
>
> (b) increased under section 38 of that Act (failure to give statement of employment particulars),
>
> the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).

92. It is common ground that **The Acas Code of Practice on disciplinary and grievance procedures** (Code No.1, most recently revised and published on 11 March 2015) is a "relevant Code of Practice", and the Tribunal finds that to be the case.

93. The Tribunal has had regard to the claims presented in this case and it appears to the Tribunal that the claim relating to unfair dismissal by reference to **Section 103A of the Employment Rights Act 1996** is one to which the **ACAS Code No.1** applies.

94. Having regard to the content of the **ACAS Code No.1** the Tribunal finds that there was little or nothing in terms of formal procedures within the Respondent company. This was explained to some extent by the informal manner in which the day-to-day management of the business was undertaken by the Claimant and Dr Coke. The arrangement was for the Claimant to report on the events of the day by way of a virtual meeting which took place at 1800 each evening. In the light of the discussion which took place during those meetings strategic decisions would be taken by Dr Coke while agreement would be reached on day-to-day decisions supervised by the Claimant.

95. However, this lack of formality presented a number of problems. One example had been encountered at the beginning of May 2022 in the context of the complaint made by Imoh Kupong against the Claimant by reference to the protected characteristic of race. With only the Claimant and Dr Coke to carry out key tasks, it seemed impossible to find anybody neutral who could undertake a dispassionate investigation into the allegation, with the result that the Claimant eventually looked into the matter and produced a conclusion which he shared with Dr Coke. A more acute manifestation of the same problem arose when Dr Coke met with the Claimant on 10 August 2022 to set in motion the dismissal of the Claimant.

96. The Tribunal notes that the modern version of the **ACAS Code of Practice No.1** makes no provision for circumstances in very small organisations ("micro-firms") such as the Respondent in this case. The days when statutory dismissal provisions were excluded for small employers and when (first the CIR and later the ACAS) Codes of Conduct made specific reference to small enterprises are long gone. The only clear

references to small employers are to be found in **Discipline and Grievances at work: The Acas guide** (last revised in July 2020), which does not carry the same weight as that accorded to the **ACAS Code of Practice No.1** by virtue of **Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992**. Even there, however, it is difficult to find guidance which fits circumstances where there is an owner/entrepreneur with just one employee. Thus, for example, at page 34 of **The Acas guide** (which is concerned with "appeals") it is stated that:

> In small organisations, even if there is no more senior manager available, another manager should, if possible, hear the appeal. If this is not possible consider whether the owner or, in the case of a charity, the board of trustees, should hear the appeal. Whoever hears the appeal should consider it impartially.

That proposition has little or no resonance for what is effectively a "one-man show", such as the Respondent company or, indeed, the "boutique consultancy" which has been established by the Claimant.

97. In the absence of any dispensation for small employers, the Tribunal is obliged to find that in this case the Respondent has failed to comply with the **ACAS Code of Practice No.1** in relation to formal grievance and disciplinary procedures, as well as in relation to appeal against a decision to dismiss.

98. The question for the Tribunal therefore becomes "was that failure unreasonable?".

99. In the view of the Tribunal the answer to that question may be that the absence of formal procedures is rendered reasonable to some extent by reason of the small size and administrative resources of the undertaking (to borrow the terminology of **Section 98(4)(b) of the Employment Rights Act 1996**). However, even if there were to be an argument to that effect, what is inescapable is that the absence of any arrangement for an appeal against dismissal in a disciplinary context cannot be reasonable – given the underlying emphasis upon communication, openness and fairness (in terms that lawyers would recognise as the so-called "principles of natural justice") which permeates the whole of **ACAS Code of Practice No.1**.

100. Having found that unreasonable failure, the Tribunal then has to decide whether it considers it just and equitable in all the circumstances to increase the award (or any part of it) to the Claimant.

101. In the circumstances of this case the Tribunal considers that it is just and equitable to increase the compensatory award to the Claimant by reason of the Respondent's unreasonable failure to comply with the provisions of the **ACAS Code of Practice No.1** in relation to appeal against the decision to dismiss the Claimant. Bearing in mind that the award is intended to be compensatory, but that, at the same time, it should mark disapproval of the unreasonable failure to comply, the Tribunal is of the unanimous view that it would be just and equitable in these circumstances to uplift the Claimant's compensatory award by 15%.

102. The effect of this is to increase the compensatory award of £22,683 (reached by computing the mitigated loss of earnings and then applying the "Polkey" deduction of 10%) by £3,3332.20p (15%) to give an adjusted figure of £25,546.90p.

UNPAID HOLIDAY PAY AND OTHER MONEY CLAIMS

103. The Claimant's original Claim Form ET1 included money claims for (1) Unlawful deduction from wages (unpaid salary); (2) Breach of Contract (notice pay); and (3) Unpaid holiday pay. A further claim in relation to an alleged entitlement to a "bonus" payment has been dismissed by the Tribunal for reasons set out in the presence of the parties on the afternoon of Day 8 of the hearing.

104. On Day 3 of the hearing the claims relating to alleged unpaid salary and notice pay were withdrawn by the Claimant and the Tribunal dismissed those claims. The Tribunal was also informed that agreement had been reached between the parties in relation to the claim for allegedly unpaid holiday pay. The Tribunal was asked by the parties to record that agreement in terms that "The Claimant's claim for unpaid holiday is made out" and that an order should be included for the Respondent to pay a sum of money to the Claimant.

105. The amount which the Respondent is to be ordered to pay to the Claimant has been said to be based upon a computation to be undertaken in the light of events in March 2023. In the Claimant's Schedule of Loss dated 6 February 2024 the figure for breach of contract (unpaid salary) was put at £1,087.46p; the sum for breach of contract (notice pay) at £653.85p; and the claim for holiday pay at £954.00p.

106. It is common ground – and this was confirmed by Counsel for the Claimant on the morning of Day 3 – that in March 2023 the Respondent made a payment to the Claimant in the sum of £2,134.00p. This took place two days before the parties were due to attend a Preliminary case management discussion before Employment Judge Glennie on 16 March 2023. There is no mention of any payment by the Respondent in the case management notes of Employment Judge Glennie. Instead, the money claims remained in the List of Issues drawn up for and referred to in the case management orders made by Employment Judge Glennie on 16 March 2023 and that situation remained until Day 3 of this hearing.

107. It is now common ground that the sum paid by the Respondent to the Claimant on 14 March 2023 was in excess of the amount claimed and due having regard to the claims for unpaid wages and notice money. The total claimed in respect of those two matters is £1,741.31p. (i.e. £1,087.46p + £653.85p). The amount of the excess is therefore £391.69p (i.e. £2,134.00p - £1,742.31p).

108. It is agreed that credit is to be given for the excess over the amount due for the unpaid wages and notice money. That credit is to be set against the sum of £954.00p due in respect of unpaid holiday pay. The balance after setting off the credit is £562.31p.

109. Having regard to the above and it having been determined by consent that "The Claimant's claim for unpaid holiday is made out", the Tribunal orders the Respondent to pay to the Claimant the sum of £562.31p.

DISPOSAL

110. Having regard to the above, the unanimous judgment of the Tribunal is that:

(1) The Claimant was unfairly dismissed for having made protected disclosures [ERA 1996 s.103A] and the Respondent is ordered to pay to the Claimant the sum of £25,546.90p. by way of a compensatory award.

(2) The Claimant was subjected to detriments by the Respondent done on the ground that the Claimant had made protected disclosures [ERA 1996 s.47B] and the Tribunal declares that the Claimant's complaint under Section 48(1) of the Employment Rights Act 1996 is well founded. However, the Tribunal considers that it would not be just and equitable to make any further award on that account.

(3) The Claimant suffered injury to feelings in respect of his unfair dismissal and the Tribunal orders the Respondent to pay to the Claimant the sum of £3,500.00p. The Tribunal does not consider that it would be just and equitable to make any further award for injury to feelings in relation to the detriments to which the Claimant was subjected on the ground that he had made protected disclosures.

(4) By consent it was agreed that the Claimant's claim for unpaid holiday pay is made out (less credit for overpayment of wages and/or notice pay made in March 2023) and the Respondent is ordered to pay to the Claimant the sum of £562.31p.

Employment Judge Professor A C Neal

21 February 2024

Sent to the parties on:

28 February 2024

……

For the Tribunal

……..

ANNEX (all gross figures)

COMPENSATORY AWARD (LOSS OF EARNINGS)

(EDT = 18 August 2022}
Salary at EDT = £34,000.00
Taking into account duty to mitigate

Period 18/8/2022 – 31/8/2022 (2 weeks)	**£ 1,308.00**
Period 1/9/2022 – 28/2/2023 (6 months/26 weeks)	**£ 17,000.00**
Period 1/3/2023 – 31/5/2023 (3 months/13 weeks @ 50%)	**£ 4,250.00**
Period 1/6/2023 – 31/8/2023 (3 months/13 weeks @ 25%)	**£ 2,125.00**
After 1/9/2023 = ZERO	
	==========
Total award for loss of earnings	**£ 24,683.00**
LESS: POLKEY deduction (percentage chance = 10%) **(£24,683.00 x 10% = £2,468.30)**	**£ 2,468.30**
	==========
	£ 22,214.70
ACAS UPLIFT (Just & Equitable = 15%) **[Relating to the failure to respond to the appeal]** **(£22,214.70 x 15% = £3,332.20)**	**£ 3,332.20**
	==========
	£25,546.90

INJURY TO FEELINGS

Lower Vento Band (set at £ 3,500.00)	**£ 3,500.00**
	==========
	£ 29,046.90

TOTAL COMPENSATORY AWARD = £29,046.90