Case No: 1803164/2021
1803903/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms E Tahir

Respondent: National Grid UK Limited

Heard: **2- 4 May 2023**
Deliberations **26 May 2023**

Before:
Employment Judge JM Wade
Ms H Brown
Mr K Smith

Representation
Claimant: Mr S Anderson, Counsel
Respondent: Ms C Millns, Counsel

RESERVED REMEDY JUDGMENT

The unanimous Judgment of the Tribunal is:

1 The Tribunal awards the sum of £2850 by way of damages in respect of wrongful dismissal.

2 In accordance with Sections 119 and 124 of the 2010 Act the Tribunal awards the following sums:

Injury to Feelings	£40, 000.00
General Damages (psychiatric injury)	£10, 000.00
Aggravated Damages	£ 5,000.00
ACAS Uplift at 15%	£ 8,250.00
Interest thereon	£ 11,706.28
Past Pecuniary Loss to 2 May 2023 and ACAS uplift	£ 56,681.00
Interest thereon	£ 7861.86
Future Pecuniary Loss (including share save)	£73719.47
Future medical expenses	£ 1215.00
ACAS uplift at 15%	£11,240.17
Total of all Equality Act awards including interest	£225,673.78

3 The respondent shall pay to the claimant the total sum of £357,004 reflecting the grossing up of the sums awarded above as follows:

Grossing up

Add damages in respect of wrongful dismissal £ 2850.00

Deduct
Agreed sums to be deducted from grossing up £10,000 PI/£30,000
Sum determined by the Tribunal to be excluded: £1215 medical expenses.

£228,524, from which - £41, 215 (not subject to tax) = £187,309 to be grossed up:

The 20% slice £12,500 = £10,000
The 40% slice £100,000 = £60,000
The 45% slice : £213,289 (117,309 /0.55) = £117,309

REASONS

Introduction

1. The circumstances of this case are unusual. The claimant brought complaints of wrongful constructive dismissal and Equality Act complaints of harassment and victimisation. The respondent conceded liability and a Judgment was sent to the parties on 14 September 2022 recording that the complaints were successful. That included Equality Act contraventions by subjecting the claimant to 26 acts of sexual harassment and 8 acts of victimisation. The Employment Judge directed this remedy hearing before a full Tribunal, and the preparation that was to take place.
2. The claimant had made an application at a hearing in September 2022 for expert evidence from an employment and rehabilitation expert. The Tribunal refused that application, giving reasons, including that it was not clear what question could be answered by such an expert. There was a direction for an expert's medical report and at this hearing the Tribunal was greatly assisted by that and many relevant questions were answered by it.
3. Both parties have been represented by counsel and solicitors throughout. The claimant's remedy case was fully pleaded in a comprehensive schedule of loss, to which the respondent had provided a far briefer counter schedule.
4. The parties cooperated to the extent they could, and counsel were very helpful in communicating agreed awards.
5. The parties were at odds over some aspects of the claimant's remedy case (future loss, mitigation, aggravated damages, medical expenses, share save loss, renovation feasibility study, and ACAS uplift).
6. The Tribunal heard the claimant's evidence – she had provided a lengthy witness statement, referring to a mitigation bundle of around a thousand pages and the Tribunal also had a further core bundle of around 700 pages. Three days were allocated for the hearing. The respondent's case was put efficiently to the claimant on the disputed matters.
7. The claimant's position on future financial loss, in summary, was that she would require a further degree to be able to recover the career path she had

lost by virtue of the respondent's contraventions. Her case was that she would earn no income from the commencement of that further four year study period, plus one further year to enable her to find a comparable role.

8. The Tribunal then heard from Ms Nicoll, the respondent's Chief People Officer, and she gave evidence about the respondent's mitigation and future loss case, having included that evidence in her witness statement, referring to the underlying material in our bundle. She could not assist the Tribunal on all matters – for example she did not address the respondent's ACAS code compliance case, and could only comment with limited knowledge on other matters put to her.
9. The Tribunal heard the parties' submissions and announced its extempore judgment on the matters in dispute (subject to calculation) and the parties were released to seek to conduct calculations such that a final and comprehensive remedy judgment could be given. The facts and conclusions found and announced were only those necessary to determine the issues in dispute. Those facts and conclusions, corrected for error and elegance of expression appear below together with, where appropriate, our reserved judgment on the matters which remain in dispute.

10. The parties were unable to agree all calculations and instead case management orders were agreed, recording in their introduction:

    "During this three day remedy hearing the parties have agreed the awards for injury to feelings and general damages in the draft judgment below, and a monthly net loss figure of £2850;
    The Tribunal announced its judgment and reasons on future loss (a period of five years from 5 April 2023), assuming a counter factual of earnings at the RNB offer level plus 5% increases after first, second, third and fourth years); mitigation (the claimant was unreasonable in declining the RNB offer, in all other respects she acted reasonably), aggravated damages as pleaded - (£5,000), medical expenses (as pleaded), share save (as pleaded), Darley street feasibility study (refused), ACAS uplift as pleaded – 15%; and the approach to be taken to interest (ITF, general, aggravated to run ***from*** *8 January 2021 (mid point of contraventions spanning July 2020 to 7 July 2021) to 2 May 2023; lost earnings to run* ***from*** *7 August 2021 (after one month's notice) until 2 May 2023);*

    and the parties having sought to calculate and agree the award for future loss, interest, grossing up and any other consequential calculations and being without sufficient time to do so, and their being a live costs application from the claimant (not yet seen by the Tribunal) and a potential cross application……".

11. Directions were then given to adjourn to 25 May and for a short telephone hearing on 23 May to address outstanding case management. The parties then submitted an agenda document which helpfully summarised the points of disagreement (which had narrowed to three points) and their positions on those points.
12. By that telephone hearing the costs hearing had been postponed on application, and time was allocated for the Tribunal to deliberate on the reserved parts of the judgment, taking into account the parties' ongoing points of disagreement. The parties were content that these matters be settled by the Tribunal at a papers hearing, without their attendance, such that the final

judgment could be given. The claimant had also requested reasons, her request driven by one part of the Tribunal's extempore decision announced on 4 May – the future loss period.

The Law

13. The Tribunal had Ms Millns' helpful note of the legal principles applicable to the main points of dispute. We simply reproduce it here.

14. Any award of compensation for discrimination will be assessed under the same principles as apply to torts (see s124(6) and s119(2)). The central aim is to put the claimant in the position, so far as is reasonable, that he or she would have been had the tort not occurred (Ministry of Defence v Wheeler [1998] IRLR 23 and Chagger v Abbey National plc [2010] IRLR 47).

15. Where loss has occurred as a result of the discrimination, tribunals are expected to award compensation that is both adequate to compensate for the loss and proportionate to it (Wisbey v Commissioner of the City of London Police [2021] EWCA Civ 650).

MITIGATION OF LOSS

16. The usual common law rules of mitigation apply to claims for compensation in discrimination cases: a claimant is expected to take reasonable steps to mitigate their loss. If discrimination has resulted in their being out of work, that will usually mean that they must mitigate their loss by looking for alternative employment.

17. In Cooper Contracting Ltd v Lindsey UKEAT/0184/15, Mr Justice Langstaff (then President of the EAT) set out the following key principles derived from case law that tribunals should take into account when considering the issue of mitigation of loss:
18. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.
19. The burden of proof is on the respondent, as the wrongdoer. The claimant does not have to prove that they have mitigated their loss.
20. It is not some broad assessment on which the burden of proof is neutral. If the respondent does not put forward evidence to the tribunal that the claimant has failed to mitigate, the tribunal has no obligation to make that finding (Tandem Bars Ltd v Pilloni UKEAT/0050/12).
21. What has to be proved is that the claimant acted unreasonably; they do not have to show that what they did was reasonable (Waterlow & Sons Ltd v Banco de Portugal [1932] UKHL 1, Wilding and Ministry of Defence v Mutton [1996] ICR 590).
22. There is a difference between acting reasonably and not acting unreasonably (Wilding v British Telecommunications Plc [2002] IRLR 524 (CA).
23. What is reasonable or unreasonable is a matter of fact.

24. *The claimant's views and wishes are one of the circumstances that the tribunal should take into account when determining whether the claimant's actions have been reasonable. However, it is the tribunal's assessment of reasonableness, not the claimant's, that counts.*
25. *The tribunal should not apply too demanding a standard on the claimant (Waterlow, Fyfe v Scientific Furnishings Ltd [1989] ICR 648 and Wilding).*
26. *The correct approach for a tribunal when considering the impact of a failure to mitigate on compensation is for it to identify what steps the claimant should have taken to mitigate their loss, the date by which such steps would have produced an alternative income, and then to reduce the amount of compensation by the amount of income which would have been earned (Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498)*
27. *Gardiner-Hill was endorsed by the EAT in Edward v Tavistock and Portman NHS Foundation Trust [2023] EAT 33, subject to an acknowledgment that mitigation arguments may arise in a range of different circumstances and may therefore give rise to a range of different issues. At paragraph 81 of its judgment the EAT in Edward set out helpful guidance for tribunals:*
28. *The starting point is the EAT's guidance in Cooper Contracting. The burden of proof is on the respondent at all times.*
29. *The tribunal should consider the questions identified by Gardiner-Hill:*
    What steps was it unreasonable for the claimant not to have taken?
    When would those steps have produced an alternative income?
    What amount of alternative income would have been earned?
30. *While the questions raised in Gardiner-Hill will be live in most cases, they are not exhaustive and may not be applicable in every case. Mitigation arguments may arise in a range of different circumstances and may therefore give rise to a range of different issues.*
31. *The questions concerning whether the claimant failed to take reasonable steps and what would have happened had the claimant taken the steps he should have taken are interrelated and will need to be considered together. The reasonableness of steps may, for example, be affected by the state of a particular job market at the relevant time.*
32. *Although Gardiner-Hill requires a tribunal to make findings as to when the claimant would have found a job and what it would have paid on the balance of probabilities, the tribunal should bear in mind that the nature of the exercise is the assessment of a counterfactual. That is not the same as determining whether a past alleged fact happened or did not happen. The tribunal should make a finding based on a broad evaluation of all the available evidence. As Lord Summers said in Hakim v The Scottish Trade Unions Congress UKEATS/0047/19 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.*
33. *It is not necessary for a tribunal to find that a claimant would, on the balance of probabilities, have been successful in obtaining a specific job at a particular point in time. In most cases, that would be a very difficult exercise, if not impossible. Apart from anything else, it would depend on the evidence of the decision makers for specific jobs and an assessment of the field of competition for the jobs. In the EAT judge's experience, that sort of enquiry has not been necessary to prove a failure to mitigate.*

34. *Passages from Hakim (paragraph 18) and BCCI v Ali (No.2) [2002] ICR 1258 (paragraphs 24 to 25) support the view that in finding that a claimant would have obtained employment by a stated date it is not necessary to identify the particular job that they would have obtained.*

REFUSAL OF WORK

35. *If a claimant refuses an offer of work, that refusal must be reasonable in the circumstances. If it is not, the claimant will have failed to mitigate their loss and any compensation that might have been due to them will be adversely affected. Their compensation may cease at the point of offer (or soon afterwards).*

36. *8. The question is not whether it would have been reasonable for the claimant to accept the offer, but whether the claimant has acted unreasonably in refusing it. (Wilding v British Telecommunications Plc [2002] IRLR 524 (CA)).*

RETRAINING

37. *A claimant may choose to undertake a training course or pursue a career change following their dismissal. The question will be the extent to which the employer should be liable for lost earnings in these circumstances. In practice, the answer will depend on the question of remoteness of damage.*

REFUSAL OF LOWER PAID ROLE

38. *Refusing other employment merely because it involves lower wages can be a breach of the duty to mitigate. (**Daley v A E Dorsett (Almar Dolls) Ltd [1981] IRLR 385**), where a tribunal held that a decision not to take a job on a lower wage was reasonable. While the EAT upheld this, it stressed that it would only be in special circumstances that such a decision would be reasonable and each case must be considered on its own facts.*

39. *11. A dismissed employee is, however, entitled to spend time looking for other employment of equivalent standing before applying for employment at a lower level, without being deemed to be acting unreasonably (**Yetton v Eastwoods Froy Ltd [1967] 1 WLR 104**). The question of how long they should continue before looking for lower paid work is a matter for the tribunal.*

40. Mr Anderson provided a relevant extract from Harvey reminding us that compensation must enable loss sustained from Equality Act contraventions to be made good in full. That leaves open to the Tribunal to determine what loss has been, or will be sustained, of course, which is no small task in a case such as this, particularly in relation to future loss. He also provided us with Ministry of Defence v Hunt and others, [1996] EAT ICR 554, Rentplus UK Limited v Coulson 2022 ICR 1313 and Orthet Lrd v Vince-Cain [2004] IRLR 857 concerning mitigation by undertaking a university course.

41. In relation to the dispute which emerged between the parties as to the correct approach to grossing up, we were also helpfully provided with Yorkshire Housing Ltd v Cuerden UKEAT/0397/09/SM. The parties' dispute concerned the assessment the Tribunal should make of the claimant's marginal tax rate. The principle on that to be gleaned from Cuerden is that the Tribunal must make findings of fact about the claimant's correct taxation position, based on on the material before it.

42. Finally, the claimant having referred to the Tribunal's assessment of a five year period of future loss as "seemingly arbitrary", we include the relevant principles set out at paragraphs 22 to to 26 of Mr J Edward v Tavistock and Portman NHS Foundation Trust [2023] EAT 33:

22 The approach to loss of earnings (both past and future) was addressed by the EAT in the wellknown series of cases brought against the Ministry of Defence by servicewomen who had been dismissed on grounds of pregnancy. The parties put Ministry of Defence v Hunt [1996] ICR 554 before me. Hunt draws on the general guidance set out in Ministry of Defence v Cannock [1994] ICR 918. In Cannock, the claimants argued that if they had not been dismissed they would have returned to service after a period of maternity leave and would have progressed their service careers. Morison J began his general guidance as to compensation by referring to the principles Judgment approved by the court for handing down Edward v Tavistock and Portman NHS Trust © EAT 2023 Page 10 [2023] EAT 33 stated by the House of Lords in Mallett v McGonagle [1970] AC 166 (a fatal accident case). He cited (949F-G) the following passage of Lord Diplock:
*"**The role of the court in making an assessment of damages which depends on its view as to what will be and would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate of what are the chances that a particular thing will or would not have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."***
23 Morison J then went on to consider a series of hypotheticals that would arise in assessing compensation. In doing so he made the following observation (951A-C):
*"w**hat are the chances that had she been given maternity leave and an opportunity to return to work, the applicant would have returned? The answer is not, with respect to some industrial tribunals, a question of fact at all….. The question is to be answered on the basis of the best assessment that the industrial tribunal can make having regard to the available material."***
24 In Cannock, Morison J said (953D) that the tribunal should normally calculate damages for future loss of earnings by using the multiplicand and multiplier method adopted by the courts in personal injury cases. He said it was not satisfactory for a tribunal to calculate loss by taking earnings over the full period of loss and then deducting a percentage for contingencies and accelerated payment.
25 While a multiplicand/multiplier approach may be appropriate particularly in cases of long-term or career long loss, in many cases the tribunal will instead

make a determination as to when the employee is likely to get another job on equivalent terms and calculate the loss to that date, awarding no loss after that date. This was described as the "usual approach" by Elias LJ in Wardle v Credit Agricole Corporate Bank [2011] ICR 1290. In Wardle, at the time of the tribunal remedy hearing the claimant was in a new job, paying less than he earned at the respondent. The starting point for compensation was the difference between his old pay and his new pay. However, the tribunal found that there was a 70% chance that within three years of the hearing the claimant would return to a job that was as well paid as his job with the respondent. The tribunal awarded compensation for the whole period through to the claimant's retirement, but discounted it by 70% after the first three years, to reflect the chance of the claimant finding a job that fully replaced his lost earnings. The Court of Appeal held that the tribunal erred in its approach. After considering the rare cases where it is appropriate to assess loss over a career lifetime, Elias LJ said: Judgment approved by the court for handing down Edward v Tavistock and Portman NHS Trust © EAT 2023 Page 11 [2023] EAT 33 "[51] However, in my view the usual approach, assessing the loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases – and they are likely to be the vast majority – where it is at least possible to conclude that the employee will in time find such a job. In this case the tribunal has in effect approached the case on the assumption that it must award damages until the point when it can be sure that the claimant would find an equivalent job. [52] In my judgment, this is the wrong approach. ***In the normal case, if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice, the speculative nature of the exercise means that the tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide."***

26 This passage was cited with approval by Underhill LJ in Griffin v Plymouth Hospital NHS Trust [2015] ICR 347:

"[9] The tribunal considered the issue of future loss of earnings at paras 5.3.2-5 of its original remedy reasons. After referring to various factors affecting the assessment it held that she was likely to obtain suitable alternative employment at 25 hours per week in a year's time; and it awarded one year's loss of earnings, being £15,201.48, on that basis. At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of the probabilities."

After quoting paragraph 52 of Wardle, he continued:

"It is, however, convenient to refer to it, as the tribunal did, as the date on which it was likely she would obtain employment."

Findings

43. The claimant left school in 2013 with ABB at A level – the "A" in maths. She read law at Leeds university, living at home throughout from 2013 to 2016. Her older brother graduated in engineering the same year. The claimant had experienced doubts about reading law. Her brother's graduation ceremony cemented her decision **not** to pursue a career in law but in the built environment instead.
44. From 2013 to 2016 the claimant had undertaken work for her mother's HR consultancy, for a charity supporting asylum seekers, and as a legal researcher.
45. From 2016 to 2017 she was supported at home to focus full time on applying for competitive graduate schemes in the engineering/construction sector. She successfully joined COLAS rail in Birmingham in 2017, securing important industry experience and training accreditation, including "SMSTS". She became the sole site based health and safety focussed advisor on a billion pound project.
46. At COLAS she reported harassment allegations and was then dismissed; she brought two claims in the Employment Tribunal, the second in relation to HER dismissal. At or before an interim relief application hearing she agreed a settlement, which was recorded in a public judgment. She had moved to Birmingham for the COLAS role, but then returned home to Yorkshire when she became unwell following that episode.
47. The claimant used settlement monies and other savings to buy and renovate a residential property which she then sold at a profit – doing much of the practical renovation work herself. On her CV she describes herself that year as "property developer". On the property's sale she had considerable sums then to reinvest.
48. Her SMSTS accreditation in the COLAS role enabled her to secure a role with the respondent – the latter treated the SMSTS accreditation as equivalent to a relevant HND or similar higher education attainment. She obtained one of a limited number of Construction Development Programme (gas and electricity) ("CDP") positions. The programme was an 18 month training contract to become a project or site supervisor commencing on 14 April 2020. The role involved working in the field at sites operated by the respondent, being the respondent's eyes and ears on the ground, and working in partnership with contractors to deliver schemes of work or operations.
49. The CDP role provided a salary of around £30,000, a company car and other benefits. Fifteen months into that role the claimant resigned, having suffered sexual harassment a second time, this time from her mentor, and victimisation by him and others, including those charged with resolving matters when she complained. That victimisation included circulating a copy of the previous COLAS judgment amongst colleagues and seeking to influence the investigation of the claimant's complaints.
50. The claimant's resignation from the respondent was July 8 2021. She had reported symptoms of mental ill health to her GP from February 2021. She was treated with different medications and throughout she followed her GP advice, and she accessed the appropriate local mental health service – "healthy minds".
51. In a medical report dated 30 December 2022 she was diagnosed by a chartered psychologist and medical expert in these proceedings as having suffered from adjustment disorder with mixed anxiety and depressed mood, caused by the contraventions of the respondent. The symptoms included that the claimant was bereft that for a second time she had lost her career path and financial stability.

52. By December 2022 the claimant was recorded as continuing to have symptoms including relating to sleep difficulties, appetite, concentration, low mood anxiety and irritability , avoidance, intrusion and hyperarousal, all of which, as well as the events at the respondent, have lessened her confidence.
53. Those symptoms are expected to resolve with further counselling treatment within 10 months from the report (that is by October 2023), from commencement of appropriate treatment. Those symptoms may also affect work in the construction sector, because the built environment is often safety critical and any lapse in functioning could present danger. They were also likely to have prevented her successfully studying, had she re-entered university in September 2022.
54. The claimant's symptoms of anxiety disorder were also such that a post treatment assessment, or benchmark, would need to be carried out to address whether her disorder posed a health and safety risk, in the construction sector in particular.
55. The contraventions at the respondent spanned a year – the mentor had started harassing the claimant in July 2020. The contraventions ended when she resigned in July 2021.
56. Thereafter the claimant – in her own words – ran away to an "air b and b in Spain", bereft that she had twice been subject to workplace harassment derailing her career. After some respite with sun and rest and re-establishing routines including exercise, she began applying for roles.
57. From Spain she went back to the UK, at the beginning of September, and then out to Dubai to start an estate agency role she had secured in November 2022. That fell through for reasons unconnected with the claimant. She stayed with a cousin and her family in Dubai, then her family arranged a further holiday in Thailand, not least because panic attacks had recurred when seeking to board a plane back to the UK.
58. By January 2022 the claimant had accepted a new role, with a firm of accountants starting on 15 February 2022, working in HR, ensuring onboarding of new starters. As at today they are her current employers.
59. The claimant had started this role full time and while that had initially been insecure, her post was made permanent and her line manager understands she needs adjustments for her mental health, including working from home and the ability to take breaks and naps as required.
60. The claimant had applied for over 200 roles between January 2021 and February 2023, including since the exchange of statements for this hearing; those were mainly to graduate schemes in the built environment/construction sector/infrastructure sectors. About two thirds of those applications were roles comparable to that with the respondent –site based built environment roles. That is the congenial employment to which she seeks to return.
61. About one third were "make ends meet" roles, which is a short hand for roles which the claimant believed she could do, and had the skills for, but which were not resuming or furthering her ambition to return to site based built environment or infrastructure roles.
62. Of the roles applied for between September 2021 and March 2023 the claimant has been offered only three. The first was the Dubai post, which she accepted and tried to commence, but discovered she had been mis-sold a post – and her health deteriorated.
63. The second was the role she accepted with a firm of accountants working in HR ensuring onboarding new starters – her current employers.
64. The third is a role she declined in March this year – 2023 - from "RLB".

65. The only other interview in a built environment,site based role to which she was invited was for a housing provider, at which she thought she performed well but was not appointed - that interview was on 25 March 2022.
66. The feedback received from countless rejections gives no insight into why the claimant has not been successful – it is best summarised as, "there was a better candidate", which is the generic answer (using the industrial knowledge of this Tribunal) almost always given on rejection.
67. With one employer, she mentioned her Tribunal proceedings and heard nothing further.
68. There were also, in the material period, site based built environment roles for which the claimant did not apply, mostly for geographical reasons, as she wishes to remain living at home with the support of her family. The claimant accepted that her search criteria may well have excluded potentially fruitful career roles for her – or at least that is our conclusion based on her evidence on the nature of her search and its limitations.
69. However, happily, for the claimant's confidence at least, in March 2023 an offer came for an assistant project manager role at "RLB", after an on line interview following contact with a recruitment consultant.
70. The firm is international, with a Leeds office and a small team in the built environment sector. The interview focussed on whether the claimant would "fit" with that established team, and the claimant was successful. The role was very nearly on commensurate benefits to that with the respondent. The claimant declined it.
71. Her reasons to decline were explained in her statement; she had had an upset at the accountancy firm and had verbally resigned; she knew she need to replace those earnings; she was approached by the recruiter about a role at RLB, but then told it had gone away. Subsequently the RLB interview was offered and the offer was made. The claimant rejected it, planning to go to university to undertake a foundation year and then a three year engineering degree in September of this year and she considered the risk/reward analysis to be against taking the RLB post.
72. She then contacted a therapist and has had one introductory session to begin therapy, albeit she does not find talking about her circumstances helpful at present.

<u>Further conclusions - failure to mitigate and assessment of future loss</u>

73. Given the claimant has applied for so many roles, and given the qualities expressed in her CV – strong academic record - law degree – sector experience, we are satisfied that she is prejudiced in the employment market by two principal factors: her CV does not go "in a straight line: - that is, relevant pre-degree indicators, degree, relevant post degree experience; it rather indicates a change of tack which requires explanation and that may deter some employers; secondly, the previous proceedings and/or the coming to an end without explanation of the COLAS role.
74. In these circumstances the respondent has not proven that had the claimant applied for any of the roles or schemes for which we have found she did not apply, many of which were included in Ms Nicoll's statement, that she would have been successful.
75. Was it reasonable for the claimant to reject the RLB role in view of her analysis of the risk/reward and the expert evidence on health (which, by that stage, she had seen)?
76. The Tribunal does not consider the claimant is misconstruing the expert's report, indicating that the symptoms of her diagnosed disorder will require a

risk management approach, should she return to the construction sector. However, she had also suffered an upset or onset of symptoms at the accountancy firm, a seemingly benign environment outside the construction sector, where her symptoms are understood.

77. She recognises that the report identifies risk, and in order to manage risk., she will have to disclose her condition, as she has with her current employer, given the back ground and her insight into her own condition. That is not without stigma for anyone, but particularly at a time when she would otherwise have been forging a career path with vigour and without symptoms.
78. On the other hand, there are challenges and risks recognised in the university study route. The claimant considers further study as the only way back to site based environment roles – and it will also buy her sufficient time that she will be recovered and the health and safety risk currently to be managed, will have receded.
79. Against these reasons, there are other factors to be considered and weighed. In December she was not sure she would take up the university place, as recorded by Dr Latif. In March her assessment of the RLB role was on the basis that it would only be for five months. She appears then, between December and March of this year, to have closed her mind to not going to university – her intention appears to have firmed in that period.
80. The RLB role delivered nearly the pay and benefits of her previous post with the respondent; it was in the right sector, albeit not the right role; and it was a small team; and it was close to her family support, enabling her to remain living at home, whilst being with an international firm suggesting some career progression prospects. There was also the confidence boost from knowing that she had succeeded at interview.
81. The claimant had applied in January 2022 for an engineering degree to five universities. She received offers at them all. She was offered and accepted a foundation year at the university of Sheffield – the foundation year because she does not have physics at A level – followed by an engineering degree course. Her plan was to start that in September 2022 but she sought deferral, feeling not well enough to study and it turns out she was probably right about that.
82. The claimant had also been offered masters degree study in engineering at the University of Bradford over three years. The claimant considered that three year study at Bradford would set up her up to fail, as she did not have physics.
83. The claimant also considered a working life of forty years working in a role other than in a congenial role which she had previously enjoyed, and to which she wished to return, was not reasonable.
84. The work for the accountancy firm does not challenger her - it is not a profession, but it is home based and to some extent therapeutic as she is able to continue to have emotional support from her family while continuing to earn a regular income. She describes the pressure she puts on herself to occupy one of five professions, which is what wider family members all do – we can guess perhaps what they are, but having rejected law in favour of the built environment, we consider being able to say “I’m an engineer” in future, and to earn a stable living is now of even greater importance, given the events that have unfolded.
85. These events have served to cement the regret the claimant has in having a law degree rather than an engineering degree – many of the roles she now seeks would regard an engineering first degree as more relevant and an immediate qualification for some roles.

86. In truth we cannot truly know why, in each case of being unsuccessful, the claimant did not succeed in her many applications to return to that built environment career, nor can we know for sure whether she would have succeeded with the applications she did not make, but could have made, illustrated by the respondent, but she is currently prejudiced in the labour market for the reasons above.
87. On balance, weighing all these factors – we consider the claimant has acted unreasonably in turning down the RLB offer. She has closed her mind to working while undertaking part time studying – a route open to her, or to regaining the site based role she desires through means other than a second degree in engineering, or any other less linear routes to a built environment site based role, than via a full time engineering degree.
88. The Industrial experience of the lay members in particular in this case leads to a very clear (and unanimous) decision that a further four or five years out of the work place studying full time for a degree in engineering is an unreasonable means back to the claimant's previous career path in all the circumstances of this case.
89. It does not align with our experience of the many different ways in which career path return could be achieved. It is also at odds with the respondent's evidence on the point, which we accept.
90. In short, we consider that if the claimant continues with a "make ends meet" role (which could, on balance reasonably have been the RLB role to maximise the ends that could be met), and continues to apply for roles returning to the desired site based role, with work alongside perhaps more study, she will succeed in that endeavour – her career will again fly, as it has in the past. She will catch up the career earnings and track, which she evidences at page 6 of her schedule of loss, after five years, in our assessment. She has shown considerable ingenuity and tenacity in the past, and in our judgment will do so again, allowing for recovery of her health.
91. In all other respects she has acted reasonably, given all that had happened. Anyone having experienced the contraventions she had acted reasonably in taking a period to recuperate and recover somewhat, before commencing work. As we have said, the claimant had followed the advice of her GP in the main. The expert's report is given with the benefit of hindsight and cannot render the claimant's approach to her circumstances unreasonable, up until she rejected the RLB role.
92. The claimant has proven the earnings she would have achieved with her previous role, absent the contraventions. Those figures were not challenged and are set out at page 6 of the schedule. We consider that on our assessment, a period of five years from the point that she ought reasonably to have started the RLB role, which the parties agree is sensibly from 5 April 2023, is the just period.
93. The schedule sets out the "but for" case on career progression to 26 February 2032, but it will be plain on our assessment that the calculations should properly be curtailed at 4 April 2028.
94. In arriving at a five year future loss period, we make an assessment of the evidence before us, both positive and negative. The claimant has demonstrated herself to be resilient and resourceful, turning to property development after the last episode of harassment. She is also academically strong and has demonstrated herself to be very capable and highly regarded at work. She enjoys the support of a loving family, with brothers in the sector, or likely to be in the sector to which she wishes to return, who will no doubt be able to encourage her and act as sounding boards on fruitful career choices.

95. We consider that once these proceedings are resolved, she will again return to resilience and high performance. Indeed, it is possible the claimant may recover her previous career trajectory more quickly than within five years if she choses to do so.
96. The negative indicators are the number of rejections and the two factors to which we refer above, and the impacts of the contraventions on the claimant's health - expected to resolve by October this year, or a little later given the short delay in commencing treatment (which for the avoidance of doubt, we do not consider unreasonable).
97. Taking all the circumstances into account, the five year future loss period is, on our assessment as an industrial jury, the just period (recognising that for expedition the period commenced in the past at the date of this hearing and the actual loss period is a little less than five years).
98. Within the RLB offer documents, (or otherwise within the mitigation bundle or Ms Nicoll's evidence) there is little evidence to which we can tether promotion prospects, salary and benefits progression within RLB, or how that would have evolved. It is the respondent's burden to prove the step which, if taken, would reasonably have mitigated loss. It is said in the offer letter that there would be opportunities for career progression. The respondent says that is sufficient for us to conclude that the RLB post, which for the claimant was a "make ends meet" post, had she accepted it, would have had the same steep salary and benefits progression as her cherished role with the respondent, such that future loss is extinguished, or as good as.
99. We tread with caution when considering such a conclusion. We had no positive evidence of the benefits progression in that firm and we note that the role was in the Leeds office, where we have some industrial knowledge of starting salaries and progression in the sector. In our judgment there is potential considerable injustice to the claimant in concluding that salary progression would have been as it was with the respondent, a very large employer with a very stuctured approach to progression; equally there is injustice, and the potential for windfall, in applying a "flat straight line" approach to calculation of the earnings the claimant would have earned in the RLB post.
100. Deploying our industrial experience to tackle both potentials for injustice then, we assess that the RLB earnings would have increased on average 5 % each year, without role progression but acknowledging the potential for changes in duties or merit based increases. That assumes the current inflationary wage pressures (which for 2024 might result in a higher or lower increase) but which over a five year period in which fluctuation can be expected, seems to the Tribunal as an industrial jury, a basis to assess on the basis of a 5% average.
101. As to progression into different and higher paid roles within RLB such as to have achieved an "immediate catch up" to her "but for position" (which is the respondent's case), that strikes us as unlikely on balance. The claimant is still in a period of recovery to her health. She would have been settling herself into a new "make ends meet" role, for her - in a new firm and potentially with adjustments as they are in place for her currently. She would, in that time also be seeking ways to return to site based roles with other employers, and potentially looking to undertake further part time study to do so.
102. It may be that she could accelerate rehabilitation and obtain career progression within RLB, but the respondent has not proven those steps or their consequences, on the balance of probabilities, as part of its mitigation case; and if that is imposing too high a burden (or the wrong burden on the

respondent), we consider that it is plain, given the circumstances, that the RLB post, had it been accepted, would not have extinguished future loss.

103. In our judgment the only sums which come to be deducted from the claimant's "but for" calculations on page 6 are those which the respondent has proved as the starting salary and benefits for the post which was unreasonably declined (in our judgment), but, given our assessment of the future loss period, it is in the interests of justice to include an increase as above over the period.

104. These conclusions ought to give the parties the subtraction sum to come from the claimant's information on page 6 and hopefully will enable the parties to calculate what that future loss is to be and of course if there is any other matter on which they require the Tribunal's clarification then we are happy to provide it.

Aggravated damages

105. As far as the other matters that we need to resolve, two principal issues were pleaded and the parties will recall our direction that aggravated damages can include conduct after a claim has commenced, if it satisfies the relevant test. Ms Millns provided the correct further principle that aggravated damages are there to compensate not punish; the Tribunal must ensure there is not duplication.

106. The matters in the claimant's schedule were limited to: 1) in the grievance investigation the claimant's evidence and the power dynamic between the claimant and the mentor were ignored; and 2) the said perpetrator was not dismissed, but remained employed until his resignation. Those are the two matters that are raised.

107. On those two matters (which were not pleaded as contraventions in themselves to which the injury to feelings award attaches) we have had no respondent evidence from those that were directly involved, whereas the claimant set out her evidence and was not challenged upon it.

108. The context of our assessment includes that there was no apology from Ms Nicoll's during her evidence when asked whether there was any respondent conduct which she regretted nor anything from which, frankly, the claimant's profound upset and injury could draw comfort. The highpoint of her evidence was that, " I am sure there are learnings to be got from this", but she did not identify what those might be. The claimant has established the fact of the aggravating matters on which she relies.

109. As regards the initial investigation, in essence the respondent's outcome was perverse given the evidence. Further it was aggravating conduct in our judgment to not dismiss the perpetrator subsequently when the facts were understood, within a period either before the claimant resigned or after the claimant resigned and before he resigned, given the undisputed and exceptional evidence base in this case. That in the context that the respondent itself failed to resolve the matter informally through redeployment, as the claimant wished, pressured the claimant to submit a formal grievance, rejected that grievance, overturned that on appeal, then took a disiplinary approach to the allegations and then used the disciplinary process as a means not to tell the claimant of the outcome for the perpetrator of her complaints, and then took such time that the perpetrator resigned before a disciplinary process concluded.

110. The two matters relied upon are, in our judgment, subsequent conduct which fails to treat the claimant's complaints with the requisite seriousness.

She has not had any acknowledgment or recognition of the way in which this matter was treated seriously or otherwise as regards the perpetrator, that continued in Ms Nicoll's evidence, and that is deeply aggravating of injured feelings for somebody who has reported the matter and sought to be removed from harassment. There it is.

111. The Tribunal assesses that the respondent's subsequent conduct has increased the impact on the claimant's injury to her feelings and awards the £5000 sought.

ACAS uplift

112. As far as the ACAS uplift is concerned, again, this is addressed in the claimant's statement, but not by the respondent in evidence. There was no explanation of why the respondent had conducted matters, and why its approach was reasonable.

113. We accept to a large extent the submissions that were made on the claimant's behalf by Mr Anderson. He relied on paragraphs 32 (read with the Foreword). There was an unreasonable failure to deal with the matter informally as the claimant wished. Equally, there was a failure to permit the claimant to explain not only the complaint but how she sought it to be resolved, the latter we consider to be unreasonable (Paragraph 34).

114. Having lost control of her simple wish to be removed from the influence of a perpetrator of harassment, the respondent then conducted a grievance investigation which did not put to the claimant, the perpetrator's case. This was an unreasonable failure to comply with paragraph 4 – employers should carry out necessary investigations to establish the facts of the case. "Necessary" is not spelled out in the Code, but fundamental to establishing facts is that where allegations are made and are provided to the alleged perpetrator to be able to give their account, whether this is a misconduct investigation or a grievance investigation, the complainant must see what the perpetrator is saying and have the opportunity to address it before conclusions are reached. That is fundamental to fairness and getting to the facts. That did not happen until a draft report was presented to the claimant.

115. The Tribunal awards the pleaded 15% uplift. This is not 1984. These events occurred in 2021. There is so much guidance available on how to deal with allegations of sexual harassment in the workplace and the Code itself sets out that separate procedures are to be encouraged. Whatever approach is taken, Code compliance is usually a helpful starting point not to be overlooked. This is part of the context in which we award this uplift.

Share Incentive Plan

116. The claimant had joined the respondent's three year plan, into which she had sacrificed salary in return for the purchase of shares at 80% of their market value. While shares of course go up as well as down, her "but for" case, that she would have remained with the respondent and continued to purchase shares over the three years. That case was accepted by the Tribunal. Assessing what is just and equitable, it seems to us that the claimant's calculation is entirely fair and conservative.

117. Her new circumstances are such that she is not currently able to access such a scheme. We did not have evidence that RLB is listed or that she could have reasonably mitigated that loss through that or other means. The gain/loss to her is a capital gain or loss at the point the shares are sold. That comes sensibly to be assessed, as pleaded, as future loss. We award the sum as pleaded: £4500.

Darley Street Feasibility Study

118. The claimant sought the costs of a property investment opportunity as a head of financial loss. The Tribunal considered this too remote by reference to general principles.

Medical expenses

119. We also award the claimant, as pleaded on her but for case, £1215 in treatment costs, comprising 15 sessions EDMR/CBT sessions at £380 per block of 5 and £75 in respect of the initial assessment.

Calculation of the matters on which the parties cannot agree

120. Applying the decisions above to the calculations agreed and/or determined as set out in the schedule of loss, the figure of £49,288 included in the draft judgment as past pecuniary loss, is arrived at by deducting £2200 (Darley Street) from the past loss figure of £51,488.29 on page 4 of the claimant's schedule.
121. It will be apparent to the parties from these explanations that the claimant's calculation of £74,934.47 is to be preferred in respect of future loss and the consequent £11,240.17 uplift in respect of ACAS conciliation.
122. However the Tribunal considers it is in the interests of justice to separate out the medical expenses element of this sum because properly, it ought not to be subject to taxation, nor grossing up, pursuant to Section 406 of the Income Tax (Earnings and Pensions) Act 2003.
123. As to the grossing up calculation, the approach pleaded or taken in the claimant's schedule of loss, as supported by Gourley/Cuerden, is broadly speaking the correct approach.
124. The Tribunal has assessed loss on a net basis. The claimant will receive the sums ordered in this tax year - 2023/2024. The size of the award is such that she will lose the benefit of a personal allowance. Further, we accept her case that she will earn sums of at least £25,000 - the make ends meet sums, with her current employer. Adopting those two conclusions, the calculations follow as they appear in the Judgment above, which broadly speaking adopts the claimant's pleaded approach (in her schedule of loss), but reduced to take account of the Tribunal's other decisions.
125. The somewhat different and additional approach, contended for in the claimant's calculations document since our judgment on the principal issues in dispute, does not appear to the Tribunal to be helpful to arrive at the correct sum to be paid by the respondent.
126. We would also refer the parties again to the authorities above concerning the Tribunal's task in assessment. There are no certainties and taxation is no exception. The claimant's circumstances could change again within the tax year as a result of life events outside the parties' control. The Tribunal has to do the best it can with the information before it.
127. Finally, the Tribunal's draft Judgment on which the parties later commented, did not note damages in respect of wrongful dismissal, and we correct that in this final judgment, and in part, reserved, Judgment and reasons.

Employment Judge JM Wade

Date 12 July 2023