Case Number: 2202735/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr Glenn Cowie	(1) Vesuvius Plc (2) Agnieszka Tomczak (3) Patrick Andre (4) Vesuvius Holdings Limited	

Heard at: London Central Employment Tribunal

On: 13 March 2024
(14, 28 March 2024 in chambers)

Before: Employment Judge Adkin
Dr V. Weerasinghe
Ms Zofia Darmas

Representations

For the Claimant: Mr J Susskin, Counsel
For the Respondent: Ms S Belgrove, Counsel

JUDGMENT

(1) The Tribunal's decision dated 22 December 2022 that there should be a 5% discount for accelerated receipt is revoked under the power of the Tribunal to reconsider its earlier decisions under rule 70 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules"). There will be no discount for accelerated receipt.

(2) The employer Fourth Respondent shall pay the Claimant **£3,171,723**. The calculation of this sum appears in table 1 below.

REASONS

Hearing

1. This **second remedy hearing** was fully remote in the sense that all parties, representatives and the members of the Tribunal joined by CVP from separate locations.

Procedure

History

2. The Claimant presented his claim on 12 May 2020 against the First, Second, Third Respondents. By consent, at a case management hearing on 17 February 2021 the Fourth Respondent, the Claimant's employer at the date of his dismissal, was added as a party.

3. The liability hearing took place on 11 – 22 October 2021 and a decision upholding some of the Claimant's claims was promulgated on 21 January 2022.

4. At a reconsideration and (first) remedy hearing in November 2022 the Tribunal varied its decision on allegation 19 and dismissed complaints of victimisation and protected disclosure detriment specifically in relation to that allegation.

First judgment on remedy

5. A judgment with written reasons on remedy dated **22 December 2022** ("**the December 2022 judgment**") was unfortunately not promulgated and sent to the parties until 10 January 2023 due to administrative delay. That decision gave a definitive figure for injury to feeling, interest on injury to feeling and the basic award for unfair dismissal. As to the compensatory award, the Tribunal made detailed findings about the likelihood of the Claimant leaving employment at various dates due to an agreed retirement or for other reasons. A figure of 5% was decided for accelerated receipt of future losses. The Tribunal ordered a figure of 7.5% for an ACAS uplift.

6. The parties were ordered to assist the Tribunal in finalising a figure for a compensatory award given that a number of elements required the parties' input due to the absence of clear evidence or agreement, specifically net earnings figures, LTIP, dividends, interest on financial losses and "grossing up".

7. A case management order provided in a series of stages for the parties to jointly produce an Excel spreadsheet to allow the compensatory award to be finalised. For a variety of reasons neither party complied with that order, including possibly the administrative delay in the promulgation of the decision with the case management order. The result was that rather than having four weeks to

comply with the order, the Claimant only had eight days between promulgation of the order on 10 January 2023 and the deadline on 18 January.

8. On 25 January 2023 the Claimant sadly suffered a heart attack before he could comply with the first order. This led to a delay of several months.

Inter party correspondence

9. Where references below refer to the Claimant and Respondents communicating, this is shorthand. All correspondence was on their behalf by their solicitors.

10. There was then substantial correspondence over a number of months during which limited progress was made on agreeing the outstanding points. The parties were unwilling to engage with the production of an agreed single document which is what the Tribunal had directed.

11. On 14 April 2023 a spreadsheet was provided by the Claimant to the Respondents. This document used some of the Respondent's own numbers from a document setting out various scenarios from the first remedy hearing.

12. On 21 July 2023 a letter from the Claimant sent to the Respondents which explained the attached spreadsheet. This included the grossing up element for South Carolina tax [SB2/193] which is explained below.

13. On 31 August 2023 a further version of the spreadsheet was provided by the Claimant. The Respondents complain that they were not supplied with all supporting evidence. In the Claimant's covering email it contained the following:

> "Please state any disagreements of principle (or of fact) in your cover letter in reply in a way that is readily understood by ourselves and our client (or indicate with clearly indicated notes on the document any disputed elements with some explanation).

14. The Claimant complained in a letter dated 13 September 2023 that the Respondents' spreadsheet did not have the functionality showing the underlying calculations.

15. Two days later on 15 September 2023 the Respondents wrote a letter to the Tribunal querying the lack of supporting evidence and complaining that the Claimant's spreadsheet did not have the necessary degree of transparency in particular in relation to net/gross figures. That letter contained the following:

> "The Respondents are currently preparing their response to the spreadsheet provided on 31 August 2023. The Tribunal will no doubt appreciate that this is not a straightforward exercise and requires input from **both legal and tax teams across different jurisdictions**."
>
> [emphasis added]

16. On 16 November 2023 the Respondents enclosed their own "spreadsheet", although this was apparently not in excel. This mentioned South Carolina tax and said that it was a matter of choice where the Claimant chose to live. This letter went on to suggest that the Respondents' accountants believe that the Claimant's tax calculations overstated what he would ultimately in tax after his end of year assessments. They requested copies of his end of year tax assessment for all completed US tax years and confirm further reductions and rebates the Claimant expected to apply for current and future years.

Case management – November 2023

17. There was a further case management hearing in November 2023 at which Employment Judge Adkin listed the second remedy hearing. Counsel at that hearing had some hope that various matters might be agreed. Ultimately that is not how matters played out.

18. The second remedy hearing could only be listed in March 2024 due to the non-availability of the Tribunal panel members and counsel's congested diaries.

Valuation of the successful claims

19. As to the final figure, the parties are very nearly £1,000,000 apart.

20. The Claimant's spreadsheet "C Master Spreadsheet V3" gives a final grossed up figure of £3,044,427.

21. The "Respondents' calculations spreadsheet – 14 March 2024 (updated 22 April 2024)" gave a final grossed up figure of £2,076,170.

Correspondence between November 2023 and March 2024 hearings

22. By an email 9 February 2024 the Respondents continued to query the Claimant's tax situation:

> "You have told us that your client's calculations of his mitigation earnings are based on the at-source tax deductions made by his employer. However, you have also told us that your client's tax affairs are complex and require many differing factors to be taken into account. We naturally conclude therefore that the net mitigation figures currently provided by your client are not an accurate reflection of the tax he has paid.
>
> Your client's obligation is to provide accurate net calculations to the Tribunal. He should have done so at the outset of this matter, years ago. The fact that we are repeating our correspondence is only indicative of your client's continued failures.
>
> We do not doubt that there may be a level of complexity involved in this exercise, indeed many of these remedy calculations are complex, but the Tribunal is more than capable of grasping complexities. We do not agree that the Tribunal will be willing to accept your client's current figures as accurate; to do so would be

> to risk a resultant award which recovers greater (or lesser) sums than the losses your client has been awarded in principle. There is **no need for expert evidence here, simply accurate evidence from your client**.
>
> Continuing in this line of correspondence is incurring unnecessary costs and delays for the parties, please confirm whether your client will now provide the relevant evidence or that his position remains as set out in your email. If your client continues to refuse to provide evidence of his net mitigation earnings then we will invite the Tribunal to reach judgement based on the deduction of your client's gross mitigation earnings (which are evidenced).

23. By an email dated 20 February 2024 the Claimant continued to argue that the grossing up principle should apply in respect of the South Carolina tax income, and disputed the Respondents’ position that his place of residence was simply a matter of personal choice.

24. By an email dated 27 February 2024 the Claimant chased up a substantive response.

25. On 29 February 2024 the Respondents provided an updated spreadsheet.

Second remedy hearing

26. The intention of the Tribunal was that this second remedy hearing was supposed only to deal with a short, discrete number of loose ends if the parties were unable to agree them: specifically net pay rather than gross, grossing up and some figures on LTIP/bonus where it was unclear what had been agreed between the parties.

27. The number of points in dispute sadly increased rather than decreased since the first substantive remedy hearing. Neither party appears to have approached the question of evaluating remedy entirely in a spirit of compromise, but rather has on each side taken points which have served to perpetuate the dispute and have failed to put their heads together to present data to the Tribunal in a common format in Excel as ordered. This has led to further delay and has made the task of the Tribunal lengthier and more difficult than it should have been.

28. We are grateful to counsel for agreeing a list of issues for this second remedy hearing which appears as an appendix to this judgment.

Evidence

29. In addition to the multiple bundles produced at the liability and first remedy hearing noted in the two earlier written reasons, a second supplementary bundle was produced for this hearing, which contained 276 pages. References to documents in that bundle that will appear in this format [**SB2/123**] where 123 is the page number.

Submissions

30. We are grateful to counsel for providing detailed written submissions at the second remedy hearing, an authority bundle from each party and oral submissions which were capped at a little under two hours for each party, with a brief right of reply for the Claimant.

31. Further written submissions were supplied by the parties in response to a query from the Tribunal sent on 3 April 2024. We are grateful for the submissions provided by both parties on 22 April 2024.

THE LAW

<u>Foreign law</u>

32. In **Brownlie v FS Cario (Nile Plaza) LLC** [2021] UKSC 45 Lord Leggatt wrote:

> 116 The rationale for applying English law by default, however, depends upon neither party choosing to advance a case that foreign law is applicable. If either party pleads that under the relevant rules of English private international law foreign law is applicable to an obligation, and that case is well founded, it is the duty of the court to apply foreign law. To apply English domestic law in that situation would *ex hypothesi* be unlawful. In accordance with general principle, the burden is on the party who is making or defending a claim, as the case may be, to prove that it has a legally valid claim or defence. Where the law applicable to the claim or defence is a foreign system of law, this will require the party to show that it has a good claim or defence under that law.

33. Later on in his decision at paragraph 114 Lord Leggatt gave some general guidance on the presumption of similarity:

> 147. …. the procedural context in which the presumption is relied on matters. Self-evidently, there is more scope for relying on the presumption of similarity at an early stage of proceedings when all that a party needs to show in order to be allowed to pursue a claim or defence is that it has a real prospect of success. By contrast, to rely solely on the presumption to seek to prove a case based on foreign law at trial may be a much more precarious course.
>
> 148 I would add that it should not be assumed that the only alternative to relying on the presumption of similarity is necessarily to tender evidence from an expert in the foreign system of law. The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant

> foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says."

Grossing up principle

34. "Grossing up" is based on the principle established in the decision of the House of Lords in the case of **British Transport Commission v Gourley** 1956 AC 185, HL.

35. Taking account of the tax a winning claimant must pay on any award, they should not be in a better or worse financial position than if a dismissal had not taken place. In practical terms this usually requires the Tribunal to estimate the tax that the winning claimant will have to pay on an award of damages and add a sum by way of "grossing up" such that the claimant ends up with a figure after payment of tax which reflects their net loss caused by the dismissal.

Grossing up (foreign element)

36. The editors of IDS handbooks on employment law offer the following commentary in chapter 13 of the handbook dealing with Unfair dismissal (13.72):

> "If one of the parties contends that the tax law of a country other than the UK needs to be considered and applied to the grossing up process, it is crucial that that party takes responsibility for ensuring that the tribunal has the necessary information to enable it to apply the relevant law."

37. In **International Petroleum Ltd v Osipov** (UKEAT/0229/16/DA UKEAT/0058/17/DA) – the Tribunal found that Mr Osipov had tax liability to pay both UK tax and US state tax and grossed up for both UK and US state tax.

38. IPL did not pursue on appeal an argument that the Tribunal was wrong to find that the Claimant was liable to pay tax in the UK on the portion of the award made to the Claimant to account for his liability to pay state tax in New Jersey (per paragraph 4 Simler P).

39. In that case, it was argued by IPL that the US-UK tax treaty meant that no US federal tax was owing. In respect of the US state position, the Claimant's expert stated in a report dated 22 November 2016 as follows (recited by Simler P at **paragraph 19**):

> "If, in the year of payment, Mr Osipov is resident for State tax purposes in New Jersey or other of the states of [the] United States he will be subject to the laws of that state. Almost all US states impose an income tax on residents and very few states provide any relief for taxes paid to foreign countries. As a result the likelihood is that the payment will be subject to state taxes in full, subject to confirmation of Mr Osipov's state of residence, and

a US state tax gross up is likely to be required (on top of the UK tax gross up)."

40. In that case the respondent employer had not sought their own expert evidence and sought to do so by an application to adjourn the hearing at the last minute. Simler P held:

> 38. …
>
> … The Respondents had only themselves to blame for that situation. They could, and should if they wished to do so, have obtained the evidence and information they considered necessary to produce the calculations required by the Tribunal, based on the proper law they contended for, and that would have enabled the Tribunal to determine whether, and to what extent, their arguments made a difference to the calculation of tax likely to be exigible on the award, and to calculate the award in final form.
>
> 39. …
>
> There is a strong public interest in the finality of litigation, and it is well established that this principle applies, **even in a case decided on a basis of law that may prove to be wrong**.
>
> [emphasis added]

Order of adjustments for compensatory award

41. There is a convenient summary of the order of adjustments for a compensatory award in the Employment Tribunal Remedies Handbook 2024-25 (Benjamin Gray, Bath Publishing):

> Adjustments to the compensatory award
>
> 1) Calculate the total losses suffered by the claimant;
>
> 2) Deduct any amounts received from the employer such as payment in lieu of notice or ex gratia payment which made to the employee as compensation for the dismissal (Digital Equipment Co Ltd v Clements [1997] EWCA Civ 289). This must exclude any enhanced redundancy payment above the basic award;
>
> 3) Deduct earnings which have mitigated the claimant's loss or a sum which reflects any failure by the claimant to mitigate his or her loss (s123(4) ERA 1996);
>
> 4) A 'Polkey' deduction to reflect the chance that the claimant would have been dismissed in any event had the employer acted fairly (Polkey v AE Dayton Services Ltd [1987] IRLR 50 (HL));
>
> 5) Decrease/increase for accelerated/decelerated receipt of compensation in respect of future/past loss (Bentwood Bros

(Manchester) Ltd v Shepherd [2003] EWCA Civ 380) (see also Accelerated/decelerated receipt);

6) Percentage increase or reduction up to a maximum of 25% to reflect an unreasonable failure by the employer or employee to comply with the ACAS disciplinary code (s207A TULR(C)A) (see ACAS (The Advisory, Conciliation and Arbitration Service));

7) A percentage reduction, up to a maximum of 25%, if a protected disclosure was not made in good faith (see also Protected disclosure);

8) Any extra award for a failure by the employer to provide written particulars of employment (s38 EA 2002) (see also Written statement of particulars);

9) Percentage reduction for any contributory conduct on the part of the employee (s123(6) ERA 1996). …;

10) Deduction for any enhanced redundancy payment to the extent that it exceeds the basic award (s123(7) ERA 1996);

11) Interest on past losses, if available;

12) Gross up

CONCLUSION ON REMEDY

FINANCIAL LOSSES

<u>(**Issue 1**) Should C be permitted to pursue a new claim for further relocation costs?</u>

42. This is in effect an application by the Claimant to amend the schedule of loss to add additional relocation costs which the Claimant says were not included in his original Schedule of Loss.

43. The Tribunal found no satisfactory explanation has been put forward why this part of the claim could not have been presented with reasonable diligence before. The substance of remedy has already been dealt with. This second remedy hearing is dealing with loose ends that we were not able to deal with at the previous hearing because of complexity or lack of information on specific points.

44. Considering the timing and manner of this application to amend, we did not find that it was in the interests of justice to entertain an application to amend made so long after matters relating to financial loss ought to have been put before the Respondents and Tribunal.

45. This application is refused.

(**Issue 2**) Should the ET reduction factors be applied to certain sums, namely:

(a) 2019 AIP (payable in March 2020);

46. Paragraph 2 of the judgment dated 22 December 2022 applied a 10% discount across the whole compensatory award for loss of earnings to reflect the possibility that employment might have come to an end for a non-discriminatory reason. The explanation for that discount was provided at paragraphs 146 – 155 of our written reasons for the first decision or remedy.

47. The Claimant invites us not to apply that 10% reduction to an AIP bonus for 2019, payable in March 2020 on the basis that he would certainly have received this.

48. We accept the Respondents' arguments on this point. The 10% discount was necessarily on a broadbrush basis. Although there might be arguments either way on this point, our finding is that we already have and should apply this to this bonus income received in March 2020. Any other approach will simply be unpicking the broadbrush approach applied in our decision of December 2022 which has not been challenged by either party.

49. The 10% discount will apply to this item.

(b) certain LTIP awards (vesting annually from mid-March 2020);

50. For similar reasons to those given above, the relevant reduction factors decided upon by the Tribunal should be applied to this item. Again this is in the interests of certainty. It would not be in the interests of justice to unpick the broadbrush discount.

51. The 10% discount will apply to this item.

(c) Travel allowance?

52. For similar reasons the relevant reduction factors decided upon by the Tribunal should be applied to the travel allowance. The travel allowance would only have been paid if the Claimant was still in employment. We have found that there was a percentage chance of him remaining in employment but less than 100%. Accordingly the deduction should be made.

53. To reiterate we are not going to unpick the broadbrush nature of the deduction exercise for some items not others. No doubt specific arguments could be made for different items but in a claim of this size with a number of heads of claim items claimed it would take what is already a complex exercise and a complex calculation and make it unmanageable. There must be finality.

54. The 10% discount will apply to this item.

(**Issue 3**) Should some of the LTIP figures (for later years' awards) be recalculated to allow for adjustment from the figures provided and relied upon at the Remedy Hearing in order to incorporate actual performance percentage achievement figures?

55. The submission put forward on behalf of the Claimant at the second remedy hearing was that LTIP figures could be derived using a ratio between different figures contained in a schedule of figures annexed to Ms Belgrove's submissions made on behalf of the Respondents at the first remedy hearing.

56. The Respondents' position was twofold. First that LTIP figures had been substantially agreed between the parties in the run-up to the first remedy hearing, and the Claimant was seeking to re-argue what had already been agreed. Second, the Claimant's position on valuation was simply wrong and ignored the actual basis that LTIP should be calculated using which related to the share price. The basis for calculation was set out at paragraph 15.5 of Ms Belgrove's submissions document dated 14 October 2022 and incorporated in the Respondents' spreadsheet calculation in an explanatory table in cells E77-J82.

57. What was agreed? The Tribunal has considered what it was that had been agreed and not agreed in relation to LTIP at the first remedy hearing. In the December 2022 reasons, in the section paragraph 182 – 185 we noted points that had been agreed (periods 1 and 2). We noted that the Claimant had conceded the point about pro-rating. Finally we noted that emails of 12 and 14 December 2022 between the parties had led to a lack of clarity about what had been agreed.

58. Where there has been any agreement between the parties in the previous schedules, this Tribunal will not allow the parties to depart from that agreement. No good or coherent reason was advanced for resiling from earlier agreed points. This can only prejudice the Respondents and cause further delay making a complex task even less manageable.

59. The Tribunal had no hesitation in accepting the Respondents' submissions on calculation of LTIP which were clear and corresponded to the evidence. We were persuaded that LTIP was calculated by reference to the share price. We accept the Respondents' figures in relation to this head of claim. The Respondents' approach contains a methodology which is consistent with the figures for LTIP in the period that the Claimant had previously agreed.

(**Issue 4**) Should the 4% dividend figure be 4% per annum or that figure *compounded?*

60. The Claimant invites the Tribunal to calculate dividend income on the basis of 4% compounded interest rather than simple interest.

61. The Tribunal has already made a decision that the appropriate dividend figure should be 4% per annum. We did not decide that that should be compounded. We are not prepared to make a reopen this point in the Claimant's favour to compound the dividend figure.

(**Issue 5**) Is C entitled to an AIP award for the first four months of 2024?

62. The Tribunal found that in a number of scenarios for a planned retirement the Claimant would working to the end of April of a particular year in order to ensure payment of his bonus for the previous year. It does not follow that he would then get one third of the bonus that would ordinarily be paid the next year. We bear in mind based on industrial experience that an important element of an employer's motivation in operating a bonus scheme is to encourage retention. It is frequently the case that employees wish to stay in employment to the point when bonus entitlement has crystallised. Our finding is that the Claimant would have worked to April 2024 in order to receive his full bonus paid then for the year 2023.

63. There is no finding of fact that we have made that supports the Claimant's argument that he should receive a bonus for a third of 2024, nor having considered it do we think it was likely that in any scenario he would have been paid a third of a bonus.

64. Our decision is that the Claimant is not entitled to receive an award for the first four months of 2024.

(**Issue 6**) Should the discount for accelerated receipt be referable to the date set down in the Remedy Judgment or to a new date?

65. The original judgment was for a 5% deduction for accelerated receipt of future losses. At that time in December 2022 some losses stretched as far into the future as far as March 2024.

66. The Claimant made a reconsideration application on this point by email on 19 January 2023. Employment Judge Adkin wrote on 21 June 2023 to say that he could not conclude that there was no reasonable prospect of success pursuant to the procedure under rule 72(1) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules"). It followed that this application would be dealt with at the second remedy hearing.

67. The Respondents say that the Claimant's non-compliance with the Tribunal's order caused delay, and that the Claimant ought not to profit from that by having the deduction for accelerated receipt varied.

68. The Claimant does not accept that his non-compliance is the substantial cause of delay given his ill health and delay caused by the Respondents during the course of 2023 but in any event says that the Respondents have been sitting on the money, or in other words the Claimant has been kept out of his money and ought not to give credit for accelerated receipt, since by the time he receives payment, none of the payment will reflect future loss.

69. As to causes of the delay, there were multiple causes of delay. There was an administrative delay on the part of the Tribunal in promulgating the decision which can only have made compliance more difficult, since the original four

week period given for compliance with the first order was contracted to 8 days. It is a matter of fact that the Claimant did not comply with the order. Thereafter the Claimant was very ill. It seems realistic based on medical evidence we have seen that he was prejudiced in his ability to deal with the claim for at least three months.

70. The Respondents asked for further disclosure e.g. in relation to the Claimant's tax payments in South Carolina.

71. The Respondents did not engage with the exercise of trying to produce a jointly submitted Excel spreadsheet. They took their own approach to this. Plainly of course the Respondents could not have produced a jointly submitted spreadsheet in compliance with the case management order made in December 2022 since by 22 February 2023 no progress was being made due to the Claimant's state of health.

72. Each party is pointing the finger at the other as a cause of delay. It seems to the Tribunal it is difficult to identify either side as being more fault than the other. There has been some fault and lack of compliance on both sides. Additionally, some substantial causes of delay in this case fall outside of the control of either side.

73. We have come to the conclusion that whether one side or the other in this litigation is at fault in the delay in this case does not particularly help us. There is fault on both sides. There are additionally extraneous factors which caused delay.

74. The decision as to whether to vary an earlier decision is "in the interests of justice". There are some competing factors here. Finality in litigation is highly desirable. That would operate in the Respondents' favour, suggesting that matters already decided by the Tribunal should not be reopened. Indeed that principle has operated in the Respondents' favour on other items considered above.

75. On the other hand the reason for making a discount for accelerated receipt is that the receiving party is able to invest money they have received in compensation earlier than they would have received it had there been no unlawful conduct. In this case the Claimant will not receive any monies on an accelerated basis. By the time he receives any money from the Respondents it will be after the point at which he would have received it as part of his remuneration in the ordinary course. In these circumstances a discount for accelerated receipt would be a windfall to the Respondents. They will have the benefit of a discount even though they have held onto the money and the Claimant has not had the benefit of receiving the money early.

76. Does the prejudice to the Claimant in having a discount for accelerated receipt when in fact there has been no accelerated receipt outweigh the prejudice to the Respondents in having this point reconsidered?

77. There was no decided figure for future loss. That still required the input from the parties and further deliberation at this second remedy hearing. In other

words future loss had not been finalised. We find that the prejudice to the Claimant does outweigh that to the Respondents.

78. On balance we find that the interests of justice dictate that we ought to vary the 5%.

79. We will reflect the lack of actual accelerated receipt by **varying our decision dated 22 December 2022 to remove the application of a 5% discount for accelerated receipt of future losses. There will be no such discount.**

(**Issue 7**) Should interest run to the date of assessment set down in the Remedy Judgment or to a new date?

80. The Respondents argue that a date of assessment has been defined in our December 2022 judgment and that this ought not to be varied.

81. The figure for interest on the award for injury to feeling has been assessed. That award was certain, the assessment took place on 22 December 2022. We have decided that that figure should remain as in the December 2022 judgment. The date of assessment for that figure was 21 December 2022. We accept the Respondents submission in relation to the date of assessment for the injury to feeling award. That date of assessment should not be varied.

82. As to interest on financial losses contained within the compensatory award, regulation 4(1) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 defines the “day of calculation” as the day on which the amount of interest is calculated by the Tribunal. For those financial losses that calculation has not been made until this second remedy judgment and reasons.

83. The broad principle behind the award of interest is to provide compensation to a successful claimant for the loss they have suffered by virtue of not having received payment of the award at the date of the loss suffered. The Claimant has not yet received payment.

84. In those circumstances the period for which interest will be calculated is the midpoint between the date of discrimination i.e. 1 August 2019 and the date of assessment which will be **19 June 2024**. The total period is 1,784 days. The mid point is 9 January 2022. The number days between the mid-point and the date of assessment is **892 days**.

(**Issue 8**) What is C’s net pay in respect of mitigation earnings? Specifically, should he give credit for tax rebates?

85. The Claimant has received various rebates from the tax authorities in respect of both federal and state income taxes in the US. There is a dispute between the parties as to which parts of these rebates should be credited as mitigation income and therefore deducted from the net income that the Claimant would have received had he not been dismissed.

86. It is not in dispute that rebates relating to salaried income earned by the Claimant subsequent to his dismissal ought to be credited in this way. That is plainly right.

87. The dispute relates to rebates which the Claimant says are for unrelated matters. The Claimant says that these are tax rebates relating to his financial affairs other than his salaried income. The implication of the Claimant's position is that these are tax rebates which he would have received whether or not his employment with the Respondent came to an end, and ought therefore to be ignored. The Claimant's figure for net income earned in mitigation is **£330,639**.

88. The Respondents' position is the Claimant is overstating the amount of tax he needed to pay in relation to his income once the rebates are taken into account. They also argue that there has been a failure of disclosure. They say that they have repeatedly requested the detail and evidence of those tax payments and that the Claimant has not provided the tax evidence requested. The Respondents highlight that only the Claimant has access to this information. The Respondents' (corrected) figure for mitigation is **£425,567**.

Evolution of the parties' positions on tax & mitigation

89. It is not necessary or helpful to attempt to capture the entire history of the parties' positions on this point, but some key points below give a flavour of the way that the disputed point has evolved:

89.1. In an updated schedule of loss dated 23 February 2022 only gross salary figures for sums received in mitigation were given.

89.2. In the Claimant's Reply to Respondent's Counter Schedule dated 5 May 2022 the Claimant again gave figures gross in a mixture of US dollars and pounds Sterling.

89.3. By an email of 25 September 2023 [SB2/203-6] the Claimant provided his earnings statement from Imerys Minerals USA, Inc and a summary spreadsheet providing a breakdown of salary, auto allowance, bonus, federal income tax, Medicare tax, Medicare surtax, GA [Georgia] State Income Tax, Social Security Tax for the half year June – December 2021; and the whole years January to December 2022 and 2023 [SB2/207]. This converted figures given in US dollars to British Pounds using a conversion exchange rate of 1.2.

89.4. In correspondence on 16 November 2023 the Respondents raised the concern of its accountants that tax calculation for mitigation amounts provided by the Claimant based on payroll data would be likely to overstate the amount of tax he needed to pay.

89.5. In an email dated 20 December 2023 Mr Daniels on behalf of the Claimant provided the following detail on the Claimant's actual US tax payments [SB2/250]:

"The Claimant's tax calculations in USA are complex as it involves property tax, short term investment gains, long term investment gains, losses on investments, Tax on dividend income, Mortgage relief etc. We are instructed these figures are correct"

89.6. By an email dated 30 January 2024 Ms Penny for the Respondents raised a concern that if only payroll data was relied upon the actual tax deductions would not be properly reflected and asserted that the disclosure obligations applied regardless of whether that involved the disclosure of personal data or not.

89.7. By an email dated 9 February 2024 Ms Penny for the Respondents set out that although the situation was complex there was no need for expert evidence and raised a concern that the absence of accurate net calculations led to a risk of an award being greater or lesser than what the Claimant has been awarded in principle. This was answered by Daniels on 20 February 2024. In short his position was that the claimant need not disclose his tax arrangements which did not relate to loss caused by the Respondent and the question of mitigation.

The spreadsheets provided post-hearing

90. At the second remedy hearing on 13 March 2024 the Tribunal requested that the parties provide their excel spreadsheet calculations.

91. Although this this did not represent compliance with the early order since there was not a set of calculations in a single spreadsheet, this at least enabled the Tribunal to see how figures have been calculated by examining the spreadsheets.

92. Following that request:

92.1. The Claimant provided his Master Spreadsheet on 14 March 2024 sent at 8:54. This was apparently an updated version of the one originally provided to the Respondents on 31 August 2023 [SB2/199].

92.2. In the Respondents' first calculation spreadsheet dated 14 March 2024 sent at 11:55, it was suggested that the total received by the claimant in gross mitigation was £566,202, assumed to be equivalent to a net £169,861. A tax rebate figure of £29,226 was deducted to give a figure of net income received in mitigation of £219,087.

92.3. In the covering email the Respondents' solicitor highlighted that the Claimant had stated that his gross Imerys mitigation for June to December 2021 was £117,300; in the spreadsheet produced that morning that number had reduced to £112,788, without explanation. (Dealing with that point of dispute, the Tribunal has checked the calculations originally provided on SB2/207 for the half year 2021 and these do correspond to the US dollar figures on the earnings statement on SB/204 and to a conversion to pounds at a rate of £/$ of 1.2. In other words the Claimant's "corrected" figure £112,788 figure appears to be correct).

92.4. The Respondents' corrected their calculation in an updated calculation dated also sent on 14 March (at 16:42) (also consistent with the very last version of the Respondents' figures provided on 22 April 2024). It was admitted that the earlier figure contained an error of calculation and suggested that the total received by the claimant in gross mitigation was £566,202, equivalent to £396,341 net income (30% tax assumed). A tax rebate figure of £29,226 was added to give a figure of net income received in mitigation of £425,567. This represented a very significant change in the Respondents figure of over £200,000.

93. The very last word from the Claimant was by email from Mr Daniels sent at 07:46 on 15 March 2024 attaching a spreadsheet dated "Copy of 14 March mitigation Claimant explanation Keystone 735am FINAL.xlsx". That spreadsheet summarised the two most recent positions of the Respondents described above and provided the Claimant figures, which seem to be substantially derived from SB2/207 the calculations referred to above and the payslip data which appears at SB2/204-6. The Claimant gave alternative figures of £536,712 gross, from which it was said that actual tax of £205,805 was deducted. Taking account of a rebate of £4,038, but less a tax underpayment requiring payment of £3,770 meant that there was credit given for a sum of £268, leading to a total net mitigation sum of **£330,639**.

Evidence on rebates

94. Considering the evidence we have been provided with:

94.1. A letter from accountants dated 17 May 2021 [**SB2/257**] the Claimant and his wife were due to receive refunds for tax year 2020: $294 in relation to federal taxes and $28,854 in relation to Ohio state taxes.

94.2. A letter from accountants dated 14 April 2022 [**SB2/259**] the Claimant and his wife were due to receive refunds for tax year 2021: $4,167 in relation to federal taxes and $678 in relation to Georgia state taxes. A payment of $882 was to be deducted in respect of South Carolina state taxes.

94.3. A letter from accountants dated 8 May 2023 [**SB2/262**] the Claimant and his wife were due to receive refunds for tax year 2022: $432 in relation to federal taxes and $644 in relation to Georgia state taxes. A payment of $3,090 was to be deducted in respect of South Carolina state taxes.

Conclusion re: rebates

95. The fact that this correspondence is addressed to both Mr and Mrs Cowie does in our assessment support the Claimant's position that the information given about tax rebates or tax overpayment relate to matters broader than simply his personal salaried income working for Imerys. The Claimant says that this reflects property tax, short term investment gains, long term investment gains, losses on investments, Tax on dividend income and Mortgage relief. The Tribunal accepts this.

96. The Respondents equivalent calculations assume that the Claimant paid 30% tax. While that might have been a reasonable working assumption, based on the Claimant's earlier estimate, by the time of the hearing in March 2024 we had benefit of some actual tax payment figure. On the Claimant's figures the total tax he paid of £205,805 is 38% of the £536,712 total he earned in total during the period in tax years 2021/22 through to 2024/25. It follows that an assumption of paying only 30% tax as per the Respondents' suggestion materially understates, we find, the Claimant's actual tax burden, which overstates the net income he has received since termination and correspondingly understates his overall loss of net income.

97. We are satisfied, based on the evidence of the Claimant's earnings statements and the correspondence from his accountants 17 May 2021, 14 April 2022 and 8 May 2023 [SB2/257-263] that the Claimant has proven his loss in respect of the mitigation calculations. The relatively small figures put forward in the correspondence from the accountants in relation to rebates leads us to the conclusion that the figures put forward by the Claimant do not materially misstate the extent of his loss.

98. Accordingly we have used the Claimant's figures in relation to the mitigation of loss figures received net of tax.

(**Issue 9**) How should C's award be grossed up (the South Carolina issue)?

Tribunal's reasons at liability stage on grossing up

99. For ease of reference the Tribunal's earlier reasons were:

> 258. "Grossing up" is an increase applied to an award of compensation by the Tribunal to ensure that a claimant is compensated for the true net loss. It should be calculated to take account of the elements of the compensation that will be taxed.
>
> 259. Mr Cowie and his advisors are better placed than the Tribunal to calculate the tax that will need to be paid on this award, since it may depend on other income outside of our knowledge and in which jurisdiction **or jurisdictions** he will be paying tax.
>
> [emphasis added]

Dispute

100. It is not in dispute between the parties that grossing up to reflect the deductions which will be made to the judgment sum *should* be made to reflect the sums it is anticipated will be deducted by the UK tax authorities from the sum awarded by the Tribunal. The dispute is whether the Claimant's award be grossed up for South Carolina state income tax.

Submissions

101. Some of the key points in the parties submissions are highlighted below. The core of the submissions from each side are in writing and the detail of those submissions can be referred to if necessary.

102. Following on from Tribunal deliberation on 28 March 2024 after the second remedy hearing Employment Judge Adkin asked the parties to offer submissions in writing on whether the decision of Simler P sitting in the case **Osipov v International Petroleum** (UKAT/0229/16/DA, UKEAT/0058/17/DA – addendum dealing with tax) might offer the Tribunal assistance in the present case. Written submissions were received from both parties, for which the Tribunal is grateful.

Claimant's case

103. The Claimant's case is that he is now resident in the state of South Carolina. He says that he will not pay US federal tax, due to the agreement between the USA and UK in relation to income tax (usually called the UK/US Double Tax Convention), but that he will have to pay a state tax of **6.4%** (corrected by the Claimant from an earlier figure of 6.5%).

104. The first time the South Carolina element was claimed for was in a cell in in an excel spreadsheet provided by the Claimant to the Respondent on 21 July 2023 as £207,228 based on a rate of 6.5% [**SB2/193**]. That figure was also included in a spreadsheet sent to the Respondents on 31 August 2023 [S2/**198**]. The covering email contained the following request:

> "Please state any disagreements of principle (or of fact) in your cover letter in reply in a way that is readily understood by ourselves and our client (or indicate with clearly indicated notes on the document any disputed elements with some explanation).

105. By a letter of 16 November 2023 the Respondent said on this point:

> "6. South Carolina Tax
>
> Where the Claimant is now located is a matter of personal choice. The Respondents are obliged to account for UK tax on the award; they are not liable for any additional tax the Claimant is subject to because he has elected to be resident in a different tax jurisdiction – had his employment with the First Respondent continued he would certainly have been employed in the UK."

Accountant's advice re South Carolina income tax

106. In a letter of 16 February 2024, the Claimant's accountant William E Joseph, wrote to him as follows:

"This letter is in response to your request for information. As you know from working with our firm, I am a Certified Public Accountant who prepares Federal, State and local income tax returns. I have been licensed in the State of Ohio since 1993 and our practice covers income taxes in all 50 states. The purpose of this letter is to provide you with calculations of the estimated income taxes owed on your UK settlement income assuming a settlement is received during calendar year 2023. I understand that you will likely share this letter with your legal counsel as well as the UK tribunal that you have indicated is handling your case. Please keep in mind that you are our client, and no other client relationship or responsibility is created on our behalf with those that you chose to share this letter with. As you already are aware, as a resident of the United States and of the State of South Carolina, you must file and pay your income taxes annually based on calendar year worldwide income.

Taxable Income

From the information that you provided, we would expect that all settlement related payments that you are to receive, including, interest and awards for injury to feelings to be subject to both US Federal income tax and South Carolina state income tax. Based on your gross settlement of approximately $4,162,800, you will have income taxed at all the marginal brackets from 10% to 37% (see the brackets in the chart overleaf).

[*chart entitled* Tax brackets 2023 for taxes filed in 2025 *omitted for present purposes*]

South Carolina Income Taxes

The State of South Carolina collects income tax using the Federal taxable income number from the US income tax form. There are no allowances or deductions available in South Carolina. In addition, there is no credit for foreign taxes paid, only for income taxes paid to other states which does not apply since no state taxes will have been paid on this income at the source.

The maximum income tax rate for SC is **6.4%** for 2024. Using a conversion rate of 1.2 we estimate South Carolina State income tax due on the UK compensation payment in 2024 to be approximately $263,800.

The information presented above in this letter is provided to the best of my knowledge.

[emphasis added]

107. In line with the letter from the accountant Mr Joseph, the Claimant accepts that the relevant figure for South Carolina state income tax is **6.4%** rather than 6.5% as had previously been claimed.

108. Mr Susskind for the Claimant has developed points in written and oral submissions. Among those arguments are:

108.1. The Gourley principle is not disapplied because of where a claimant is domiciled. The Tribunal should not ignore that the Claimant lives in South Carolina or pretend for the purposes of grossing up that he lives in the UK.

108.2. The argument that the decision that the Claimant "elected" through personal choice to live in South Carolina should not stand given the Tribunal's finding was that he had found a job there to mitigate his loss i.e. this was a consequence of discrimination and tortious damages should apply.

108.3. The Respondents have not disputed and indeed benefited from the South Carolina tax regime in part when it comes to credit being given for income mitigation, but are refusing to recognise that the Claimant has a tax liability in South Carolina when it comes to the question of grossing up.

108.4. *Res judicata* applies. The Tribunal at paragraph 258-9 of the written reasons on liability has already decided that tax will need to be paid which may depend on which jurisdiction or jurisdiction**s** (plural) he will be paying tax.

108.5. As to the Respondents' reliance on the case of **Brownlie v FS Cairo (Nile Plaza) LLC** [2022] AC 995, Mr Susskind points out the content of paragraph 148 of Lord Leggatt's decision, in which acknowledges that there is much information suggests that the need for expert witness may be outdated.

109. As to the **Osipov** case, the Claimant argues that a broad proposition to be derived from that decision is that parties should not benefit from their own lack of cooperation in the process of evidence gathering or "ambushing" the other side, which it is submitted the Respondents' position on this point is.

Respondent's arguments re: grossing up

110. The Respondents' arguments are summarised succinctly in Ms Belgrove's written submission. These may be summarised as follows:

110.1. The Claimant's decision to relocate to South Carolina is one of personal choice, the cost of which the Respondents should not pay.

110.2. If Claimant is correct in pursuing this claim, it would be necessary for the ET to determine and apply foreign law, specifically tax treatment of foreign judgment awards in South Carolina.

110.3. In the decision of the Supreme Court in **Brownlie**, Lord Leggatt confirmed that the default rule is that English law is applicable in its own right where foreign law is not pleaded and that there is a presumption of similarity between foreign law and English law when foreign law is not proven. In this case, the "default rule" applies. The Claimant has not pleaded that the ET should apply the law of the United States nor the law of South Carolina. In those circumstances, English law is treated as applicable in its own right where foreign law is not pleaded. Accordingly, the ET must apply only English law in respect of grossing up.

110.4. Further and alternatively, the "presumption of similarity" applies; where the Claimant has not adduced evidence to prove the law of South Carolina, it is presumed to be the same as English law.

110.5. In order for the ET to determine and apply foreign law, it would require expert evidence in respect of the legal position on the tax treatment of foreign judgment awards in South Carolina in order to gross up the Claimant's net award correctly. In the absence of expert evidence, the ET cannot determine and apply foreign law. It would be impossible for the ET to determine how an award made by a foreign tribunal or court would be treated, for taxation purposes, in South Carolina.

110.6. The burden rests with the Claimant and he has not discharged that burden. He has not provided expert evidence to the Respondents nor sought, at any time, permission to rely on expert evidence.

111. As to the Osipov case, the Respondents argue that it highlights the importance of expert evidence where a party is seeking to rely on foreign law, which is significant given that there is no independent expert in the present case.

<u>Conclusion on grossing up for South Carolina tax</u>

112. Our conclusion is that grossing up should include an element for the tax that the Claimant will pay in South Carolina for the following reasons.

113. It was clear to the Tribunal and parties back in December 2022, the date of the liability decision that more than one tax jurisdiction might play into the grossing up calculation, as reflected in paragraphs 258-9 of the written reasons. It should have been clear to both parties that the Tribunal had in contemplation that potentially more than one jurisdiction was going to be engaged, given the context of the case which the Claimant was formerly resident in the UK and now resident in the US. It seems to us that the suggestion made now by the Respondents that the Claimant being resident in South Carolina is purely a matter of personal choice runs counter to our finding at paragraph 238 of our written reasons in the first remedy decision that the Claimant relocated back to the USA to mitigate his losses. We accept the Claimant's position that this relocation is one of the consequences of the discriminatory dismissal.

114. The approach of Respondents is to take a strict pleadings point on US law and also expert evidence. There are several reasons why we have concluded that this is not a desirable approach.

115. First, we bear in mind Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") rule 2 and the overriding objective to deal with cases **informally** and **flexibly**, which are not principles which taken apply to cases like Brownlie. We have derived some assistance from the acknowledgement in Lord Leggett's decision that expert witness evidence is not needed in every case.

116. Second, the exercise facing the Tribunal is principally one of fact, i.e. how much tax is the Claimant going to pay on the judgment sum in South Carolina? To the extent that this contains a question of law, this is distinct and less complex than the question of whether liability would be established for a claim in tort which needed to be established under the Egyptian law (to use the example from Brownlie).

117. Third, the point about multiple jurisdictions was highlighted in the Tribunal's written reasons. From the context the parties could only have understood that this was UK and US. In other words the parties have been on notice for over a year that this was going to be a question to consider.

118. The Claimant left it relatively late to get a letter from his accountant. The Respondents have done nothing at all in respect establishing the tax position when they were on notice that the Claimant was seeking to gross up for South Carolina state tax from the Claimant's correspondence of 21 July 2023. The Claimant expressly request that any disagreement of principle be raised in the Claimant's further correspondence of 31 August 2023.

119. Fourth, we have a statement from the Claimant's accountant which gives a coherent and plausible explanation of the appropriate tax treatment i.e. the Claimant will have no federal tax liability, but he will have a liability to pay South Carolina tax. This is not an independent expert appointed by a Tribunal. It appears to this Tribunal to be the statement of a professional doing his best to set out the tax situation as he understands it. Following Lord Leggatt's guidance, we take the view that court appointed expert witness is not necessary in every case. We do not find that expert evidence is necessary in this case.

120. A letter from an accountant is in our view evidence of the tax position. Is there a reason to doubt it? We note in passing that the position set out by Mr Cowie's accountant is essentially similar to the expert evidence quoted in the Osipov case i.e. that there is an exemption from US federal tax where UK tax is paid, but no such exemption applies in the case of US state income tax. Plainly it would be wrong to place any weight on expert evidence given in different circumstances. Looking at the matter in the round, however we do not have any good reason to seriously question that the Claimant's accountant's view is correct.

121. Fifth, the Respondents have not sought to provide their own expert evidence, nor have they put forward any evidence nor indeed advanced any good argument that the Claimant's accountant is wrong. Essentially the Respondents are relying on a technical pleadings point, not seeking to argue that the Claimant's accountant is mistaken.

122. Sixth, the strong public interest of finality in litigation is clear and obvious, and particularly in this case when matters have dragged on to such an extent. We bear in mind the guidance of Simler P that the desirability of finality may mean a decision should be taken when the basis of law may be wrong.

123. Based on the evidence we have received, we find on the balance of probabilities that the Claimant will have to pay state tax in South Carolina once he is in receipt of damages from the Respondents pursuant to the Tribunal's award. We note that the Respondents accept that the Claimant is paying tax in the US under other heads of claim. Indeed they rely on tax rebates in the US as increasing sums received in mitigation which thereby reduced the net loss of income. In our view there would be an element of unreality to ignore the tax liability and the risk of doing injustice to the Claimant. In short if we did not gross up we find on balance of probabilities that the Claimant would have to pay part of his damages to the state of South Carolina, and would be under-compensated for his loss of earnings.

124. In conclusion therefore we find that the compensatory award should be grossed up to take account of state income tax in South Carolina.

(**Issue 10**) What is the correct basis for netting down and subsequent grossing up calculations?

125. The approach that the Employment Tribunal has applied is to consider the loss of net income by deducting net income actually received from net income that the Claimant would have received. To that differential grossing up is carried out as discussed above.

(**Issue 11**) Whether the award for injury to feelings should be grossed up to account for tax that will be levied on it? (C says that it should be grossed up.)

126. **Section 406 Income Tax (Earnings & Pensions) Act 2003** has been amended such that for terminations after 6 April 2018, compensation for injury to feelings in a termination payment is taxable to the extent that the £30,000 'allowance' has been exceeded.

127. The EAT confirmed in **Slade v Biggs** [2021] EA-2019-000687 that the wording of the amended section 406 is broad and includes injury to feelings in consequence of dismissal or "in connection with" termination.

128. Given that the termination in this case was after 6 April 2018 and the injury to feeling award was in connection with termination, the injury to feeling award will be taxed insofar as it goes above the £30,000 allowance.

129. Given this grossing up will apply to this award. The sum for injury to feeling and interest thereon has been added into the figures for the grossing up exercise then deducted at the end, since judgment for these sums was given in the December 2022 judgment.

(**Issue 12**) Whether C is entitled to be compensated for a *pro rata* travel allowance for 2024? (C says that he should be so compensated.)

130. The Claimant argues for a *pro rata* travel allowance for part of 2024 until 20 April 2024 (i.e. 4 months).

131. The Respondent argues that this is a new claim and that it is too late.

132. In the December 2022 remedy judgment at paragraph 194 the Tribunal awarded £6,400 p.a. for the remainder of Mr Cowie's employment. We found that there was a 57.375% percentage chance that he would have continued working until a retirement date of 30 April 2024.

133. Accordingly, we do not find that this was a new claim, it is simply one that has not yet been quantified.

134. Notwithstanding the position of the Respondents that this should not be recovered, the Respondents' calculations cell B115 has £6,400 for travel allowance for the tax year 2023 – 2024. We presume that this reflects a travel allowance for the period April 2023 – March 2024.

135. It seems therefore that the only element not captured in the Respondents' calculations is for the month of April 2024. By our calculation the relevant figure is 57.375% (factoring) x 1/12 (one month only) x £6,400 x 0.8 (basic tax deduction), which is £244.80. Rather than attempting to insert this into the Respondents' calculations of net income we have added this at the end at Table 1.

(**Issue 13**) Whether certain awards for the 2019/20 year should be awarded gross or net of tax (specifically, Sale of US home, Cleveland Airfare, Second Shipping container, and Taxi)? C says that these should be awarded gross.

136. The following items are claimed as part of the Claimant's claim for financial losses due to his discriminatory dismissal: sale of US home, Cleveland Airfare, second shipping container, and taxi.

137. These items are the recovery of expenses rather than income from which income tax would ordinarily be deducted. These sums should be awarded gross rather than net of tax.

Calculations of compensation

138. Our judgment dated 22 December 2022 has already dealt with injury to feeling, interest on injury to feeling and the basic award.

139. We have shown the basis of the calculation for the compensatory award in three tables:

139.1. **Table 1** Summary Calculation of Compensation – This gives the Grand Total which is the sum that the Fourth Respondent must pay to the Claimant.

139.2. **Table 2** Net loss after mitigation – this shows the Claimant's net loss of income taking account of mitigation income, factoring in the discounts for the four different periods described at paragraph (4) of our judgement dated 22 December 2022 (further explained at paragraph 171 of the December 2022 written reasons.

139.3. **Table 3** Grossing up – this grosses up for income tax in the UK and South Carolina.

Loss of net income (Table 2)

140. The Tribunal unanimously decided that we should adopt the Respondents' calculation of the various income figures on the basis that the Excel spreadsheet provided by the Respondents was better laid out and structured made it easier to follow the relevant calculations. We have accepted the Respondents' LTIP figures for the reasons given above.

141. We have modified the Respondents' calculations to take account of the decision of the Court of Appeal in **Wheeler**.

142. This culminates in **table 2** (net loss after litigation), which is forms the top line of **table 1** (summary calculation of compensation).

143. The columns in table 2 are derived as follows:

143.1. First column, "Net loss" comes from the Respondents' net loss figures reflecting income but for dismissal net of tax, totalling £1,797,456 (cells D25-D149 of the Respondents' calculations spreadsheet);

143.2. Second column "net mitigation" comes from the Claimant' net mitigation figures, totalling £330,639 (see cells H25-H31 of the Claimants' calculations). Where the four periods breaks over different tax years, the Tribunal has allocated the Claimant's mitigation figures net of tax *pro rata*, assuming that the income was earned uniformly over the year (details in the note);

143.3. Third column "Difference" is the arithmetic difference between the first and second columns. The total is £1,466,817, but this is before factoring has been applied;

143.4. Fourth column "% factor" is based on the Tribunals' percentage factoring, summarised by the Respondents' (Respondents' cells C152-161);

143.5. Fifth column "Total after ET factoring for each period" = third column x fourth column organised by periods corresponding to the four periods in the December 2022 decision broken over the six tax years (2019/20 –

2024/25). There are nine different figures, which reflects the fact that the four periods and six tax years do not perfectly coincide. The total is £1,074,834, this is after factoring has been applied;

143.6. Sixth column "Total after ET factoring for each tax year" takes the data from the fifth column and summarises into the six tax years. The total is also £1,074,834.

Wheeler

144. We accept the Claimant's submission that following the decision of the Court of Appeal in **Ministry of Defence v Wheeler** [1998] IRLR 23, the Tribunal should deduct net sums earned in mitigation of loss (new job) from net income that the Claimant would have earned (old job) to give us a net loss figure first, *before* applying a percentage reduction to reflect possibility of a non-discriminatory dismissal.

145. For ease of calculation, using the Respondent's spreadsheet calculation we have applied the percentage reduction to the mitigation income earned in the relevant tax years as follows:

145.1. tax year 2019/20 – not applicable (no income);

145.2. tax year 2020/21 – not applicable (no income);

145.3. tax year 2021/22 – 0.765 the discount factor for period 2 (within May 2020 – December 2022);

145.4. tax year 2022/23 – 0.765 the discount factor for period 3 (within January 2023 – April 2023);

145.5. tax year 2023/24 – 0.590 the discount factor representing a blended average of one month at 0.765 for period 3 (April 2023 only) and 11 months at 0.574 for period 4 (May 2023-March 2024);

145.6. tax year 2024/2025 – 0.574 (April 2024, i.e. tail end of period 4).

Grossing up (Table 3)

146. Using the loss of net income figure derived from the Respondents' calculations we have used a version of the grossing up section from the Claimant's spreadsheet since this was clear and provided a method of grossing up for both UK and South Carolina state income taxes. The Respondents' calculations did not provide calculations for the South Carolina state income tax element of grossing up.

147. This is summarised in **table 3**.

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Employment Judge Adkin

Date 19 June 2024

WRITTEN REASONS SENT TO THE PARTIES ON

20 June 2024

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

APPENDIX
AGREED LIST OF ISSUES
SECOND REMEDY HEARING

1. Should C be permitted to pursue a new claim for further relocation costs?

2. Should the ET reduction factors be applied to certain sums, namely:

   (a) 2019 AIP (payable in March 2020);

   (b) certain LTIP awards (vesting annually from mid-March 2020);

   (c) travel allowances?

3. Should some of the LTIP figures (for later years' awards) be recalculated to allow for adjustment from the figures provided and relied upon at the Remedy Hearing in order to incorporate actual performance percentage achievement figures?

4. Should the 4% dividend figure be 4% per annum or that figure *compounded?*

5. Is C entitled to an AIP award for the first four months of 2024?

6. Should the discount for accelerated receipt be referable to the date set down in the Remedy Judgment or to a new date? C made a reconsideration application on this point.

7. Should interest run to the date of assessment set down in the Remedy Judgment or to a new date?

8. What is C's net pay in respect of mitigation earnings? Specifically, should he give credit for tax rebates? [*Note that the parties may have reached agreement on this save for one figure*]

9. How should C's award be grossed up (the South Carolina issue)?

10. What is the correct basis for netting down and subsequent grossing up calculations?

11. Whether the award for injury to feelings should be grossed up to account for tax that will be levied on it? (C says that it should be grossed up.)

12. Whether C is entitled to be compensated for a pro rata travel allowance for 2024? (C says that he should be so compensated.)

13. Whether certain awards for the 2019/20 year should be awarded gross or net of tax (specifically, Sale of US home, Cleveland Airfare, Second Shipping container, and Taxi)? C says that these should be awarded gross.)

Table 1. SUMMARY CALCULATION OF COMPENSATION	Value (£)
Income subject to ET factoring	
Loss of income (net of tax), factoring applied per table 2	1,074,834
Sub Total Net Income	**1,074,834**
ACAS uplift 7.5% on sub total loss net income	80,613
Net after ACAS uplift	1,155,446
Daily Rate interest @ 8%	253
Days calculated from midpoint between 1 August 2019 and :	892
Total interest on past financial losses	225,898
Total Net financial losses plus interest	1,381,344
Injury to feelings	20,000
Interest on Injury to feelings	5,431
ACAS uplift 7.5% on sub total net income	1,907
Total	**1,408,682**
Losses exempt from ET factoring	
Travel Allowance 2019	6,400
Sale of US home	15,000
Cleveland Airfare	1,000
Second shipping container	11,981
Taxi	170
Settling allowance (retirement to SA)	28,333
Total losses exempt from factoring	**62,884**
Travel Allowance April 2024	245
SUB-TOTAL PRE-GROSSING UP	**1,471,811**
Grossing up for UK & South Carolina state income taxes	1,725,588
Less injury to feeling + interest on ITF (already ordered 22.12.	- 25,431
GRAND TOTAL	**3,171,723**

Table 2. EMPLOYMENT TRIBUNAL FACTORING							
Tax Year	**Net loss (R figs)**	**Net mitigation (C figs)**	**Difference**	**ET factoring**	**Total after ET factoring for each period**	**Total after ET factoring for each tax**	**Note**
Tax Year 19/20	140,856	-	140,856	0.900	126,771	126,771	Full year, no mitigation income
Tax Year 20/21	21,061	-	21,061	0.900	18,955	230,952	1 month April 2020, no mitigation income
	277,119	-	277,119	0.765	211,996		11 months May 2020- March 2021, no mitigation income
Tax Year 21/22	431,382	76,679	354,703	0.765	271,348	271,348	April 2021 - March 2022 - full year
Tax Year 22/23	190,072	103,709	86,363	0.765	66,068	225,942	Breaks down into 9 months April - December 2022 and 3
	243,555	34,570	208,985	0.765	159,874		months January - March 2023 - Claimant net mitigation figure
Tax Year 23/24	22,462	6,724	15,738	0.765	12,040	218,171	Breaks down into 1 months April 2023 and 11 months May -
	433,072	73,959	359,113	0.574	206,131		March 2024 - Claimant net mitigation figure £80,682 split pro
Tax Year 24/25	37,877	35,000	2,877	0.574	1,651	1,651	1 month April 2024
Net Loss after ET facto	**£1,797,456**	**£330,639**	**£1,466,817**		**1,074,834**	**1,074,834**	

Table 3. GROSSING UP		Factor	Tax	Net Award	Gross Award	Comments
				1,471,811		Sub-total pre-grossing up (Table 1)
Lower Rates						
Basic rate	20.0%		7,540		37,700	20% tax up to 37,700 basic rate
Higher rate	40.0%		34,976		87,440	40% tax 37,700 to 125,140 higher rate
National insurance	3.0%		3,754			
South Carolina Tax	6.4%		8,009			South Carolina on 125,140 basic and higher rates
Total of lower rates			54,279	70,861	125,140	
Higher Rates						
Additional tax	45.0%					Additional rate over 125,140
National insurance	3.0%					
South Carolina Tax	6.4%					
Total of higher rates	**54.4%**	**2.19**	1,671,309	1,400,950	3,072,259	54.4% tax on All above 125,140, Additional rate 45% + National Insurance +6.4% South Carolina tax
SUM OF LOWER AND HIGHER RATES			1,725,588	1,471,811		
GROSSED UP TOTAL					3,197,399	NB this includes ITF + interest already ordered