EMPLOYMENT TRIBUNALS

Claimant: **Ms Denise Harrington**

Respondent: **Hilco Capital Limited**

Heard at: **Newcastle Employment Tribunal**

On: **18 April 2024**

Before: **Employment Judge Sweeney**

Representation:

For the Claimant: Simon Goldberg KC
For the Respondent: Sophie Garner

RESERVED JUDGMENT ON REMEDY

The Judgment of the Tribunal is as follows:

1. **The Respondent shall pay to the Claimant a Compensatory Award of: £295,828.**

REASONS

Background

1. In a judgment dated **11 February 2019** (the 'liability judgment') the Employment Tribunal found that the Claimant had been unfairly dismissed for the reason, or principal reason that she had made a protected disclosure. It also found that it was impossible to say on the evidence that she would have been dismissed. The Respondent appealed the liability judgment but the appeal was rejected on the sift and on **25 February 2020**, Griffiths J refused a renewed application for permission to appeal under rule 3(10) EAT Rules 1993. In a subsequent judgment, dated **25 February 2021** ('the remedy judgment') the Employment Tribunal made an award of compensation in favour of the Claimant in the sum of £244,328.45. The compensatory award covered loss of remuneration for a period of 85 weeks from the date of dismissal to **1 June 2019**. The Respondent appealed the remedy judgment. HHJ Auerbach allowed the appeal and, among other things, quashed the compensatory award (*Hilco Capital Limited v Harrington* [2022] UKEAT/EA/000557). The EAT held that, in the absence of any evidence of any

experience arising from any actual job application or any other fact supporting the assertion, the tribunal had erred in finding that the Claimant's failure to apply for any jobs did not amount to an unreasonable failure to mitigate her loss of remuneration.

2. The matter of remedy was remitted in the following terms:

"The matter be remitted for rehearing by a differently constituted Employment Tribunal to determine the compensatory award afresh in particular (a) by deciding afresh the issue of mitigation and to what period the award for loss of remuneration should apply and (b) by applying paragraphs 2(b) and (c) of this order when calculating that award."

3. Paragraphs 2(b) and (c) read as follows:

"(b) When determining afresh the compensatory award, the sub-head of loss in respect of bonus should reflect the annual bonus figure agreed by the parties, pro-rated by weeks to the number of weeks' lost remuneration that the tribunal determines afresh should be awarded; and

(c) When determining afresh the amount of the compensatory award, the tribunal should include credit for the amount of the payment in lieu of notice that the claimant (respondent to this appeal) received."

4. At a preliminary hearing on **06 November 2023,** Regional Employment Judge Robertson agreed that as this was a rehearing, the parties were at liberty to adduce further or new documentary evidence and witness evidence as to the appropriate amount of the compensatory award. REJ Robertson directed that an updated schedule of loss be served on the Respondent, that the parties prepare a bundle of documents and that any witness statements be exchanged by **08 January 2024**. As the remitted hearing was concerned with the unfair dismissal award only, it was agreed that the matter could and would be listed before a judge sitting alone.

The remitted hearing

5. The parties had agreed a joint bundle consisting of **413 pages** (with the page numbers very inconveniently printed in small font on the top left had corner of each page). The Claimant gave oral evidence having served a supplementary witness statement. For the Respondent, Henry Foster, CEO, gave oral evidence, also having served a supplementary witness statement. I refer to these witness statements as the 2024 witness statements.

6. The following matters were agreed for the purposes of calculating the compensatory award:

6.1. The Claimant's net weekly pay (including BUPA/insurance/pension contributions) was £1,687.10 (£87,729.20 a year).

6.2. The Claimant's net weekly bonus was £821.83 (£42,735 a year).

6.3. The Claimant was paid a gross sum of £20,508 as payment in lieu of notice (this was confirmed in an email from the Respondent dated **03 May 2024** sent on behalf of both parties further to my request).

7. Both Mr Goldberg and Ms Garner had prepared and submitted written opening submissions.

8. In paragraph 6 of his submissions, Mr Goldberg submitted that, insofar as the Respondent seeks to resurrect its 'Polkey' arguments, these are not open to it at the remedy hearing. This was a specific reference to paragraphs 8 and 9 of Mr Foster's 2024 witness statement and, as it transpired, paragraphs 22 and 23 of the Ms Garner's submissions. Mr Goldberg observed that this is the very argument that was the subject of the appeal against the liability judgment. Ground 12 of the appeal concerned what has been referred to as the 'Polkey' issue: **Polkey v A E Dayton Services Ltd** [1987] UKHL. Mr Goldberg referred me to paragraphs 10-11 of Griffiths J's judgment on the Rule 3(10) application.

9. It is very common for lawyers and judges to refer to the 'Polkey' reduction. That casual shorthand does not, however, adequately describe the task that a tribunal has to undertake when assessing a compensatory award under section 123 Employment Rights Act 1996. In its purist or 'classic' sense Polkey is used as shorthand for considering whether the employer would or might have fairly dismissed the employee for the same reason it purported to dismiss in the proceedings before the tribunal either at the same time or at a later date.

10. It is right to say that paragraphs 8 and 9 of Mr Foster's 2024 witness statement covers the same ground as the matters set out in ground 12 of the appeal against the liability judgment. Mr Goldberg submitted that this is res judicata. However, he agreed that it was limited to the 'classic Polkey' argument, namely that the Respondent would or might have been dismissed fairly at the time or very shortly thereafter (on the basis set out in paragraphs 8 and 9 of Mr Foster's 29024 statement) had the Respondent not in fact dismissed the Clamant because she had made a protected disclosure.

11. Ms Garner agreed that this 'classic Polkey' argument was not in play in these proceedings. Nevertheless, I would, she submitted, have to consider how long the Claimant would have remained in employment with the Respondent (whether by as a result of a subsequent dismissal or her leaving) and whether, during that period, she would have continued to receive a bonus.

12. I identified the key issues as being:

12.1. The application of section 123 ERA 1996,
12.2. The period of loss

12.3. The losses incurred, in particular 'bonus'.
12.4. The issue of 'stigma'
12.5. The issue of mitigation of loss and whether it was appropriate to reduce the compensatory award for a failure to mitigate.
12.6. Whether, and to what extent, the Respondent was able to advance any 'Polkey' argument.

Findings of fact

13. My findings are limited to the events following the Claimant's dismissal, to matters regarding the nature of the Respondent business, the work performed by the Claimant and her experience and circumstances. The following matters were agreed for the purposes of calculating the compensatory award:

13.1. The Claimant's net weekly pay (including BUPA/insurance/pension contributions) was £1,687.10 (£87,729.20 a year).

13.2. The Claimant's net weekly bonus was £821.83 (£42,735 a year).

13.3. The Claimant was paid a gross sum of £20,508 as payment in lieu of notice.

Hilco Capital Limited (the Respondent)

14. The Respondent is a financial services company which invests in underperforming businesses. Henry Foster is, and has been since **01 January 2017**, its Chief Executive Officer ('**CEO**').

15. The claimant was dismissed with effect from **13 October 2017**. At the date of termination of employment she was approaching her 60th birthday, her date of birth being **16 October 1957**. To date, she has not undertaken any paid work, a period of some six and a half years. Her state pension age is 66.

16. The job description at **pages 150 to 157** (which had been prepared by the Claimant for the purpose of an equal pay claim which was eventually settled) accurately reflects what she did for the Respondent and accurately sets out her experience, skills and knowledge.

17. In terms of her work experience prior to joining the Respondent, she was employed by Littlewoods PLC from 1973 to 1995 where she worked in various positions but largely as HR and Office Manager. From 1996 to 2000 she worked as HR and Payroll manager with a company called Uptons & Sons PLC, which was then acquired by the Respondent, for whom she worked as HR/Payroll Director.

18. As regards her work for the Respondent, this involved an 'internal' and an 'external' aspect. She was Head of HR within the Respondent organisation – that is the

'internal aspect'. She was responsible for HR and payroll and from time to time gave advice to other associated companies of the Respondent. She reported to the CEO. She has experience of drafting standard employment contracts for employees and, with legal assistance, contracts for consultants. She has experience of writing a complete personnel manual and associated policies and updating following amendments to legislation. In short, she has considerable experience of most, if not all HR matters and at a senior level.

19. The external part of her role involved her being 'parachuted' out to external companies, where she advised on and provided HR consultancy services to the clients of the Respondent. Her responsibilities were as set out in her equal pay job description, paragraphs 27-63 of **pages 153-155**. She is CIPD qualified and has a strong working knowledge of employment and TUPE law issues, best practice, policies and procedures, people management, redundancies and payroll requirements, pension auto enrolment. She possesses a range of skills, including planning, financial, organisation and communication. She has coached and mentored junior HR employees. On any analysis, she is a very experienced and skill HR professional.

20. The Claimant preferred the external part of her role. It is no exaggeration to say that she loved the work and found it exciting, challenging and appealing – much more than the internal role, which she considered rather routine by comparison. Although she was based at the Respondent's Middlesbrough office, in undertaking the external role, she frequently and for significant periods of time worked away from Middlesbrough, working out of the offices of the Respondent's clients.

21. As part of her remuneration package with the Respondent, the Claimant was paid a bonus. As set out in paragraph 6.2 above the amount was agreed for the purposes of the compensatory award. Initially, the bonus had been based around deals worked on in the year (this was by reference to the external work done by the Clamant). However, this changed in about 2007 when bonuses were based around general profitability with some assessment of the quality of the work done by the employee.

22. Since her dismissal, the Respondent has not undertaken external HR consultancy work with its clients. As for the internal HR functions, some of those are undertaken by Mr Foster (although precisely what is unclear) and some of the functions (again unclear what precisely) are occasionally outsourced to solicitors. Payroll responsibility now lies with the Chief Financial Officer.

23. Following her dismissal in **October 2017**, the Claimant perused some potential job roles online. She did not see many that were near the salary she had been on with the Respondent. She looked at potential roles within the Middlesbrough/Darlington area. She was prepared to work nationwide depending on whether her travel and accommodation expenses would be met. The roles that she saw advertised did not appeal to her because they were at a much lower salary and were not as exciting as the role she had enjoyed with the Respondent. She considered them to be rather

basic in comparison. Therefore, although the Claimant saw advertised roles which she could have applied for, she did not because the salaries were substantially lower and the work was unexciting. She believed that she had a better prospect of obtaining better paid and more satisfying work through a venture that had been set up by two former colleagues, Lakhbir Bhondi (known as 'Lax') and Tony Hooper ('Tony').

24. Between the date of her dismissal on **13 October 2017** and the date of the fist remedy hearing, **24 November 2020**, the Claimant had not applied for any employment. That was a period of over three years. Between then and the date of this remedy hearing, **18 April 2024**, the Claimant has still not applied for any jobs.

HHB Associates Limited

25. HHB Associates Limited was incorporated on **29 January 2016**. The company has two directors: Lax and Tony, former colleagues of the Claimant from their time with the Respondent. The company filed micro accounts in 2017 to 2019 and from then has filed dormant accounts. It has never traded. She had direct experience of working with them before and building up a business from a small team. She genuinely believed that they could do this again.

26. Ms Garner challenged the Claimant on her involvement with HHB Associates. She put to her that she had, in reality done, very little if anything to secure gainful employment through HHB. Much of this challenge was based on the dearth of documentary evidence produced by the Claimant. However, I accept the Claimant's evidence that it was difficult for her to demonstrate by documentary evidence just how much time she devoted to working with HBB, and that there were some difficulties regarding her ability to produce documentation for the reasons given in paragraph 12 of her witness statement. I also accept that much of the efforts involved them trying to build connections with Administrators and people they knew within the industry. She attended meetings to discuss business opportunities. They were looking to secure work with distressed companies, whereby a team would work on behalf of the administrator, for example closing down a failed or failing business for which a daily fee would be charged to the administrator. This was in line with the external work the Claimant had performed for the Respondent. In seeking to build up this business, the Claimant, and her former colleagues, were keen for the Respondent not to learn of their activities as it was a competitive market.

27. She had a business card made up confirming her involvement with HHB Associates. I accept and so find that for a period of time after her dismissal, the Claimant dedicated her efforts to building up a business alongside her former colleagues. In some cases they got as far as signing a Non-Disclosure Agreement ('NDA').

28. The Claimant attended a UK Retail Charity Ball in February 2018 in pursuit of business opportunities where she and Tony met with an investor who was looking for a retail team. The main contact was Tony who maintained contact with the investor but nothing came of it. The Claimant, Tony and Lax explored an opportunity to work with the liquidators of M and M Sports in about May 2018.

Again, nothing came of this. In February 2019 they explored an opportunity regarding the administration and sale or Bennets (Irongate) Limited. In February 2019 they explored an opportunity on another administration, Pretty Green Limited. The Claimant gave examples of other potential opportunities in paragraphs 34 to 45 and 50 of her 2024 witness statement. All of the work was speculative and at a cost to themselves and much of it involved them trying to forge relationships. None of their efforts bore fruit. The Claimant has never done any paid work for HHB Associates, either as an employee or as a consultant. She has not disclosed how much money she has spent in pursuit of these speculative ventures.

29. I am satisfied and so find that the Claimant gradually spent less time in seeking work with HHB as the months progressed. It was more likely than not averaging about three days a week in the first year after her dismissal. After that, I find that her engagement with her colleagues started to decline and became fairly minimal, with Tony undertaking most of the speculative work. Although the Claimant said she estimated they contacted about 60 companies, the available documentary evidence suggests significantly fewer than this. Although I accept that there would have been some for which she was unable to produce any documents, I find on the balance of probabilities that, in the six and a half year period, they 'looked at' approximately 30 companies and most of that activity was undertaken by Tony, with the Claimant's involvement diminishing with the passage of time.

30. As to the amount of time the Claimant dedicated towards this potential new venture, she said in paragraph 18 of her witness statement that she estimates that she spent an average of three days a week seeking work for HHB. I do not accept that the time would equate to three days a week over the whole period between her dismissal and the date of this remedy hearing. However, I accept and find that she was spending on average that amount of time for about a year or so after her dismissal, from which point her engagement started gradually declining, with very little interaction with her former colleagues by the end of 2019.

31. It must have, and I find, it did become apparent to the Claimant, that after about twelve months of unpaid effort, averaging three days a week, that the prospects of obtaining well paid and exciting work through HHB were plummeting. Nothing had come from their networking. Nothing had come from the Charity Ball, or from M and M Sports or Pretty Green. By April 2019 when nothing had come from the Pretty Green opportunity of the matters referred to in paragraph 34 of the Claimant's statement, the Claimant had been out of work for a year and a half without an income. She did not look for any alternative jobs in that time. As articulated above, she has not applied for any paid employment at all.

Job opportunities

32. Examples of roles advertised on various recruitment sites were put forward by the Respondent in the bundle of documents. On **page 130** was a list of roles advertised between **01 October 2020** and **02 November 2020**. It can be seen that the remuneration varied from £65,000 to £140,000 depending on the role and location. Examples of jobs available in the North of England were:

    32.1. Durham, £72k a year

32.2. Sheffield, £72k to £100k a year,
32.3. Sunderland, £140k a year,

33. On pages **307 – 310**, was a list of jobs advertised as available between **November 2017** to **December 2023**. In excess of 230 jobs were identified with a wide range of salaries. About 80% of those jobs were in London, the South East, East Anglia, Home Counties. Very few were identified as available in the North-East or North West and those jobs that were identified tended to command lower salaries.

Relevant law

34. When it comes to awarding compensation under a compensatory award to an unfairly dismissed employee, the overriding duty is to award what is just and equitable in the circumstances. In awarding what it considers to be 'just and equitable' the tribunal must have regard to whether any loss was sustained 'in consequence of the dismissal'. This is because section 123(1) ERA provides that the amount of compensation shall be determined having regard to the loss sustained 'in consequence of the dismissal'. The tribunal is to compensate for the loss actually suffered, not to penalise the employer for its actions, nor to give a gratuitous benefit to the dismissed employee.

35. The basic approach is set out by the EAT in the case of **Digital Equipment Co Ltd v Clements (No 2)** as qualified by the Court of Appeal's analysis [1998] IRLR 134.

36. The first task is to calculate the loss which the complainant has sustained in consequence of the dismissal, and insofar as the loss is attributable to action taken by the employer. In assessing that loss, full credit should be given by the employee for all sums paid by the employer as compensation for the dismissal. This can include amounts paid by way of ex gratia payments or payments in lieu of notice. Sums earned by way of mitigation should also be deducted at this stage, since logically there is no distinction between sums earned from the employer and sums which were earned from third parties. So too should a deduction be made from the calculation of the loss to reflect any failure upon the part of the employee to mitigate their loss as logically sums which could have been earned ought to be taken into account as much as monies that were earned. There should then, if appropriate, be a *Polkey* reduction (a shorthand or phrase for where the tribunal may reach a decision that there was a real chance that the employee would have been fairly dismissed by the employer notwithstanding the unfairness identified. The assessment of the chance of dismissal in any case may be because a fair procedure was not followed when dismissing the employee or a chance of dismissal for some other reason altogether.) There may also be a reduction for the chance that the employment would have ended anyway for a reason unknown to the employer at the time of the dismissal. The award may then need to be grossed up for tax purposes. Consideration needs to be given to this where the award is in excess of £30,000.

Polkey reductions

37. In the case of **Compass Group Plc v Mr K A Ayodele**, Underhill J (as he then was) said at paragraph 18:

"The real question here is about how a Polkey point ought to be raised. The primary burden is no doubt on the employee to prove his loss. In the ordinary case, however, that burden is discharged simply by showing that he has been (unfairly) dismissed, since that prima facie *establishes that he has lost the earnings that he would have received had the employment continued: the loss is in principle indefinite, at least up to the natural terminus of retirement — though of course in practice it will usually be limited by reference to the time that it has taken, or should have taken, for him to find a new job at the same rate of pay. If the employer wishes to rely on the fact, or the chance, that the earnings would have been lost at some earlier date for some particular reason (e.g., in the classic Polkey case, that he could and would himself have fairly dismissed the employee at or shortly after the date of the actual dismissal — but it may be something else, such as a subsequent redundancy exercise) – it is for him to raise that contention and to support it with any evidence that may be necessary (though often the relevant evidence will overlap with what is in any event before the tribunal for other purposes)."*

Mitigation

38. Section 123(4) provides that that in calculating the employee's loss, tribunals shall apply *'the same rule concerning the duty of a person to mitigate his loss as to damages recoverable under the common law'*. The burden of proving failure to mitigate is on the employer: **Fyfe v Scientific Furnishing Ltd** [1989] IRLR 331. It is for the employer to raise and make good an assertion that a claimant has unreasonably failed to mitigate. Further, it must be found that the claimant has unreasonably failed to take some particular step.

39. When assessing the amount of deduction for the employee's failure to mitigate his loss, a tribunal should not reduce the whole compensatory award by a percentage. It should instead decide when the employee would have found work and take into account any income which the tribunal then considers he would have received from that other source: **Gardiner-Hill v Roland Berger Technics Ltd** [1982] IRLR 498.

40. The focus should be on what steps it was reasonable for the dismissed employee to have taken and identify a date when such reasonable steps would have borne fruit in terms of an alternative income. The tribunal should make a finding based on a broad evaluation of all the available evidence. As Lord Summers said in **Hakim,v Scottish Trade Unions Congress** [2021] 1WLUK 240, the tribunal should not strive for a false appearance of precision; the tribunal is entitled to use its judgment to fix a suitable point in time.'

41. As was said by Lord Justice Potter in paragraph 55 of **Wilding v British Telecommunications Plc** [2002] I.C.R.1079:

"It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party the wrongdoer has no right to determine his choice. It is where and only where the

wrongdoer can show affirmatively that the other party has acted unreasonably in his duty to mitigate that the defence will succeed."

42. An employee is not required to lower their sights immediately in the kind of job for which they apply. However, it may become reasonable to expect a dismissed employee to accept a lower paid job with lesser status after a period of time. That is a matter of fact and degree for the tribunal.

Stigma

43. An employee's circumstances may include the adverse position she finds herself in within the job market because of the employer's actions. This can include the stigma of being dismissed: **Abbey National v Chagger** [2010] ICR 397, CA. The Court of Appeal said:

"95. Once it is accepted that stigma loss is in principle recoverable, in most cases it need not be considered as a separate head of loss at all. There will be evidence about the steps which have been taken by the employee to mitigate loss, and this will in practice guide the tribunal to reach a view on the likely period of unemployment. The stigma problem will simply be one of the features which impacts on the question how long it will be before a job can be found. Indeed, we suspect that in practice many tribunals fixing compensation will already have this in mind as one of the features of the job market when they determine how long it will be before alternative employment is secured.

96. ……..

97. A tribunal should take a sensible and robust approach to the question of compensation, as the Court of Appeal emphasised in Essa. Plainly it would be wrong for them to infer that the employee will in future suffer from widespread stigma simply from his assertion to that effect, or because he is suspicious that this might be the case. If he is unwilling to make good his suspicions by taking proceedings against the alleged wrongdoing employers – notwithstanding that it may be understandable why he is reluctant to do so – he cannot expect the tribunal to put much weight on what is little more than conjecture. This is particularly so given that it will in practice be impossible for the employer effectively to counter that evidence.

98. However, where, as in this case, there is very extensive evidence of attempted mitigation failing to result in a job, a Tribunal is entitled to conclude that whatever the reason, the employee is unlikely to obtain future employment in the industry."

44. Finally, in **Ur-Rehman v Ahmad** [2013] ICR 28, EAT, it was said at paragraph 20:

"There must be evidence to support a claim for loss consisting of difficulty in obtaining or keeping employment due to "stigma", particularly where the stigma consists not of taking unjustified proceedings, but successful ones against a former employer. The evidence likely to be critical is that which can answer the questions identified by the Court of Appeal in appeal from the decision of Lightman J in Ali which we have set out at paragraph 17 above. They require more than a suggestion

or suspicion that stigma might be at work ….. Stigma may have to be inferred… though this also requires a sound evidential foundation from which the inference may be drawn..."

Discussion and conclusions

45. Before determining the compensatory award, I must set out my conclusions on the key arguments that were advanced as follows:

    45.1. That any compensatory award should not include an amount for loss of bonus or that it should be for a shorter period of time than for loss of basic salary.

    45.2. That the Claimant's ability to mitigate losses were affected by stigma

    45.3. That the Claimant's ability to mitigate losses were affected by the actions of the Respondent (by 'poisoning the well').

    45.4. That the Claimant would or might have been fairly dismissed by reason of redundancy at some future point.

    45.5. Whether the Respondent has shown that the Claimant acted unreasonably in failing to mitigate her losses.

Bonus

46. At the first remedy hearing, the Employment Tribunal had apparently awarded damages for breach of contract in respect of the failure to pay bonus. Insofar as it had made any such award, this was by consent, quashed on appeal. As set out in paragraph 3 above, the EAT ordered that: *"when determining afresh the compensatory award, the sub-head of loss in respect of bonus should reflect the annual bonus figure agreed by the parties, pro-rated by weeks to the number of weeks' lost remuneration that the tribunal determines afresh should be awarded"*

47. Ms Garner submitted that the Claimant should not be compensated for the loss of any bonus because that bonus would not have been payable after October 2017. Mr Goldberg submitted that it was impermissible to separate out the bonus from the basic annual salary. In other words, I was unable to determine that the losses in respect of bonus should be in respect of any lesser period than the losses I might award in respect of basic annual salary. He submitted that the EAT order precluded any such approach.

48. I respectfully disagree with Mr Goldberg. The order remits the determination of the compensatory award afresh, in particular by deciding afresh the issue of mitigation and to what period the award for loss of remuneration should apply and by applying paragraphs 2(b) and (c) of the order when calculating that award. The order does not seek to dictate the amounts I must award in respect of the period of loss by

amalgamating the bonus with basic salary so that it be treated as one unseverable sum. Had that been so, I would have expected the order to be in such terms and not to refer to the bonus as a 'sub-head of loss'.

49. There are cases where an employee is unfairly dismissed and where he or she claims losses in respect of different elements of the overall remuneration, for example basic annual salary, pension loss and loss of private medical care. A dismissed employee may only be compensated in respect of losses that are attributable to the unfair dismissal. If it was clear that the private medical care and pension contributions would, in any event, have ended say six months after the date of dismissal, had the employee not been dismissed (for example because of his or her age), then it is difficult to see why on what basis it could be just and equitable to compensate the employee for the ongoing loss of pension and/or private medical care for longer than six months – as such loss would not be attributable to the unfair dismissal.

50. Thus, the tribunal could award loss of the value of the medical care and pension benefits for six months and the loss of salary for longer – assuming a loss continued beyond that date and that it was attributable to the employer's actions in unfairly dismissing the employee. I see no difference in principle in this case in respect of the bonus. It must be open to me to determine whether the period of loss of bonus would have endured for the same length of time as the period of loss of basic salary. That depends on the evidence adduced.

51. There was the question mark, however, as to how the bonus was calculated, the Claimant agreed in cross examination that it had been paid in respect of her external work for the third-party companies/clients of the Respondent but she also said this changed in 2007. This was consistent with her pleaded case. In paragraph 11 of the Grounds of Complaint, the Claimant contended that the bonuses were first based on the deals they had worked on that year, at the end of each deal). However, it is also pleaded that this changed in around 2007 when the practice changed to an annual bonus linked to the work she had done and the general profitability of the Respondent (paragraph 12 Grounds of Complaint).

52. The Respondent, in its pleaded case, said that the bonus was at the discretion of senior management, to be paid during the following April after the end of the Respondent's financial year end on 31 December (para 16 **page 39**). In paragraph 87, the Respondent pleaded that bonus was calculated on the results of the Respondent's business during the 12-month period ending on 31 December. It makes no reference to bonus being dependent on the Claimant completing her 'external work'. Its pleading is consistent with the Claimant's pleading in respect of the period from 2007 that it is related to general profitability.

53. Ms Garner seizes on the Claimant's reference in cross-examination to bonus having been based on her external work, submitting that bonus would have come to an end because the external work had dried up by the time the Claimant was dismissed. However, in my judgement she cannot make good her submission that

this puts an end to any bonus claim. Such submission was contrary to the Respondent's pleaded case that it was calculated on the basis of the Respondent's business results. It is important to emphasise the periods of time involved in these proceedings. It is now some 6 ½ years since the Claimant's dismissal. I conclude that the Claimant's reference to the bonus having been based on her external work was a reference to the long and distant past prior to 2007. She also said in evidence that the bonus was not based on any deals (referring to the external work) but was simply decided on by the CEO. It does not detract from her pleaded case that no set criteria for calculating bonus had been given to her and I accepted her evidence that the position changed in 2007 and that bonus was not based on deals/external work.

54. I heard no evidence at all from the Respondent as to how bonus was calculated and heard no evidence regarding its profitability or performance as a business having suffered from 2017, to such an extent that the average bonus figure as agreed between the parties of circa £42k would or might have reduced in the period post 2017 (had the Claimant remained employed). Mr Foster did not mention any of this in his witness statement and made a passing reference in cross-examination to bonus being based on external work with no elaboration. The entire submission by Ms Garner was based on the fact that the Claimant's external work had dried up by the time of her dismissal. That does not equate to evidence from which I could properly infer that she would not have been paid any bonus because that work had dried up. As at the date of dismissal, all that I had was the agreed valuation of the net bonus at £42,735. I have seen nothing in evidence that would warrant me making any finding that this would have altered in future years.

55. Therefore, although in principle I do not agree with Mr Goldberg that my hands were tied; as regards my assessment on the facts and my evaluation of what might have happened had the Claimant not been dismissed, I see no basis on the evidence for determining a lesser period of loss in respect of the bonus than in the case of basic salary.

Stigma

56. As set out above, the 'stigma problem' is simply one of the features which impacts on the question how long it will be before a job can be found. The same argument on 'stigma' that was advanced before the first tribunal was repeated before me. The only evidence advanced in support of the argument that the Claimant's failure to obtain paid employment was negatively affected by the unwillingness of prospective employers to employ her because she was a whistleblower, was the Claimant's own evidence. The difficulty with her position is that she applied for no employment. Therefore, she is in effect arguing that she would not have obtained work had she applied for any because of the stigma attached to whistleblowing. I am invited to conclude that she is right about this. Nor do I accept this as a justifiable explanation for not applying for work. She did not even test the water. In light of my finding that the Claimant has not applied for a single job, she has not satisfied me on the evidence that a prospective employer was or even might be

inclined against her because she had exercised her right to pursue tribunal proceedings or because she had been a whistleblower or because a tribunal had upheld her complaint. I remind myself of the observations of the EAT in **Ur-Rehman v Ahmad** (see paragraph 46 above).

57. I also considered paragraph 52 of the Hilco appeal judgment, where HHJ Auerbach said this:

"I do not say that the fact that she has not made any job applications, and therefore cannot put forward the sort of evidence that Mr Chagger did, will necessarily be fatal to her case. There might, conceivably, be other evidence that is found to have supported her suspicions or concerns, that is sufficiently compelling to justify her not having tested the water with even a single application. But there does have to be some evidence of that sort, which is put before the tribunal, and which the tribunal evaluates and makes findings of fact about and concludes affects the question of whether the failure to look for any jobs or make any applications at all was reasonable."

58. Thus, I recognise that the absence of job applications is not necessarily fatal. But there must be 'some' evidence to support the suspicion. There was no such sufficiently compelling evidence. There was no sound evidential basis that would warrant an inference that, had the Claimant applied for work, she would not or might not have obtained employment because of the stigma attached to whistleblowing. The Claimant's assertion was conjecture.

Poisoning the well

59. On a proper analysis, the Claimant's evidence which she relied on in support of her 'stigma' argument was more to do with the alleged 'poisoning of the well' (see below) than it was to the question of unidentified prospective employers being deterred from employing her because of any stigma attached to whistleblowing. It was argued by her that she and her former colleagues had spoken to many administrators with a view to obtaining business through HHB but got no work. It was this, she said, which led her to think that Mr McGowan had spoken to administrators to deter them from giving them any work. She drew this conclusion because, as she said '*I know how Mr McGowan works*'. She also attributed some mysterious, silent telephone calls to Mr McGowan from which she concluded he was acting against her interests.

60. This was reminiscent of the earlier argument advanced by the Claimant before the first tribunal. I note that at the EAT (see HHJ Auerbach's judgment at paragraphs 55-58) Mr Goldberg referred the court to passages of the Claimant's first witness statement where she feared that the Respondent was 'poisoning the well' behind the scenes (something which HHJ Auerbach observed was a different issue but related to stigma issue). In the hearing before me, Mr Goldberg did not put to Mr Foster that he or anyone else on behalf of the Respondent had 'poisoned the well'

against her. That may have been because (again as observed by the EAT) that the matter had not been raised by the Claimant by way of cross-appeal. Whatever the reason, it left the only evidence on the matter as that of the Claimant herself (paragraphs 55 to 62 of her witness statement) and what she said about Mr McGowan in her evidence. The Claimant may well genuinely believe this. However, a genuine belief is insufficient to establish it as a fact. She advanced very little evidence in support of her beliefs and, certainly in my judgement, nothing that could enable me properly or safely to arrive at any finding against Mr McGowan or the Respondent on the civil standard. The Claimant asserted in essence that the failure of HHB to obtain business was a result of dark forces working against her. I have evaluated that evidence. However, it amounts to an assertion and an expression of her belief, based on the matters referred to in her statement and in oral evidence. It would have been open to her to call Tony or Lax (who were more instrumental in attempting to obtain business opportunities for HHB Associate) but she called no such evidence. There was insufficient evidence to enable me properly to infer that HHB was frustrated in its efforts by anything done by the Respondent.

61. As regards other opportunities (i.e. paid employment in other quarters) there was absolutely no evidence to suggest that the Respondent had acted to frustrate the Claimant's employment prospects elsewhere. I accepted the evidence of Mr Foster that he was certainly not working behind the scenes to prevent the Claimant from obtaining gainful employment, nor was he aware of anyone doing so – and the contrary was not put to him. I also accepted his evidence that it would not have been in the interests of the Respondent to have done so. Although I had regard to the Claimant's belief, I was wholly unsatisfied from it that the Respondent had done any such thing and made no findings to that effect.

Possibility of a future fair dismissal or that the Claimant might have left the Respondent's employment: 'Polkey' reduction

62. The Respondent confirmed that it does not challenge the Tribunal's determination that the Claimant would not have been dismissed had the procedure been correctly carried out. Ms Garner recognised that this argument that a fair dismissal would or might have taken place at the time or shortly thereafter was not open to her (the 'classic' Polkey argument). However, she argued that, as compensation must only be awarded in respect of losses which are attributable to the (unfair) action taken by the employer, it was open to the Respondent to invite the Tribunal to limit any compensation up to a certain point in time, in circumstances where the Claimant would, or might have been (fairly) dismissed in any event –either then or at some future point – because of the closure of the Middlesbrough office and the drying up of the external HR work. She also invited the Tribunal to consider limiting compensation on the basis that the Claimant might have left the employment of the Respondent of her own volition at some future point, had she not been dismissed. She referred to **Ministry of Defence v Cannock**.

63. As to dismissal, Ms Garner submitted that the Claimant would have been dismissed in any event by reason of redundancy about a year after the date of her

actual dismissal. In seeking to make good this submission, she relied on the evidence regarding the strategic review of September 2016: i.e, that it would have been put into place a year down the road, or that there was a very good chance that it would have been.

64. Mr Goldberg did not suggest that this particular argument was closed off to the Respondent. As I have set out at the beginning of this judgment, he submitted that the 'classic' Polkey argument that was shut off to the Respondent was the argument that the Claimant would have been fairly dismissed at the time (or within a relatively short period of time after the EDT to allow for fair procedures to have been followed).

65. His essential point was that it was the absence of evidence that led the original tribunal to reject that classic Polkey argument (in respect of which the appeal failed). The same argument is being advanced at this remedy hearing relying on the same evidence (paragraphs 8 and 9 of Mr Foster's 2024 statement). There is nothing new, he submitted, in support of the argument that the Claimant's employment would have been terminated one year down the road. It is the precisely the same submission with a different date. He submitted that as the position is precisely as it was evidentially there is nothing that would enable me to conclude that the Claimant would or might have been fairly dismissed one year down the road. That is especially so when one recognises that the exercise is to consider the likelihood of the Claimant being 'fairly' dismissed.

66. It is incumbent on the Respondent to advance evidence that would enable me to conclude that the Claimant would have been fairly dismissed or that she might have been fairly dismissed. I remind myself of the words of Underhill J in **Compass Group Plc v Mr K A Ayodele** (see above).

67. It is right to say that the only evidence before me was that of Mr Foster in paragraphs 5 to 9 of his 2024 statement, which is, essentially, along the same lines as his evidence in his previous statement prepared for the remedy hearing, paragraphs 9 and 19 [**page 387**]. In addition, within that first statement, Mr Foster set out the evidence regarding the closure of the Middlesbrough office. I summarise that evidence in paragraph 68 below.

68. The Strategy meeting of **26 September 2016** identified 6 areas at risk, of which one was the Middlesbrough office. Of the other five at risk, the Ireland MD, Larry Howard was dismissed in early 2017. The Europe Director, Eric Van Heuven was dismissed in February 2017. A marketing assistant and graphic designer had his working time reduced and was ultimately dismissed. A second I.T. consultant had his working hours reduced. The cost of running the Middlesbrough office, excluding salaries, was in excess of £50,000 a year. One of the reasons for potentially closing the Middlesbrough office was that internal HR could be absorbed by Mr Foster and that it was more efficient to have central services based in the London office where support was required and that having an office in Middlesbrough was too detached.

69. The difficulty I have with the Respondent's argument in this hearing is that the Tribunal concluded that the principal reason for the Claimant's dismissal was her protected disclosure to America in April 2017. That was so, despite the existence of the earlier strategic plan regarding the proposed closure of the Middlesbrough office and the proposed exiting from the business of the Claimant (both of which were relied on by Ms Garner in making good her 'Polkey' type argument). The matters were relied on to justify the fair dismissal of the Claimant and were canvassed before the employment tribunal as part of the Respondent's defence of the complaint of unfair dismissal and the circumstances regarding the closure of the Middlesbrough office and the impact of the strategic review were relied on in support of the fairness of the decision to dismiss and the Polkey argument at the time. Yet the Tribunal concluded that the real reason was that the Claimant had made a protected disclosure and that there was no basis for making any Polkey reduction. What additional evidence was there, I asked myself, to enable me to conclude (in light of that now unassailable conclusion of the first tribunal) that one year down the road from September/October 2017, the Claimant would have been fairly dismissed by reason of redundancy? As a matter of principle, I accept that a 'Polkey' reduction of the sort argued for by Ms Garner (i.e. a fresh redundancy one year down the road would have resulted in the Claimant's dismissal) could be made in principle, even in a case where the tribunal found that the reason for the dismissal was whistleblowing. However, I do not consider it appropriate or proper to infer that the Claimant would have been fairly dismissed a year down the road for the very same reasons as advanced before the first tribunal and relying on the same evidence. Further, the period of one year suggested by Ms Garner was entirely arbitrary. There was no evidence of anything particular that happened one year after the date of the Claimant's dismissal.

70. That is not to say that it is appropriate to make a percentage reduction to allow for the chance that at some point between the **13 October 2017** and the remedy hearing the Claimant might have been fairly dismissed. The situation that prevailed following the Claimant's dismissal was covered in Mr Foster's witness statement at paragraph 9. What he does not say there is that the Claimant was the Respondent's HR director. He does not go into detail on who is now performing the functions undertaken by the Claimant as set out on pages **151-152** of the bundle, although he does refer to him having absorbed the internal functions with occasional outsourcing to solicitors. He does not set out what he would have envisaged happening during some future redundancy exercise. A fair procedure would involve consulting with the Claimant on her role and future role. It is possible that she would have retained her employment as HR director. She had valuable skills that could be used by the Respondent and its associated companies and the Respondent might have been persuaded, on a fair consultation, to retain her with or without a renegotiated salary to reflect the reduced scope of the role.

71. Ms Garner also submitted that I must consider the prospect that the Claimant would have left the Respondent's employment in any event at some point in the future.

72. The Claimant, on her own evidence, enjoyed the external aspect of her role. She considered the internal functions of an HR director as basic and uninteresting. The closure of the Respondent's Middlesbrough office – albeit not something in itself that would have warranted dismissal of the Claimant – is bound to have had an impact, along with the loss of the external work as part of the HR function. That inevitably raises question marks over the likelihood of her remaining in her employment with the Respondent.

73. On my assessment, there must be a chance that the Claimant's employment would have ended lawfully prior to her 66th birthday, owing to the fact that she found the internal HR work uninteresting and the closure of the Middlesbrough office and the drying up of the external work creating the real risk of a redundancy at some point. I consider it just and equitable to reflect these possibilities in a single percentage reduction, which I assess as 60%.

Failure to mitigate losses – has the Respondent shown that the Claimant acted unreasonably?

HHB Associates

74. I remind myself that it is not enough that it would have been reasonable for the dismissed employee to take the steps the Respondent has (i..e apply for paid employment). The Respondent must show that it was unreasonable of the innocent party not to take the steps. As was observed in the EAT where an employee has simply made no job applications at all, the employer is entitled to assert, at least as a starting point, that by failing to do so, they have acted unreasonably, subject to the tribunal being satisfied as to the explanation. An employee failing to look for any jobs at all is likely to be sufficient to discharge the employer's burden of proof. It is then for the claimant to explain why such a failure was reasonable.

75. The Respondent has not satisfied me that the Claimant acted unreasonably in devoting her energies to finding work through HHB Associates following her dismissal by the Respondent. Nor, importantly, has it persuaded me that during this time she acted unreasonably in not also pursuing other job opportunities elsewhere. I accept her explanation that she was genuinely trying to build relationships and to obtain work through HHB. I remind myself that the Claimant has been wronged. In seeking to build relations with a view to obtaining highly paid consultancy work in an area in which she was skilled and knowledgeable and enjoyed, she took reasonable steps to mitigate her losses. She expended a considerable amount of time and effort initially in taking these steps. By applying for other jobs would have diverted her away from the not unreasonable desire and attempts to continue in the highly remunerative niche line of work she had been heavily involved in and which she had considerably enjoyed when in the employment of the Respondent and would have indicated to her former colleagues that she was not serious. In my judgement, the Claimant did not unreasonably fail to mitigate her losses by failing to apply for any jobs whilst looking to develop opportunities through HHB Associates.

76. However, HHB came to nothing. Although that can be said with certainty, with the benefit of hindsight, I acknowledge that at the time the Claimant embarked on the project she would not know that her efforts would come to noting. However, there comes a time when a person ought reasonably to realise that he or she is 'flogging a dead-horse', so to speak. I have allowed for the fact that it can take time to forge relationships and to obtain business opportunities in the rather niche area in which the Claimant was seeking to work. I have also allowed for the fact that initial disappointments in not securing business should not immediately result in the Claimant changing tack. However, by the end of 2018 she ought reasonably to have realised that the prospects of any paid work through that venture were very poor indeed. By not applying for any remunerative work from then, the Claimant acted unreasonably by failing to apply for any jobs from January 2019.

77. Applying **Gardiner Hill**, I must then consider what would have happened had she then started to apply for jobs. It is not unreasonable for her to have set her sights on the most senior of positions, given her experience. Further, it is reasonable to expect her to have looked for work in the North East. Ms Garner submitted that it would be perfectly reasonable to expect the Claimant to look for and obtain work anywhere in the country, given that when employed by the Respondent she travelled across the country, staying away from home for long periods. However, this misses the point. She was not permanently away from home and, in any event, when she was, her expenses were covered by the Respondent. The Respondent adduced no evidence to suggest that any of the positions that might be available to her would involve, on top of any annual salary, the payment of accommodation and travel from the North East. Therefore, I am not persuaded that she ought to have sought higher paid employment in London or in the South East. Although in general that part of the country commands higher salaries, it also brings with it a higher cost of living in terms of accommodation and travel. The Claimant's age is also a factor against relocation. She was 61 years old at that time. Given her age and the fact that she lives in the North East of the country, it is unlikely that she would relocate to take up a senior HR position in the south of the country, where the vast majority of the available jobs referred to in evidence were based. It is unlikely that the Claimant would take a position in the south of the country and much more likely that she would wish to secure a position within reasonable commuting distance. In doing so, she would not be acting unreasonably in my judgement.

78. The next questions are when would she have obtained employment and at what salary? She would have seen HR jobs advertised at various levels and at various salaries in line with those evidenced in the bundle. Given her skills, knowledge and extensive experience, had she looked for senior HR roles in my judgment she would have found a senior HR role.

79. Looking at the spectrum of salaries available from the evidence produced, and using my general understanding of the sort of salaries that can be commanded in senior HR positions in the North East of the country, in my judgement, the Claimant would, have secured a senior role at a gross annual salary of £80,000 a year. I

note from **page 307** the salary range for an HR Director in Leeds of £80k - £100k in February 2019. Other senior roles in Derby and Cheshire commanded salaries of around that level at or around that period.

80. Of course, people do not generally tend to obtain employment immediately as soon as they start looking, especially if they have been out of work for a period of time. Allowing for the usual scenario of multiple application and possible rejection or unsuitability of roles or locations, it is likely that it would have taken her about three months to secure a position. Therefore, acting reasonably and doing the best I can on the evidence available, I conclude that the Claimant would have been in a position to commence employment at a senior level by April 2019, that is on a gross salary of £80,000, resulting in a net annual salary in the region of £55,000.

81. I have arrived at the above conclusions on a broad evaluation of the evidence as to the availability of employment and referring back to my findings of fact and assessing the reality of the situation. I have reminded myself of the need to assess compensation on a just and equitable basis ascertaining the amount with a due sense of proportion with a view to arriving at a sensible and just reflection of the chances assessed.

The compensatory award

82. Having set out my conclusions on the disputed matters, I turned to consider the compensatory award in the following way:

    82.1. Firstly, by determining the period of the loss and the components of the losses incurred over that period.

    82.2. Secondly, by considering what sums are to be set off from that calculation which would include any sum paid by the employer in lieu of notice and monies received by way of mitigation (or for a failure to mitigate loss).

    82.3. Thirdly, by applying any reduction for the chance that the employment would have ended in any event.

The period of loss

83. The Clamant was born on **16 October 1957**. Given her age, her state pension age is 66. She maintains that she would have continued to work beyond her retirement age. in my judgment she would not. She has shown no appetite for doing any work and she is, on her own evidence, unexcited by standard HR work. I infer from this and the state pension age that she would have retired from her HR job at age 66, on **16 October 2023**. Therefore, I limit her losses to that date. The period of loss is, therefore, **13 October 2017** to **16 October 2023**.

Loss incurred in that period

84. As the Claimant remained unemployed in that period, a total period of 6 years, her lost net income of £2,508.93 a week amounts to **£782,786.16**. That is what she would have earned in that period had her income remained at that level. I heard no evidence or submissions or received no calculations regarding any increase in pay in either the job she lost or in any jobs she might have obtained had she acted reasonably in mitigating her losses.

Adjustments to the loss

85. Against that loss, I must then consider adjustments in the following order:

    85.1. Deduction of payments already made by way of payment in lieu of notice.
    85.2. Deduction of sums earned by way of mitigation or to reflect the failure to take reasonable steps in mitigation.
    85.3. Just and equitable reductions based on section 123(1) ERA 1996 reflecting any 'Polkey' reduction or to reflect the chance that the employee's employment might have terminated in any event at some future point.

Payment in lieu of notice

86. The gross payment in lieu was £20,508. I was given no assistance as to what the net figure on this was or might be. I have estimated the net amount to be **£14,355**. Therefore: **£782,786.16 minus £14,355 = £768,431.16**

Deduction to reflect the failure to mitigate loss

87. I have found that the Claimant would have found employment at a net salary of £55,000 from **01 April 2019**. Therefore, between **01 April 2019** and **16 October 2023**, her net earnings from new employment in that period would have been **£249,688** [236 weeks x £1,058]. Deducting that amount from **£768,431.16** leaves **£518,743.16**.

Reduction to reflect the chance that the Claimant's employment would have terminated fairly in any event

88. Given that I have found there to be a 60% chance that the Claimant's employment would terminated lawfully before her 66th birthday, that figure of **£518,743.16** must be reduced to **£207,497**.

Grossing up of sum in excess of £30,000

88.1. Taxable element of award = £207,497 less £30k = **£177,497**

88.2. £177,497/ (100 - 40 = 60) x 40] = **£118,331**

Total grossed up award

£295,828 (£177,497 + ££118,331)

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Employment Judge Sweeney

Date: 10 May 2024