EMPLOYMENT TRIBUNALS

BETWEEN

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

Heard at: London Central Employment Tribunal

On: 8, 9 November 2022
(7 November pre-reading, 10, 11 November 2022 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 judgment in allegation 19 (victimisation pursuant to section 27 of the Equality Act 2010 and protected disclosure detriment pursuant to section 47B of the Employment Rights Act 1996) dated 21 January 2022 against all four respondents is revoked and substituted by an order dismissing these claims.

(2) The First, Second, Third and Fourth Respondent are jointly and severally liable and shall pay the Claimant:

a. **£20,000** for injury to feeling;

b. Interest on injury to feeling calculated at 8% from 1 August 2019 to 21 December 2022 (1,239 days) at **£5,431.23**.

(3) The employer Fourth Respondent shall pay the Claimant a basic award for unfair dismissal in the sum of **£8,976**.

(4) As to the compensatory award for loss of income, the Tribunal finds that there was a **15%** chance that the Claimant would have retired as a good leaver on **30 April 2020**, a **25%** chance that he would have retired as a good leaver on **30 April 2023** and if he did not retire either of those two dates he would have retired on **30 April 2024** as a good leaver. The Tribunal will make a **10%** discount across the whole compensatory award for loss of earnings to reflect the possibility of a non-discriminatory end of employment for reasons other than an agreed retirement.

(5) There is not yet a finalised grand total figure for the compensatory award. A final order for a compensatory award will be produced following further input (ideally agreement) from the parties on net earnings figures, LTIP, dividends, interest on financial losses and "grossing up" as well as application of a **5%** deduction for accelerated receipt of future losses and the application of a **7.5%** ACAS uplift.

REASONS

Hearing

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

Procedural history

2. The Claimant presented his claim on 12 May 2020 against the First, Second, Third Respondents.

3. 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.

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

5. Unfortunately a remedy hearing listed to commence on 10 May 2022 was not effective due to a lack of judicial resources, and the matter was relisted.

6. The Tribunal has also reconsidered allegation 19 (successful claims of victimisation and protected disclosure detriment) on the initiative of Employment Judge Adkin, following a referral from the Employment Appeal Tribunal in relation to an appeal from the Respondents.

7. The parties agreed at the hearing in November 2022 to provide the Tribunal with some assistance by agreeing some net income figures to assist in this high-value and complex case. Unfortunately in two emails dated 12 and 14 December 2022 it became clear that the parties were able to provide some assistance but not fully agree net earnings and furthermore not fully agree what they were in agreement about.

8. It has been mooted that the Tribunal provide a draft judgment on which comment could be made. The Tribunal is anxious to achieve resolution in this matter. The approach we have adopted is to try to decide what can be decided now and allow the parties to assist the Tribunal in finalising the grand total figures.

Evidence

9. References thus [D/123] are to pages in the document bundle; [HB/725] are to pages in the "main" bundle which contains pleadings correspondence and the like; [S/234] to the supplementary bundle and [SB/12] to the special bundle and [R/456] to the remedy bundle.

10. The Tribunal heard evidence from the Claimant Mr and Mrs Cowie and received a witness statement which was not challenged from Mr William Kelly, a former colleague who was Global VP Finance of the Foundry Division.

11. From the Respondents the Tribunal heard evidence from the Third Respondent Patrick Andre, CEO; the Second Respondent Agnieszka Tomczak and CFO Guy Young.

12. As to documentary evidence we retained the documents from the liability hearing, namely a 8,315 page "document" bundle, a 725 "main" bundle which contains pleadings and correspondence, a 780 page "supplementary" bundle from the Claimant and 36 pages which were agreed extracts from a confidential bundle which was not supplied to the Tribunal.

13. For the remedy hearing itself we received a original remedy bundle of 565 pages, plus an additional 54 pages.

14. Although there had been some dispute between the parties about the Claimant exceeding the word limit for witness statement and regarding some late disclosure from the Claimant, the parties happily were able to largely resolve this shortly before the remedy hearing with some pragmatic concessions. The Claimant had originally tried to rely upon a "mitigation statement" in the bundle but clarified that he only sought to rely on paragraphs 72 – 74 [R/500].

15. The Tribunal has not attempted to read every document, but have instead focussed on the documents each party referred us to.

16. References to the "Corporate Respondents" denote the First and Fourth Respondents. References to the "Individual Respondents" denote the Second and Third Respondents.

Findings of fact

Liability

17. The Tribunal made findings of fact from the commencement of the Claimant's employment in 1981 until his dismissal communicated to him orally on 1 August 2019. The findings below are supplementary to those findings.

Evidence on likely retirement age

18. Initially the Respondents relied on an email from Chris Young in April 2020 talking about a strong possibility of retirement in 2020. It has been clarified in correspondence that this related to someone else.

19. On 27 June 2018 Mr Ryan Van der Aa, Global Head of HR proposed an assumed retirement age for the purposes of calculations for a move for the Claimant from US to UK as "say 65" [D/1375]. This was no more than assumption for the purposes of calculation.

20. On 10 July 2018 the Claimant sent an email to KPMG, an advisor acting for the Corporate Respondents "I plan on retiring aged 62 (in 5 years)" [D/1545]. This was sent in the context of negotiations over the terms of the Claimant's relocation from working in the USA to working in the UK. This was however against a backdrop against which in May 2018 the Claimant was feeling uneasy about the 'under 45' policy dealt with in detail in our decision on liability. We find that the Claimant's thinking about potential retirement age was to some extent coloured by the prevailing discriminatory approach to managing roles, albeit as we found, this under 45 policy was not specifically applied to the Claimant nor management at his seniority.

21. In 2018 someone within the Corporate Respondents produced an organisation chart for the purposes of succession planning for senior roles [D/1074; D/1079]. That document gave the Claimant's expected retirement age as 66. It is not clear from the document itself who the author or authors were. Neither side in this litigation has suggested who wrote it, but it does not seem to be in dispute that it was document used for succession planning, which contains this assumption.

22. On 4 March 2019 the Claimant had a private email exchange with his wife, which gives an insight into his thinking about potential departure from working for the Fourth Respondent. He wrote:

> "They have now changed our bonus schemes. I have to get out of here!!!
>
> The question is when. Do I hanging here to we sell the Usa house what. Medical is the issue going forward. If we stay in the USA."

23. She replied:

> "Bonus was the lifeline, not just for you. *

> Why don't you speak to Gary……. just get a feel for staff. Unless time for complete laying down of tools?"

24. It is clear from this exchange that the Claimant was unhappy about changes to the bonus scheme, and that he wanted to leave at some stage.

June 2019 discussion re: retirement & leaver status

25. On 20 June 2019 there was a discussion between the Claimant and Mr Andre about the Claimant's wish to retire at the end of 2020. He said that this was said in despair because of his treatment by Mr Andre.

26. It has become relevant to the question of remedy to expand on our summary findings on this conversation contained within the liability decision.

27. The Claimant's evidence is that Mr Andre flatly turned down his request for retirement as a good leaver. Mr Andre's account is that he did not grant the Claimant's request, but that his response was more nuanced.

28. In his later grievance, Claimant recorded

> "Spoke with PA informing him of my wish to retire at end of 2020. His response was shocking stating if I wished to retire then I would be considered a bad leaver. I informed him I was disappointed at his response as I was giving him 18 months notice and when I moved to Europe my contractual retirement age was 60 so I don't see myself as a bad leaver. Wrote PA a mail stating I would then retire at 65."

29. As to what Mr Andre stated, he explained in the internal investigation of the Claimant's grievance that what he had said was:

> "I neither accepted nor refused – I said you cannot on your own decide to retire on [at] your age you can resign"

30. Mr Andre's evidence to the Tribunal is that he was doing no more than precisely stating the factual position which is that the Claimant was not yet at contractual retirement age and accordingly Remco's (the remuneration sub-committee of the Board) starting position would be to treat him as a bad leaver. He told us that he did not categorically say that there was no possibility of the Claimant retiring early as a good leaver, but that he was simply stating the factual position. By implication, Mr Andre suggests that there remained a possibility of subsequent agreement as to the Claimant being a good leaver under the terms of an agreed retirement.

31. We have to bear in mind that Mr Andre had by this stage already made up his mind to dismiss the Claimant and in fact was in the process of recruiting his successor, although the Claimant did not know this. The Claimant leaving as a bad leaver would be less costly to the business than leaving as a good leaver.

Email follow up – 20.6.19

32. The discussion was followed up by an email exchange between the Claimant and Mr Andre. The Claimant wrote:

> "As discussed I am hereby giving you a heads up on my wish to consider retiring at the end of 2020. I was somewhat surprised at your response that I may be considered a bad leaver but hope that would not be the case and that we can find a solution." [6374-5]

33. It follows that the Claimant was still open to the possibility that this could be negotiated.

34. Mr Andre replied:

> "Thanks for the heads up. Let me some time to reflect on this with Agnieszka and we will revert to you.

35. The Claimant replied to Mr Andre:

> "FYI a bit of history, when I was transferred to the UK at the Job Grade level I was the retirement age was 60. I am unsure what the group considers retirement now in the UK but if it is 65 then I will not be retiring at the end of 2020. I will be 60 April 28th 2021.

Mr Andre's reflections on Claimant's view on retirement

36. On 20 June 2019 Ms Andre wrote to Ms Tomczak "We need to think now how to use his intention to retire to our advantage"

> "I agree that an elegant solution to be negotiated would be to transition him, at any date which suits us, as a special adviser to the CEO up to end 2020 and to accept that he would then retire as a good leaver. Do you feel the Remco would accept this ?(A bit more expensive than the dismissal but not that much—and we answer the point raised by as you rightfully mention)" .6371

37. Mr Andre told the Tribunal that sometimes Remco followed his recommendations and sometimes they did not. The email does support this. It appears from this email that Mr Andre could not rely upon Remco to simply do his bidding and that in his mind at least, retirement as a good leaver was a possibility, albeit as a negotiated settlement in which the Claimant accepted stepping out of his existing role and into an adviser role.

Search for old contract

38. On 8 July 2019 the Claimant asked his wife to look for his contract for retirement age 60 since at this stage the two of them were not in the same country.

39. On 10 July 2019 the Claimant wrote to his wife about their property in the US which they were struggling to sell:

> Thank, babes I really don' t Want to ask the company to buy it and then to resign. we have more ethics than that and I'm worried they ask me to stay if they buy it [D/6747]

Dismissal

40. On 1 August 2019 Mr Andre informed the Claimant that his employment was to be terminated in circumstances that are dealt with in the written reasons on liability.

41. On 2 September 2019 the Claimant was taken off duties and placed on garden leave.

42. On 1 March 2020 the Claimant's employment came to an end.

Relocation expenses

43. In 19 July 2018 Mr van der Aa updated Mr Andre with the figures he was working on to cost the proposal to the Claimant to relocate to the UK. At that stage he queried with Mr Andre whether they should assist the Claimant with the cost of selling his house in the US and buying a new one in the UK and also paid relocation after retirement as long as this was South Africa (which he thought was unlikely) or the USA. Mr van der Aa plainly thought that these matters were reasonable but was seeking Mr Andre's approval.

44. In August 2018 Mr Van der Aa wrote in a confidential "side letter" the agreement under which he was relocating from the US to be based in Tamworth, UK. This was dated 14 August, but apparently signed on 13 August. This contained the following:

> Performance incentive Schemes :
>
> The entitlements to be considered for AIP and LTIP set out below are subject to the remuneration policies and procedures of Vesuvius plc for members of the Group Executive Committee from time to time in force.
>
> a. **Annual Bonus**: An annual cash plan (so-called 'AIP') amounting to 40% of your base salary at target and 80% at maximum. The actual earnings will depend 80% on Company performance and 20% on the level of achievement against personal objectives identified with your direct management at the beginning of the performance year.
>
> b. **Long-Term Incentive Plan**: The Company's Long-Term Incentive Plan (so-called 'LTIP'). You will receive an annual grant of Performance Shares to a maximum value of 100% of Base Salary with vesting after 3 years on a sliding scale based on performance versus threshold, target-and-maximum criteria. 50%

> of the award is based on Vesuvius' Total Shareholder Return (`TSR') relative to the TSR of the constituents of the FTSE 250 excluding investment trusts (the 'Comparator Group'). The other 5U%pfthe award based on growth in Yesvuvus' Earnings Per Share ('EPS')
>
> **Relocation Allowance**: You will receive a relocation allowance equivalent to I month's salary, paid net of income tax and National Insurance, in line with the Vesuvius International Transfer Policy,
>
> **Relocation Support**: The cost of shipping personal effects from the USA to the UK, will met by the Company, in line with the Vesuvius International Transfer Policy.
>
> …
>
> **Home Leave**: 1 return family flight per year to South Africa. 2 return flights for your spouse from the UK to USA per year. All travel should be in economy class.
>
> **Repatriation at end of Employment**: At the end of your employment, if you elect to do so, the company will repatriate you and your spouse to the USA or South Africa, in line with the Vesuvius Long-Term Assignment Policy [2352]

Relocation policies

45. In our written reasons on liability, we identified that neither party had referred us to the correct policy governing expenses for the Claimant's relocation from the US to the UK that was current at the material time. We concluded as follows:

> "103. Ms Tomczak attempted to explain the Respondents' stance in this matter by reference to the expenses provision of a travel policy (D/7911).
>
> 104. The Claimant draws our attention to the "Employee Relocation Benefit Program Homeowner" (Effective As of November 30, 2020) (D/7969). This, it seems to the Tribunal is much more likely to be the correct type of policy to govern relocation and relocation expenses. Given its date however it cannot have been the policy in force at the time that the expenses were incurred in 2018 and the grievance was raised in 2019. We note that this is version 3. There is also a policy with a similar title which appears at (D/7982)."

46. Confusingly, we have also been referred to the Long-Term International Assignments Policy (D/8122), a 44 page document from 2017, which appears to cover long-term rather than permanent international transfers.

47. A few months after the Claimant's move to the UK, in February 2019 Mr van der Aa, Global HR set down what he believed had been agreed with the Claimant in Summer 2018 in advance of the relocation [D/4233] [D/4237]. This was by reference to the Claimant's UK contract, the side letter and the applicable *Local Plus* policy (see below). He explained that this Local Plus policy was referred to in the side letter as an International Transfer Policy, but added the caveat:

> "Although the general principles in the policy were followed, Glenn's relocation **was bespoke**."
>
> [emphasis added]

48. A set of bespoke questions and answers were prepared relating to the Claimant's move (D/1472). This was by Mr van der Aa the then Chief HR Officer to Mr Andre on 9 July 2018 for approval [D/1463] and collated by Nicola Thomas, Head of Reward [D/1645]. It appears to have been used as the basis for a discussion on 10 July [D/1650]. This document contains questions from the Claimant in bold and answers. Topics include keeping the Claimant's adult daughter on US medical cover for a period of time after his departure, medical cover in the UK, company vehicle in the UK, transfer of pension arrangements from the US to UK, life insurance. Toward the end of this document there is the following:

> "**Trips home to see children or children to visit UK (grossed up)?**
>
> Yes —3 return trips per year, grossed up for tax.
>
> **Maintain one taxable trip per annum to SA** [i.e. South Africa] **for family**.
>
> Yes
>
> **Relocation on retirement to country of choice**.
>
> Yes —USA or South Africa only. [D/1650]

49. On 11 August 2018 Mr van de Aa wrote to the Claimant about the signing of the new contract and relocation costs as follows:

> "I told you that we are willing to assist you in the costs of selling your house but you only sent me the estimate this week. I need to clear this with Patrick.
>
> I can not see on my Iphone if you have attached the signed documents but Patrick will not take a decision on this subject before he had (sic) seen your signed contract, so please send it now!"

50. As to the conclusion of these discussions, we found in our earlier written reasons:

> "95. On August 13, 2018, the Claimant had a phone call with Mr Van der Aa. The Claimant enquired about clauses in his relocation contract. Mr Van der Aa told him that the terms were not negotiable.
>
> 96. The Claimant's evidence at paragraph 414 of his witness statement was that he and Mr van der Aa agreed orally by telephone in around 12/13 August 2018 that these costs would be paid, and that was what Mr van der Aa meant when he said "the given word binds" (i.e. confirming in writing what had been agreed orally). See [D/2268] and [D/2330]. The Respondents put forward a different interpretation.
>
> 97. Following up on the call on August 13, the Claimant sent Mr Van der Aa a summary of his concerns. He enquired why Mr Van der Aa's assurance that the company would pay the closing, legal and realtor fees for the move was not in the contract. The Claimant asked what the chances were of Mr Andre reneging on this. The Claimant had noted that the relocation allowance referred to "long-term assignment", which meant he would stay an employee in the USA, and yet Mr Van der Aa had said this was not possible. He asked whether the relocation support should be as per the permanent relocation policy."

Local Plus policy

51. The *Local Plus* policy is an undated First Respondent document which appears in the liability document bundle at 8171. It as designed for moves between the country of origin (Home Country) to the destination country (Host Country) on a permanent basis. It contains the following provisions:

> "7 Temporary Accommodation
>
> Home country
>
> If the assignee and their accompanying family members require temporary accommodation prior to departure, the company will pay for up to 6 nights in an approved hotel or serviced apartment.
>
> …
>
> Items not covered [D/8184]
>
> The Company will not bear any shipping, customs duty, administration, transit insurance or short-term storage costs relating to the transportation of exceptional items including but not limited to: alcohol, artwork, automobiles, boats & equipment, building materials, decorative outdoor statuary, excessive canned

goods, farm equipment, furs, garden tractors, weapons and ammunition, pets, pool tables, jewelry, letters of credit, livestock, motorcycles, pianos, planes (including parts)' potted plants, recreational vehicles except bicycles, securities, snowmobiles, trailers, wine collections, heavy and bulky shop and hobby equipment, valuable antiques or paintings, other high-value items, firearms or illegal contraband.

Accounting provision for relocation

52. The Claimant places particular emphasis on provisions made for in the Foundary division accounts for the cost of the Claimant's relocation from the US to the UK. This is relied upon on the basis that provision would only be made for expenditure that was ***estimable*** and ***probable***. The First Respondent's CFO Mr Guy Young, accepted this as a broad principle, although clarified that provision would be made if it was probable that a liability would arise, but that the quantity and timing of such a liability might still be uncertain.

53. It was conceded on behalf of the Claimant that he would only receive payment for such items of expenses if he provided documentary evidence that the sums have been expended.

54. The figure of £160,000 was put into various documents by William "Bill" Kelly, the Global VP Finance for the Foundary division on the balance of probabilities following a discussion between Mr Kelly and the Claimant. The £160,000 figure appeared in the following documents:

    54.1. In November 2018 a Profit & Loss "Bridge" [D/7188];

    54.2. In January 2019 a document entitled "Foundry – Bonus waiver related to certain restructuring activities / Bridge estimate agreed for H1 with GY/PA to FY proposal [i.e. Guy Young, Patrick Andre] [D/3771] which starts with a figure of £1,030k agreed with GY at H1 before adding and subtracting various figures sought to come up with a figure of £1,424 "requested by BK [Kelly]/GC [Claimant] at YE [year end]" [D/3772]; [insertions in square brackets added by Tribunal to aid comprehension]

    54.3. Also in January 2019 a spreadsheet entitled Q4 severance recruitment bridge showed a figure of £100k for relocation GC UK move at month 9 above trading profit and £160k for the same at 12 months, with a comment "Partially booked/accrued in December" and description "Costs to move Glenn" [D/3772].

February 2019 review of relocation costs

55. On 1 February 2019 Mr Kelly emailed Gorka Jimenez-Vidal, HR Manager International Mobility, explaining that the £160k figure was his estimate made up as follows [D/4239]:

> "One Month moving allowance 45k already paid
>
> Tax Consulting KPGM 15k already paid
>
> Accrual Estimates:
>
> House Sale Realtor Commission 6% of sale price 34k
>
> Home Sale Closing Costs 4k
>
> Physical Move home possession (initial) 11k
>
> Physical Move home possession (after sale) 8k
>
> Taxes on gross up of relocation costs 36k
>
> All other 7k
>
> Total estimate 160k
>
> This was fully accrued into 2018 results above trading profit"

56. This was then forwarded by Gorka Jimenez-Vidal to the Second Respondent Ms Tomczak, Chief HR Officer of the Vesuvius Group.

57. On 21 February 2019 Mr van der Aa wrote to Mr Jimenez-Vidal about his proposed response to Ms Tomczak on the topic of what had been agreed [D/4233]):

> "Gorka and I have had a look at what was agreed with Glenn. I have attached his UK contract, side letter and the applicable Local Plus policy. Although the general principles in the policy were followed, Glenn's relocation was bespoke.
>
> The principle was that he would get the same net take home pay in the UK as he had in the USA but would be insured for social security, incapacity, health and pension in the UK.
>
> Looking at the spreadsheet you sent, the two physical move amounts of 11k and 8k and the gross up over those (36k) are within the policy. Gorka confirms that of the total allowable cubic footage of and is 1236 cuft (Vesuvius Limit) he used 1207 cuft, so stayed within maximum.
>
> The house sale costs and house closing cost are debatable. They are not covered by the local plus policy. During the negotiations Glenn asked for the company to pay these as he would leave the USA for a prolonged period of time and gave us an estimate of US$ 52,298 total, based on a selling price of the house of US$ 775k. This would be a maximum.
>
> |discussed this with Patrick at the time and at first Patrick said that he wanted to take a decision about that once the amount was

> known. After the amount of US$ 52,000 had been quoted and when the final draft of the contract was made, Patrick decided not to allow for this payment. Therefore it is not in the contract or side letter and I explained that to Glenn at the time. This must have been late August or early September last year.
>
> I have not seen the numbers for the accruals in the spreadsheet before and therefore never agreed to any of those. I remember that when we looked at the annual forecast for Foundry for full year 2018, Foundry had a total accrual for Glenn's relocation of E 200k. I said at the time to Patrick that I though it would be more in the region of £100k.

58. The following day Mr van der Aa wrote in similar terms to Ms Tomczak [D/4237].

Later discussions about relocation cost provisions

59. On 27 August 2019 Terry Finley, an employee in the finance function emailed the Claimant:

> "In the US we provided £97k (125k USD) in 2018 for your relocation with £79k (102k USD) remaining.
>
> In the UK accrued £24k Jul ytd with provision to reach £48k by year end for UK home purchase." [D/7180]

60. In a latter exchange Mr Finley confirmed to the Claimant that he believed that the £120k was communicated by Mr Kelly to Mr Young.

61. Mr Finley wrote to a colleague in a finance role Geoffroy Godin on 4 September 2019:

> "Currently there are provisions for Glenn's relocation with a portion in the US and UK as noted below. Should we leave the relocation provision as it stands for August reporting until the dust settlements with cost if any associated with Glenn leaving the company?
>
> In the US we provided £97k (125k USD) in 2018 for Glenn's relocation with F79k (102k USD) remaining currently. The change from the initial relocation provision related to household items moved from US to UK in 2019.
>
> In the UK accrued £24k Jul ytd 2019 with provision planned to reach £48k by year end for UK home purchase" [7300]

62. The following month Mr Godin replied in an email chain dated 2 October 2019

> "You should stop to accrue but keep the accrual until the Glenn's case is resolved"

Confidential information

63. The Claimant sent a series of emails containing confidential documents to his personal email address and his wife's email address between 10 August 2019 and 24 August 2019 after learning that he was to be dismissed. He also forwarded new emails to his personal email account as they arrived into his work inbox. The remedy bundle contained a print out of the "meta data" relating to those files at page 201.

June 2020 – Claimant's discussion with financiers

64. In May and June 2020 the Claimant had some preliminary discussion with Mr Skip McGee, a financier based in the US, about the possibility of buying the First Respondent then delisting it from the stock exchange.

65. Mr McGee's team prepared some material relating to this proposal to which the Claimant responded in an email dated 22 June 2020:

> "For now I'll avoid adding or discussing anything that is not in the general domain." [D/7825]

66. The Respondents invite the Tribunal to draw the inference that the Claimant was intending at a later stage to share confidential information that was not in the general domain, which would be a breach of his contractual obligations.

67. The Claimant denies that this in fact happened and his evidence was that the discussions with Mr McGee did not lead anywhere. The Tribunal does not have cogent evidence to lead us to the conclusion that the Claimant did in fact divulge information outside that which is publicly available.

EXPENSES

68. On 8 October 2020 the Claimant wrote to Ms Tomczak with a spreadsheet showing relocation expenses in the sum of £76,690.22 plus tax at 47% of £36,044.40 making a total including tax of £122,734.62 [D/7864].

69. There is an invoice addressed to the Claimant's wife dated 8 June 2020 for the cost of removals from Cleveland Ohio to Alrewas, Staffordshire [D/7870].

70. Mr Susskin conceded, realistically, that the Fourth Respondent would only have been likely to pay evidenced claims.

Vacation – July 2020

71. The Claimant's expenses claim in October included car hire and 13 items in the period 4 July – 9 August 2020 entitled "Accommodation USA after house sale". This expense claim is supported by a series of invoices for stays in what the Respondents characterise as high end beach resort hotels with expenses such as beer, wine, liquor and restaurants.

72. The Claimant characterised this period as a move from his US home toward an airport in Atlanta in stages taking his dogs with him.

73. On 15 July 2020 the Claimant had an email exchange with Skip McGee, in which he wrote no problem but I am on vacation for a week with my daughter then flying to the UK [D/7837].

Claimant's post-Respondent earnings

74. By a letter dated 14 April 2021 the Claimant received an offer of employment from Imerys Minerals USA, Inc as Americas Vice President for the High Temperature Solutions Business Area on an annual base salary $225,000 p.a. plus bonus and other elements to his package [D/8075].

75. The contractual documentation shows that this was agreed to be a two year assignment, with the possibility of an additional year if the Claimant remained in good standing with Imerys and the parties (i.e. the Claimant and Imregys) mutually agreed to an extension [D/8080]. Mr Cowie's oral evidence was that he had recruited his successors in this role and accordingly did not expect to continue to be employed by Imerys beyond the two year assignment initially envisaged.

Good leaver status/LTIP

76. There is evidence that senior executives leaving would be treated as good leavers as part of a negotiated settlement, e.g. Mr van der Sluis, Mr Gary Novak, and Mr Mathei. The Claimant characterised this as "standard practice" at paragraph 801(b) of his first witness statement.

77. The Claimant stated in his remedy witness statement (paragraph 10) that he understood that company severance for retirement was on the basis of "no pro-rating". He admitted at the hearing that he was under a misapprehension about "pro-rating" Long Term Incentive Plan and that this would have prevented him from entering a good leaver agreement. The correct position, which the Claimant now understands, is that shares granted under the LTIP only vest after three years. A good leaver is only entitled to a pro-rata sum to reflect the duration of employment during the vesting period.

78. The Tribunal finds that on the balance of probabilities but for the discriminatory dismissal and other detrimental treatment a constructive conversation between the parties about the topic of good leaver would have resolved this problem and this in itself would not have been a barrier to the Claimant leaving as a good leaver.

THE LAW

79. We are grateful to both Counsel for their written submissions, and for providing authority bundles.

80. Claimant's counsel has referred to 19 authorities. The Respondents' counsel has referred to 18 authorities. It is not proportionate the Tribunal to refer to

every single authority referred to by the parties. We have taken account of these authorities insofar as they are relevant.

81. Pecuniary and non-pecuniary losses which flow "directly and naturally" from discrimination are properly recoverable under "but for" causation principles: *Corr v IBC Vehicles Ltd* [2008] 1 AC 884. Such losses are recoverable even if the loss was not reasonably foreseeable: per Pill LJ at [37] in *Essa v Laing Ltd* [2004] ICR 746.

82. Where it is satisfied that there is some prospect that a non-discriminatory course would have led to the same outcome an Employment Tribunal must reduce damages accordingly: *Abbey National plc and Hopkins v Chagger* [2009] ICR 624. A Tribunal must avoid incorporating another guise of unlawful and/or discriminatory conduct in the *Chagger* exercise. On the other hand any hypothetical exercise relating to future employment in the absence of discrimination must relate to the actual respondent employer not a “reasonable employer” (*Abbey National Plc v Formoso* [1999] IRLR 222).

83. In *Allied Maples Group v Simmons & Simmons* [1995] 1WLR 1602, Stuart-Smith LJ endorsed the availability of a percentage approach to future losses. He said at p.1610:

> ‘Questions of quantification of the plaintiff’s loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court’s assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party, namely the plaintiff’s employer.’

84. In *Ministry of Defence v Wheeler* [1998] IRLR 23 the Court of Appeal held that a Tribunal was entitled to assess future loss by considering different percentage chances of W remaining in the Armed Forces at different points in her career. They dismissed an appeal against the cumulative application of those percentages.

85. In *O’Donoghue v Redcar & Cleveland Borough Council* [2001] EWCA Civ 701, [2001] IRLR 615 the Court of Appeal found that an Employment Tribunal was entitled to find that although Ms O’Donoghue had been unfairly dismissed and victimised because of previous tribunal proceedings, her divisive and antagonistic approach to colleagues was such that it would inevitably have led to her fair dismissal within a period of six months, which amounted to an end point for the purposes of compensation. It may be possible in some cases to apply a percentage chance of dismissal at a future point, whereas in other cases it may be better to identify a date by which the tribunal could be said that dismissal would have taken place.

86. In *Wardle v Credit Agricole Corporate and Investment Bank* [2011] EWCA Civ 545 [2011] IRLR 604 the Court of Appeal held that it was rarely appropriate to assess compensation over the remainder of a claimant's career. The Tribunal found that W had a 70% chance of finding an equivalent job 3 years after he was dismissed by CACIB. It followed that on the balance of probabilities his loss of earnings ceased at that point.

CONCLUSIONS

RECONSIDERATION

Allegation 19

87. In the judgment and written reasons sent to the parties on 21 January 2022, the Tribunal found that Allegation 19 was made out as an unlawful allegation of victimisation and as a protected disclosure detriment. The allegation is "*failure to involve all brief (properly or at all) the Chairman and/or the Non-Executive Directors about the Claimant's grievance submitted on 1 October 2019, appeal against dismissal, whistleblowing report & allegations of discrimination*".

88. The Respondents appealed the decision on liability.

89. On 27 May 2022 HHJ Katherine Tucker at the Employment Appeal Tribunal used the Burns/Barke procedure to query specifically (i) which Board was being referred to at paragraph 373 of the reasons & (ii) Was, and if so, how, was the issue of whether the Claimant had a contractual entitlement to have his grievance investigated by the Board, identified as an issue within the case? HHJ Katherine Tucker suggested that the Tribunal might wish to reconsider its decision.

90. By a letter dated 23 June 2022 EJ Adkin wrote to the parties on his own initiative inviting submissions on reconsideration.

91. In July the parties exchanged written submissions and replies to those submissions. We are grateful for these succinct submissions

Tribunal's reconsidered decision

92. Allegation 19 is *the failure to involve or brief (properly or at all) the Chairman and/or the Non-Executive Directors about C's grievance submitted on 1/10/2019* (D7286-7298), *appeal against dismissal* (9/03/2020) (D7679-7704), *whistleblowing report and the allegations of discrimination raised by C*.

93. The Claimant's pleaded case was as follows:

> "Paragraph 18.26: The Chairman and the Board were largely kept out of the matter so far as I am aware and a grand cover-up followed. Those actions were to my further detriment as they prevented me from having a fair investigation of the matter and allowed Mr Andre and his cohorts to pull the strings. The whole

> matter was then controlled by Ms Tomczak who reports to Mr Andre (the main person I had cause to complain about), and Mishcon solicitors."

94. The Tribunal accepts the submission of the Respondents that the context of this allegation was that the Chairman and Non-Executive Directors being referred to here are of the First Respondent (i.e. the plc parent company), rather than the Fourth Respondent, the Claimant's employer.

95. It is not in dispute that the Claimant did not put forward the claim in the first instance as being a breach of contract.

96. The Tribunal has reconsidered afresh the evidence and submissions from the liability hearing, together with the further written submissions and replies put forward by counsel for both sides. We have looked again at the Claimant's contract (deed) of employment dated 14 August 2018. We have not received any further witness evidence on this, nor were oral submissions made during the course of the remedy hearing.

Findings of fact already made

97. The Tribunal made the following findings in our written reasons on liability at paragraph 177-185 (excluding the first six words of 180 and the last sentence of 185), which, having reconsidered, still represent our findings of fact and are repeated here for ease of reference:

> "177. The First Respondent's grievance policy provides:
>
> "7.2.1.2. If the complaint is against the person with whom the grievance would normally be raised, another suitable line manager will be asked to hear the grievance." [D/8200]
>
> 178. The Claimant's terms and conditions of employment contains the following at clause 15:
>
> > "Any disciplinary or grievance matters will be conducted by the Board of Directors of the Company or its designee, in accordance with the principles of the ACAS Code of Practice on Disciplinary and Grievance Procedures and any relevant legislation." [D/2419]
>
> 179. The Claimant initially tried to get the grievance investigated without the involvement of Mr Andre. There was an email exchange between the Claimant's solicitor and a solicitor acting for the Respondents. On 4 October 2019 Mr Campbell for the Respondents wrote:
>
> > "I've discussed the position with the GC [i.e. General Counsel]. There is simply no practical way to deal with the allegations raised in Mr Cowie's letter without discussing them directly with, amongst others, Mr Andre. The Company has confirmed that it will treat the letter in line with its usual

> grievance process. In the first instance this means that it should be provided to the CHRO [i.e. Ms Tomczak], who will decide how to take the complaint forward. As I'm sure you have advised Mr Cowie, the Company understands its own legal obligations that may arise from Mr Cowie's letter"
>
> 180. … the Claimant was initially trying to get this grievance to be considered by the Chairman and non-executive directors of the Board.
>
> 181. The grievance was passed to Ms Tomczak on 6 October 2019.
>
> 182. On 8 October 2019 Ms Tomczak emailed Mr Andre at his private email address with a copy of the 1 October 2019 grievance/appeal against dismissal document [D/7301].
>
> 183. The Respondents admit that Ms Tomczak took the decision that she was the most appropriate person to hear the grievance on the basis that she was the most senior HR person. She told the Tribunal in her oral evidence that she did not discuss this matter with the Board.
>
> 184. The Respondents seek to justify this decision on the basis that it follows within the operational part of the business.
>
> 185. When Ms Tomczak was asked about the possibility of an external person hearing this matter, her evidence was that this would not the procedure in any company, given that this was an internal process. She disagreed that this was a special situation which might justify such an approach. We did not receive evidence that Ms Tomczak was the designee of the Board. …

98. We have omitted the first six words of paragraph 180 and the last sentence of paragraph 185 above about the contractual provision given that these intimate or suggest legal conclusions rather than findings of fact and our approach has been to consider legal conclusions afresh.

Contractual provisions relevant to Board

99. The Claimant's deed of employment dated 14 August 2018 also contained the following provision:

> 1. DEFINITIONS
>
> For the purposes of this Agreement:-
>
> (a) The expression "Associated Company" means the Company, any holding company of the Company and any subsidiary of the Company or of any such holding company (with "holding company" and "subsidiary" having the meanings ascribed to

> them by Section 1159 of the Companies Act 2006)- or which is an associated company of any such company (as "associated company" is defined in the. Income and Corporation Taxes Act 1988) and reference herein to an "Associated Company" and to "Associated Companies" includes any successor or assignee of the Company or any Associated Company and shall be construed accordingly
>
> …
>
> 3. DUTIES
>
> (a) The Employee is appointed to act as President Foundry in such specific capacity with the Company or any other Associated Company as the Company may reasonably require from time to time. The Employee may be required in pursuance of his duties hereunder to perform services not only for the Company but also for any of its Associated Companies. In the event that the Employee is appointed to such a role with an Associated Company, or is required to perform services for any Associated Company, the term "Company" herein shall mean the Company and any such Associated Company.
>
> (b) The Employee acknowledges that he will as part of his duties be expected to take part in the overall management of The Company and its Associated Companies at the highest levels.

Respondents' witness evidence on allegation 19

100. The Third Respondent Mr Andre's written evidence on this allegation was:

> "135. The Claimant raised a grievance about his dismissal on 1 October 2019. This was investigated by Ms Tomczak. I was interviewed by her on 9 or 10 October 2019. I was not involved further in the investigation of the grievance. It has been suggested that I failed to brief the Chairman and other non-executives on the grievance. I did not think it was necessary or usual practice to involve the Chairman or non-executives. It would not be usual for them to be involved in the investigation of a grievance. In any event, as a subject of his grievance, it plainly would have been inappropriate for me to be communicating with the other Board members on its investigation. I confirm that not involving the Chairman and/or the other non-executive directors had nothing to do with the Claimant's age, race or any complaints he may or may not have raised.

101. Mr Andre's oral evidence was consistent with his written evidence.

102. In the witness statement of the Second Respondent Agnieszka Tomczak she did not deny that she had not briefed the Board but said:

> "In my experience it would be unusual to involve or brief the Chairman or any of the other non-executive directors on a grievance or the allegations contained in it during the process. Non-executive directors would not expect to be briefed on such matters, which fall squarely within the remit of the executives of Vesuvius and management." [paragraph 40]

103. There is no reference to allegation 19 in the witness statement of Mr John McDonough, the Chairman of the First Respondent. In his oral evidence he said that the Board reviewed the findings of the grievance, he saw the grievance, that the Board had three meetings and external advice on the process, and the Board was satisfied with the results of the investigation. He said that Ms Tomczak was "authorised and able".

104. The contractual position regarding the Board was put to Ms Tomczak by Ms Darmas, a non-legal member of the Tribunal panel. Ms Tomczak's oral evidence was consistent with her statement i.e. that the Chairman and NEDs would not expect to be briefed and in this case they were not.

105. There is an apparent conflict between the evidence of Mr McDonough and Ms Tomczak. There is an absence of contemporaneous documentation and it is not dealt with in Mr McDonough's witness statement. We consider that Ms Tomczak was closer to the detail of the grievance. The impression we have is that Mr McDonough's involvement was minimal and at a later stage, once the grievance already been investigated.

106. Importantly it was not put to Ms Tomczak in express terms that she knew at the time that the Claimant had a contractual right to have his grievance considered by the Board, nor was it suggested that she or Mr Andre had deliberately ignored or disregarded that contractual right. There is no evidence that this contractual right was drawn to their attention at the time.

CONCLUSION ON RECONSIDERATION

Detrimental breach of contract

107. It is clear that the Claimant had a contractual right to have grievances heard by the Board of Directors of the Company or its designee.

108. It is a possible interpretation of the clause highlighted by Mr Susskin that in the Claimant's circumstances, whereby he worked for both the Fourth and First Respondents, the word "company" included both. Clause 15 on that interpretation would be capable of referring to the Board of Directors of either the Fourth or First Respondent. The Respondents dismiss this interpretation as convoluted. The Tribunal considers that it would be a somewhat surprising result if an employee was thereby given a contractual right to have grievances investigated by two different boards of directors. We have not received any evidence at all about the Fourth Respondent's Board. We do not find that we need to determine this contractual point.

109. On any view the Claimant did have a contractual right for a grievance to be conducted by a Board of Directors or designee. He did not receive that. We accept Ms Tomczak's evidence on this point where it conflicts with the evidence of Mr McDonough, since it was she that dealt with the grievance and she was inevitably closer to the detail of it.

110. We have considered whether it is fair to conclude that the Claimant had suffered a detriment by virtue of a denial of his contractual right to a Board of Directors (or designee) investigation.

111. The contract arose in questions from the Tribunal to Ms Tomczak more or less at the conclusion of her evidence. It was not put to her that Ms Tomczak had deliberately or knowingly denied the Claimant his contractual right, or even that she knew about the contractual provision. It is not clear to us that the Claimant or his advisers at the time made such a point, although there was correspondence at around this time.

112. It was not the Claimant's pleaded case that there was a breach of contract. The significance of that is that the Respondent witnesses were not on notice to deal with this point in their evidence.

113. Based on the evidence we cannot on the balance of probabilities conclude that either the Second or Third Respondents had in mind that there was a contractual right to the Board (or designee) dealing with a grievance.

114. In those circumstances we do not think that there is evidence to lead us to the conclusion that the denial of the contractual right was a detriment because of the protected disclosures or protected act in this case.

Arguments other than breach of contract that detriment occurred

115. We have considered whether there is other evidence that was that the failure to brief or involve the Board might have been a detriment because of the protected act/protected disclosure, aside from the breach of contract point.

116. It is submitted on the Claimant's behalf that aside from the contractual point he was a very senior manager, just below Board level, he was asking for the Chairman of the Board to consider his grievance raising very serious matters. It is further submitted that the Second Respondent Ms Tomczak was manifestly an inappropriate person to deal grievance

117. Ms Tomczak's evidence was it was unusual to involve the Board and she considered she was the most appropriate person to deal with it. She made the point that because of the Claimant's seniority it would not be appropriate for her to pass the matter to a junior HR colleague.

118. Our role is not to identify whether this course of action was wise, but merely whether this amounted to a detriment because of the Claimant having raised the protected act/protected disclosure. We take account of the fact that this was the main Board of a plc and the extent to which it would become involved in the case of an individual, even a senior one, would be limited.

119. Ultimately we found that in the absence a finding of a deliberate and knowing breach of contract, we do not conclude that allegation 19 succeeds as a detriment.

120. It follows that we revoke our original decision on this point and substitute a decision dismissing the parts of the different claims based on allegation 19, i.e. victimisation and protected disclosure detriment.

REMEDY

FINANCIAL LOSSES

Figures

121. Through the Claimant's Schedule of Loss, the Respondents' Counter Schedule of Loss, the Claimant's updated Schedule, incorporating comments on the Counter Schedule and skeleton arguments the parties have agreed some key figures. We are grateful the efforts that have been made.

122. As noted above unfortunately by an exchange of emails 12 and 14 December 2022 the attempt to agree net figures was not fully successful. The Tribunal requests further assistance from the parties, ideally on an agreed basis, to calculate the loss of net income, LTIP, dividend figures as well as grossing up.

RETIREMENT AGE

123. The Claimant's case before the Tribunal is that had he been treated as a good lever he would have left at age 63. If he had not had all of the benefits that would go with departing as a good leaver he contends he would have left at the age 65.

2020 departure

124. The Tribunal finds that, absent the discriminatory dismissal there was a possibility of the Claimant agreeing to retire in 2020. This was something that he mentioned in June 2019 although did not in the event follow it through. We take account of the fact that there were changes in the bonus scheme, unrelated to age discrimination, about which he was unhappy. We have the evidence of exchanges of email with Mrs Cowie which shows that the possibility of leaving was being discussed between them privately in March 2019 when he wrote "I have to get out of here!!!". He was not happy to be relocated to the UK away from his immediate family and there were plainly pressures on him in this role leaving aside the age discriminatory factors. There was some friction between him and Mr Andre. The organisation had high expectations of the most senior employees.

125. Were it not for the discriminatory decision to dismiss the Claimant communicated to him in August 2019 and subsequent detrimental treatment, we find that there was still some chance of the Claimant agreeing to retire as a

good leaver in 2020. We note that in his private communications Mr Andre plainly thought there was a deal to be done leading to departure.

126. We acknowledge the Claimant's evidence that he only made his comments about retirement in June 2019 in exasperation at Mr Andre's approach. We have been careful not to overestimate the likelihood of a 2020 departure. We find that he was strongly motivated to maximise his income before retiring. Nevertheless there was a chance of an agreed retirement at this stage, which we have assessed as **15%**.

127. In this scenario we take the retirement date as **30 April 2020**. We find the Claimant would want to ensure he received the bonus at the end of the financial year.

Departure because of Covid

128. The Respondent contends that the Claimant would have departed during the Covid-19 pandemic on the basis that the Claimant's income would have been less and the job would have been less valuable to him.

129. The Claimant argues precisely the opposite, that in a time of great uncertainty he would have been less likely to move. He argues that being paid less made it less likely that he would retire, since he had not yet reached a position financially where he could do so.

130. We accept the Claimant's case on a departure caused by Covid. We accept that he was anxious to maximise his income to facilitate retirement and that he would have been unlikely to leave during the uncertainty of the Covid-19 pandemic. We accept what he says about this and we are supported in that conclusion in part by the fact that he has continued to work following termination of his employment with the Respondent.

2023 retirement

131. The Claimant told KMPG in 2018 when he was contemplating the move to the UK that he would retire aged 62. We find that there was some chance of that occurring. We find that there would have been a similar tension between the pressures of the role on the one hand and the desire to provide for retirement financially on the other as in 2020.

132. As with the comments made in June 2019, we are mindful of the background to the 2018 comments which is that the Claimant had concerns about an environment in which managers grades below him were only being recruited below the age of 45. While this was not directly discriminatory against him, it was an environment we find in which he may have felt constrained about suggesting that going to carry on working for a very long time. For these reasons we have been careful not to overestimate how likely it was that he would have departed 2023, so as not to effectively penalised the Claimant with discrimination in another guise.

133. Do the best we can, and necessarily in a broad brush way, our assessment is that there was a **25%** chance of the Claimant retiring as a good leaver at 62 in 2023. We find in this case that the retirement date would be **30 April 2023**.

2024 retirement

134. The Claimant's evidence in his witness statement on remedy is that if he could have retired as a good leaver he would have done so aged 63.

135. We accept that on the balance of probabilities that this is what would have happened had he not retired in 2020 or 2023 as provided for in our reasoning above.

136. We have taken account of the guidance of the Court of Appeal in the **Credit Agricole** case that a career long loss is rare. We find that Mr Cowie's situation is one of those rare cases which is genuinely a career long loss. That is for two reasons.

137. First, he was comparatively close to a plausible retirement age at the point when he was dismissed. Second, the level of remuneration he received from the Corporate Respondents was at such a level that it is unlikely we find on the balance of probabilities that he will ever achieve that level of annual compensation again.

138. We find that the retirement date would have been **30 April 2024** i.e. the month-end closest to the Claimant's 63rd birthday and again as above would ensure that he received bonus for the financial year ending the month before.

'Just and equitable' deduction

139. The Respondents submit that there should be no compensation or alternatively a substantial deduction on the basis that the Claimant has behaved in a reprehensible way by sending confidential information to himself in August 2019 and by implying to potential investors that he would divulge confidential information outside of information available in the public arena.

140. Mr Cowie denies having breached confidence in providing information to others. We have no conclusive evidence that he did. It is clear that the Claimant sent materials to himself and his wife in August 2019, some of which was confidential information.

141. The correct approach to assessing the compensation is on tortious principles i.e. "but for" the tortious unlawful acts, what would the Claimant have received by way of income. From this sum, credit must be given for income actually received.

142. Our finding is that but for the discriminatory dismissal which was communicated to the Claimant on 1 August 2019 by Mr Andre he would not have sent the confidential information complained of to himself, nor would he have been in the situation of discussing matters with potential investors and others. These are matters which only arose because of the discriminatory dismissal. This

being the case, it does not follow that the Claimant's losses are curtailed on the basis that he would have been dismissed in any event. We find the breaches of confidence or alleged breaches of confidence would not have happened had the discriminatory notification of dismissal on 1 August 2019 not occurred.

143. There is a discretion to award compensation. We accept the submission put forward on behalf of the Respondents that there may be circumstances in which a winning Claimant's conduct subsequent to a discriminatory dismissal is sufficiently egregious that this would mitigate against discretion being exercised in making an award of compensation or at least support a reduction in the level of that award. We do not find that this is such a case.

144. We find that the Claimant was motivated by wanting to amass evidence that he could first of all present to the Board, and looking ahead to rely on in potential litigation. As to his conversations with investors and others, we find that these were the actions of someone who felt wronged and was desperately trying to look for a role for himself in the future of the First and/or Fourth Respondent businesses, which had been essentially his entire career. We do not find that in the context of this Tribunal claim that the Claimant ought to be penalised for his actions.

145. Plainly if the Claimant was in breach of contractual obligations, there may or might have been remedies open to the Corporate Respondents to be pursued in other jurisdictions, about which we would make no comment.

Possibility of employment ending other than as an agreed retirement

146. An agreed retirement is not the only way that Mr Cowie's employment might have come to an end but for the discriminatory treatment.

147. We have considered whether over and above the chances of early retirement in 2020 or 2023 there should be a percentage reduction to reflect the possibility of non-discriminatory termination of the employment relationship at some stage, either resignation or dismissal.

148. We find there was a possibility of a dismissal or a breakdown in relationship, or spontaneous resignation because Claimant had simply had enough of the pressured work environment or of his relationship with Mr Andre or decided to move to another role outside of the Corporate Respondents. He might for example have simply tired of the family being in different places. The Claimant was, we find, plainly under strain in the later part of 2018 and early part of 2019 and contemplating leaving the Fourth Respondent's employment. We find that there was some prospect of the employment relationship coming to an end other than through a planned and orderly retirement at a time of Mr Cowie's choosing. These are reasons why we find should make a reduction for the "vicissitudes of life" over and above the likelihood of a planned and agreed retirement.

149. Such a reduction is necessarily a "broad brush" assessment. In assessing this figure, we must consider the situation as if there had been no age discrimination. We have considered that Mr Cowie had had a long successful

career with this firm. Mr Cowie is someone enjoys and derives satisfaction from his work and that he works hard. At his level of seniority in a publicly listed company Mr Cowie was unlikely to be placed on a formal performance plan since this was the sort of step that might cause uncertainty and concern to investors. We do not accept that as of 2019 there was a clear basis for a fair performance dismissal. Finally, we bear in mind that even on his own case Mr Cowie was in the final few years of his career; we are not taking account of the likelihood of a non-discriminatory departure over several decades, which might be thought to be reasonably large.

150. Most of these factors point in the direction of a comparatively modest likelihood of employment coming to an end for a non-discriminatory award. Given this and the fact that we have already dealt with the possibility of agreed and planned retirement in 2020 or 2023 separately we have made a broad brush assessment of the appropriate reduction for a non-discriminatory end of employment other than planned retirement being **10%**.

151. We have stood back to ensure that we are not doing a disservice to Mr Cowie by making a deduction in this way. We have considered this point carefully and do not believe that we are. Given the stage of Mr Cowie's career and the amount of evidence pointing to various different possible future retirement ages, we consider it is appropriate to take account of this evidence in making the deductions we have in relation to 2020 and 2023. An agreed retirement as a good leaver is one of ways that the Claimant's career with the Fourth Respondent might have come to an end. The other factors we have considered, which might be described as "vicissitudes" are distinct and accordingly we have made this further deduction across the whole compensatory award for loss of earnings.

Good leaver / bad leaver

152. The Tribunal finds that on the balance of probabilities had he not suffered from unlawful discrimination or detriment the Claimant would have left as a good leaver, for two principle reasons.

153. First there is evidence of other senior employees agreeing a "good leaver" status as part of their departure.

154. Second, we find on the balance of probabilities that the First Respondent's Remco would have approved a "good leaver" departure, especially as part of an agreed retirement.

Expenses

155. The approach to assessing the various elements of the expenses claimed by the Claimant is a tortious one, rather than a strict contractual one. We are assessing what he would have received but for the discriminatory dismissal of 1 August 2019 and the detrimental treatment in the claims of victimisation and protected interest disclosure allegations 20, 21, 23 & 27, specifically out of the failure to deal with the grievance submitted on October 2019, the outcome to which was 24 February 2020; the failure to deal with the appeal submitted on

9 March 2020 and the decision to treat him as a bad leaver, which flowed from a decision of Mr Andre on 21 November 2019.

156. The contractual and policy documents are not irrelevant, since these inform our assessment of what the Claimant would have been likely to receive particular sums. It is also relevant to consider what the Claimant agreed at the time of his move to the UK in 2018 and also the provisions that have been made by the Corporate Respondents in their accounts.

157. Mr Susskin rightly in our view conceded that the provisions in accounts are not the end of the matter. Before Mr Cowie would have been paid anything by the Fourth Respondent, there would need to have been evidence that he had expended those sums. We find that an organisation of this size, and publicly listed one, had a well-developed finance function that would not be authorising substantial payments without a clear paper trail.

158. We have noted that Mr Andre regarded the level of provisions made as being a provocation, suggesting that he considered that it was something of a protest on the part of Mr Cowie, most likely because he did not wish to relocate to the UK. Even had the Claimant remained in employment there would have been a critical eye cast over any expenses claimed.

Relocation expenses

159. The Tribunal found that the treatment of relocation expenses was not in itself an unlawful act.

160. The Claimant puts forward this claim on the basis that the failure to pay him his proper relocation expenses naturally flows from the discriminatory dismissal on 1 August 2019.

161. We have noted the contemporaneous emails of Mr van der Aa in February 2019, which make clear that the agreement reached with the Claimant the previous Summer was “bespoke”. In those circumstances, we find that the Respondents would have given the terms of the “side letter” priority over any policy documents in the event of a conflict between the two documents.

CALCULATIONS

Basic award

162. The parties agree the basic award is **£8,976**.

Four periods of loss

163. It is convenient for the purposes of discounting for future possibilities and also to draw the distinction between future and past loss to consider four distinct periods.

164. Periods 1 and 2 are past losses. Periods 3 and 4 are future losses. Discounts are set out below.

165. *Period 1* between termination on 1 March 2020 and 30 April 2020 at which point there was a 15% chance of retirement.

166. *Period 2* between 1 May 2020 and a date of assessment of 31 December 2022 representing the end of past loss (this date taken for convenience of calculation as this is a month end).

167. *Period 3* between 1 January 2023 and 30 April 2023, representing future loss until the point where we find there was a 25% chance of retirement.

168. *Period 4* between 1 May 2023 and 30 April 2024 representing the final period of future loss.

Cumulative discounts

169. We have taken account of the legal authority that probability/likelihood discounts may be applied cumulatively (e.g. *Wheeler*). We consider that approach is the appropriate one in this case. Plainly this is not a highly scientific exercise, since the percentages represent the impressions of the Tribunal. We are compelled by authority to carry out an exercise in assessing likelihood even though it is speculative. It is based on the Tribunal's experience and impressions based on the evidence. The overall picture, we find, is that there was a diminishing likelihood over time in the period 2020 to 2024 of the Claimant remaining in employment. The cumulative percentages below reflect that diminishing likelihood.

170. It follows from our findings above that Mr Cowie should receive

170.1. For *period 1* **90%** of his net loss of earnings between termination and 30 April 2020, reflecting the 10% discount;

170.2. **76.5%** of his net loss of earnings between 1 May 2020 and 30 April 2023, representing the Tribunal's finding that there was a 15% chance of retirement in 2020 as well as the 10% discount (i.e. 85% x 90% = 76.5%), which breaks down as follows:

170.2.1. For *period 2* from 1 May 2020 to 31 December 2022 (past loss);

170.2.2. For *period 3* from 1 January 2023 to 30 April 2023 (future loss);

170.3. For *period 4* **57.375%** of his net loss of earnings between 1 May 2023 and 30 April 2024 (future loss), representing the Tribunal's finding that there was a 15% chance of retirement in 2020, then a 25% chance in 2023 as well as the 10% discount (i.e. 85% x 75% x 90% = 57.375%).

Personal Bonus

171. As to personal bonus in May 2020, but for his discriminatory treatment we find that the Claimant would have received an assessment of **10%** of gross annual

salary, i.e. £34,000 as claimed. We accept the Claimant's case that he was unfairly marked down for his performance. The evidence that we have received is that 10% would reflect achieving targets, not over achieving since the maximum under the scheme was 20%.

172. For the March 2021 personal bonus we find that the Claimant would also have received a 10% assessment. We rely upon his history of good performance in making this assessment.

173. Similarly for the personal bonusses in March 2022, 2023, 2024 we find that the Claimant would have received a 10% assessment for similar reasons to those above.

Business bonus

2023

174. For March 2023 the Claimant claims a business bonus of £294,451, representing an 8% increase on the agreed business bonus expected to have been awarded in March 2022 (80% of salary for that year). The Claimant submits that this best reflects recovery after Covid-19.

175. The Respondents' case is that an estimated average of March 2020 (0%), March 2021 (20%) and March 2022 (80%) is the best approach.

176. The Tribunal accepts the principle that taking previous years' bonus percentage is a useful approach. We feel that taking March 2020, i.e. a bonus of zero is unrealistic since that reflected a particularly difficult year, the unusual circumstances of which are unlikely to be repeated. On the other hand, we feel taking 80% bonus as in March 2022 risks overcompensating the Claimant.

177. We find that the appropriate figure is to take an average of the previous two years level of bonus, i.e. **50%**, representing the arithmetic mean of 20% and 80%

2024

178. For March 2024 the Claimant claims a business bonus of £303,197, representing an 8% increase on the projected business bonus for the previous year (itself 8% increase from March 2022).

179. The Respondents' case is that an estimated average of March 2020, March 2021 and March 2022 is the best approach. Again, and for similar reasons to the equivalent March 2023 figure we find that the appropriate figure is to take an average of the of the March 2021 and March 2022 bonuses, i.e. **50%**, representing the arithmetic mean of 20% and 80%, since this uses the last two years' known data.

Dividends

180. The Claimant claims 4% average dividend.

181. The Tribunal find that this is a reasonable estimate and accordingly will award dividends to which he is entitled calculated as **4%**.

LTIP/Dividends

182. There appear to have been a number of points which were agreed relating to the Long-Term Investment (LTIP) scheme, in which shares granted to the Claimant would vest over a three-year period.

183. It is understood that periods 1 and 2 at least are substantially agreed.

184. At the remedy hearing the Claimant acknowledged that he had been wrong to maintain that all of the shares would vest in full for an early departure and a principle of *pro-rating* would apply such that unvested shares would only vest according to the proportion of the vesting period for which he was employed. It follows from our finding that the Claimant would have retired at the latest by 30 April 2024, that he would not receive any shares for periods beyond this point. As we understand it the grants of shares would have vested at this point representing the full value of the 2021/24 LTIP scheme, two thirds of the 2022/25 scheme and one third of the 2023/2026 scheme.

185. It is not a good use of Tribunal's time to attempt to make sense of the multiple documents generated by the parties with regard to LTIP and dividends payments given that it is now unclear following the emails of 12 and 14 December 2022 what is agreed and what is disputed.

Family trips home

186. The Claimant claims the following items: [remedy bundle 80, 87]

186.1. Family trips back to South Africa, as part of annual benefits £6,400 In the spreadsheet provided by the parties on 12 December with net payments substantially agreed, this item is not agreed and the Claimant has claimed figures in excess of his Updated Schedule, namely £13,788 in December 2022, £14,913 in December 2023 and £15,510 for 2024;

186.2. Annual Trips for Spouse Home to USA (expensed), as part of annual benefits £3,000;

186.3. Daughter's flight home with family previously not claimed, as part of a one-off miscellaneous expense £1,800;

187. The Respondents argue that this was not an entitlement to an payment, but an entitlement for expenses to be covered, and further that the Claimant has provided no evidence of such expenses. As to the annual trips for spouse the Respondents makes the point that the Claimant is now based in US will not be encouraged these expenses.

188. The Claimant maintains that this is a recoverable loss as an annual benefit he lost from dismissal.

189. As to evidence, it appears that £8,610.05 worth of family travel was incurred on CyberShift Boomerang [D/7262] in July and August 2019, representing 6 flights. The supporting documentation suggests that there were three flights from the UK to South Africa [D/7263-5] and two flights from Cleveland Ohio to the UK [D/7266-].

190. In September 2019 Mr Andre refused to approve the "family trip" as he was not sure if it was "correct". He was advised in an email dated 11 September 2019 by Ms Tomczak that even though he was on garden leave he was entitled to benefits under the terms and conditions of his employment which included one return family flight year to South Africa and 2 return flights for his spouse from the UK to USA (all travel in economy).

191. It is unclear what class of travel the flights to South Africa evidenced are. The flights from Cleveland to the UK are "Global Premier Upgrades", which the Tribunal assumes is a more expensive option than economy flights, and therefore falling outside of the contractual entitlement.

192. The fact that the Claimant may not have claimed these items since termination of his employment with the Fourth Respondent is not determinative of the issue. The measure of damages is to put him in the position as if the tort had not occurred. Had he remained in employment, we find on balance of properties that he would make a claim and been reimbursed for it.

193. We not satisfied on balance of probabilities that he has proved either the £1,800 one-off miscellaneous claim for his daughter's flight, nor the escalating value of expenses contended for family flights in December 2022 and subsequently in 2023 and 2024.

194. On the other hand there was a contractual entitlement, as Ms Tomczak recognised in her email. We find that £6,400 (the figure in the updated schedule of loss) is a reasonable estimate for the cost of six long-haul flights (4 to South Africa; 2 transatlantic), bearing in mind that they should be economy but that if taken at for example a traditional holiday break such as Christmas or Easter, it might be not be possible to find the cheapest prices. In those circumstances we will award **£6,400 p.a.** for the remainder of Mr Cowie's employment for the combined flights to South Africa and transatlantic flights, but not an additional £3,000 element claimed which appears to us to be in excess of the contractual provision for economy flights and on the balance of probabilities not likely to be covered.

Private medical insurance

195. The Claimant claimed **£1,700** p.a. which the Respondent agrees pending evidence.

196. The evidence is not entirely complete, but there is evidence of the Bupa annual premium being £1,642.91 back in 2018/9 when the Claimant first moved to the UK. We infer

197. On this basis the Tribunal will allow the sums claimed for annual private medical insurance.

Life insurance

198. In the third page of the Claimant's Reply to Respondent's Counter Schedule [R/136] the Claimant clearly agreed not to pursue this item in view of comments in the Counter Schedule.

199. It was somewhat surprising therefore to see that this item reappear in the Claimant's "agreed" excel spreadsheet.

200. **£0** is awarded for this item.

MISCELLANEOUS EXPENSES

201. We remind ourselves that the burden is on the Claimant to prove these losses.

202. Fuel for private vehicle was not pursued. **£0**.

203. USA tax submission claimed as £1,081.20 (a conversion from USD$1,265) for an invoice dated 10 June 2020. We are not satisfied that the Claimant had a contractual entitlement under his UK terms and conditions for this item to be covered. **£0**.

204. Hotel accommodation for which £10,394 was claimed and car hire £2,855. We accept the position of the Respondents that this appears to be an attempt to recover a "vacation" on expenses. We are not satisfied that any of this would have been paid or should be recovered as part of this claim. **£0**.

205. Pet relocation for which £9,800 is claimed. It is clear from the section of the Local Plus Policy dealing with items not covered [D/8184] that transportation of pets is not covered. **£0**.

206. Second shipping container for household goods for which £11,981 is claimed. There are invoices from Pickfords removals dated 8 & 10 June 2020 in support of this claim [D/7870-1]. The Local Plus Policy at clause 9.9 covers the shipping of household goods up to the limit in appendix C [D/8183]. Appendix C provides, in the case of unfurnished accommodation, for 35cbm contained + 10 cbm per child [D/8189]. We note that two provisions for physical move home possessions had been made – £11,000 for the initial move and £8,000 after sale [D/4238-9]. Mr van der Aa confirmed that the Claimant stayed within the policy allowable cubic footage. We find that on balance this sum would have been paid and can be recovered in full. **£11,981**.

207. Air fares for which £7,201 is claimed. The Claimant relies on [D/7864-7904]. This does not however provide evidence for the sum claimed. D/7867 is evidence of a flight from London to Cleveland on 20 November 2019, cost $1,206.85. Taking a conversion rate of USD$ per £ as 1.2 suggests in round figures a figure of **£1,000**, which we allow.

208. Taxi, £170 is claimed, evidenced by a receipt dated 5 September 2019 to the Claimant's home address from Heathrow airport. We consider this should be recovered at **£170**.

209. Cost of selling US home for which £29,763 is claimed. That the amount was expended is evidenced by a "Seller's Settlement Statement" from the Ohio Real Title Agency, LLC, which shows costs, totalled in a handwritten note at $36,013.25. As to the Claimant's entitlement to recover this sum, this type of expense is not covered by the Local Plus policy. Mr Van der Aa acknowledged in an email dated 22 February 2019 that the Claimant was out of pocket [D/4237], but describe the house sale costs and house closing costs as "debatable". He said that Mr Andre wanted to know the cost before he would agree anything.

210. Back on 11 August 2018 Mr van der Aa emailed the Claimant in the following terms:

> "we are willing to assist you in the costs of selling your house but you only sent me the estimate this week. I need to clear this with Patrick [Andre]"

Mr van der Aa then put some pressure on the Claimant to agree new terms to move to the UK without this question of US sales cost being fully agreed. We find that there was an intention (certainly in Mr van der Aa's mind) to pay something to "assist" the Claimant, but this was by no means a blank cheque, nor was there a concluded agreement on this point. It is not clear that the parties agreed in terms that the full cost of the U.S. House sale would be covered. Mr Andre wanted to know what the actual cost was going to be. We find that the Respondents would have provided some assistance, amounting to less than the full amount claimed but nevertheless a substantial and meaningful sum. Doing the best we can we assess that figure as **£15,000**, which we award.

211. Tax advice for which £3,000 is claimed. We do not find that the Claimant has, to the required standard, evidenced that he paid this sum and his entitlement to recover it. **£0**.

Retirement to South Africa

212. The side letter provided that the company would repatriate the Claimant and his spouse to the USA or South Africa in line with the Vesuvius Long-Term Assignment Policy. The repatriation allowance under that policy is to allow one twelfth of base salary to cover all miscellaneous incidental expenses associated with the relocation to the home country, but individual relocations expenses would not be covered [D/8154].

213. On the balance of probabilities we find that the Claimant would have chosen to relocate and been paid a one month settling in allowance on relocation at retirement £28,333 (1/12th base salary) but no other item. We are not satisfied that the Claimant was entitled to recover a fee associated with the new house

South Africa of £61,400, nor a sum for moving dogs, furniture, airfares, etc of £33,000.

214. We award **£28,333**.

Other expenses

215. We are not satisfied that the £2,400 claimed for "travel expenses between USA and New Zealand to jobhunting" and the £3,900 for "expenses incurred travelling between UK and US to find US job" have been adequately evidenced nor that these were reasonably necessary steps to mitigate the Claimant's loss. **£0**.

Credit for income received

216. We note that the Claimant gives credit against his loss of income for the following sums:

216.1. Annual salary with Imerys $207,692 (1.2 exchange rate suggests £173,076);

216.2. Annual benefits £12,882;

216.3. Annual bonus decided in April 2022 £38,790;

217. It was not clear to the Tribunal whether the mix of currencies in the schedule was deliberate or accidental.

218. As to the annual bonus to be decided in April 2023 the Claimant's simply says TBC (to be confirmed). In the absence of any other data, the best the Tribunal can do is to assume a bonus at the same level, **£38,790**.

219. *Gross income for the period April 2021 – April 2023* - for ease of calculation we have assumed that the Claimant received an annual package of salary plus benefits plus bonus of £224,749, which we have apportioned on the basis of 89 weeks in the past (for ease calculation to 31.12.22) and 15 weeks' future loss (from 1.1.23), giving an income of **£384,666** for credit to be given for in the past loss period and **£64,831** in the future loss period.

220. The Claimant contends in his Reply [R/149 paragraph 1.23] that he has a residual earning capacity as a consultant earning **£50,000** per annum. We accept this position which was not challenged at the remedy hearing and find that credit should be given accordingly. We find that **from 1 May 2023 onward he will earn £50,000 p.a**. Again credit should be given for that.

221. The Tribunal assumed, although this may not be correct, but all of the sums in this section are gross rather than net and would be subject to US tax deductions since the Claimant was working and has relocated to the US throughout this period. The Claimant is requested to confirm this provide and the appropriate net figures all in GBP, with supporting evidence.

Discount for accelerated receipt

222. Both parties agree that in principle there should be a discount for accelerated receipt of sums representing future losses. Neither party suggested a particular figure.

223. The Tribunal considers that a discount of **5%** for future losses is appropriate. Given that the element of future loss is a little over one year from 1 January 2023 to April 2024, using a broad brush the Tribunal will apply a single 5% deduction in respect of future losses.

ACAS uplift

224. The Claimant claims an 10% uplift for an unreasonable failure by the Respondents to comply with the relevant ACAS Code on conduct/grievances. The Schedule of Loss sets out the matters relied upon at paragraphs A-O.

225. The uplift under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 is engaged in two ways.

226. First, although the Fourth Respondent has pleaded that the dismissal was some other substantial reason ("SOSR") our finding is in reality that both the Second and Third Respondent considered this to be a performance dismissal. This was not SOSR where capacity was not in issue. The significance of that is that the Claimant ought to have been invited, in writing, to a disciplinary hearing and given an appeal right. He was not granted these basic procedural rights.

227. Second, there was a grievance, which we find was not satisfactorily handled. There was no grievance meeting. The Claimant did not have the benefit of an appeal.

228. We find that these failures were unreasonable.

229. As to the level of the uplift, it is appropriate to take account of the absolute value of the uplift as well as the percentage. In other circumstances, in a lower value case it might have been appropriate to make a higher percentage increase under section 207A. We find that the Claimant has realistically contended for an uplift at a lower end of the scale. Taking account of the substantial award of damages involved in this case we reduce the uplift figure further from 10% to **7.5%**. In our assessment that strikes the appropriate balance between taking account of the procedural failures on the one hand and not overcompensating the Claimant on the other.

NON-FINANCIAL LOSSES

Injury to feeling

230. The Claimant contends that there should be a separate awards for injury to feeling, totalling £54,000 comprised of £12,000 for the protected disclosure detriment, £12,000 for victimisation and £30,000 for discrimination, including dismissal.

231. By contrast the Respondents contends for a single order of £15,000.

232. Awards for injury to feeling are to compensate the successful claimant for the effect of the discrimination/detrimental treatment on them, not to punish or penalise respondents.

233. We have considered the Claimant's evidence on injury to feeling in his witness statement on remedy:

> "40. It is hard to describe fully the mental anguish that I suffered as a result of the company's treatment. It was severe and lasting. I had devoted 37 years of my life to the company.
>
> 41. I lost confidence. I felt very low. In late 2019 I suffered deeply depressive and anxious periods that I had never had before.
>
> 42. From August (D/7182) to December 2019 I visited a doctor several times. There was concern about my heart. I was prescribed medication to help with anxiety and sleep, including Diazepam.
>
> 43. I still do not really have a full night's sleep but am fortunately not using medication now. I stopped taking medication in mid-2021, concerned about reliance on sleep medication.

234. We accept Mr Cowie's evidence about the effect on him. This is not challenged. We also accept that that his low feelings and anxiety have been caused by his discriminatory treatment.

235. We accept Ms Belgrove's submissions that where there are different forms of discrimination arising from the same act, a composite award is appropriate. It is the same injury. We also accept her submission that the usual award is that in the case of concurrent discriminators each individual respondent is jointly and severally liable and there is not discretion to apportion liability, except where the injury caused by the claimant is "divisible".

236. Although the Tribunal has not found precisely the same unlawful acts proven against each one of the four respondents, this is not a case in which there is "divisible harm" which could sensibly be apportioned to different causes of action nor successful allegations within the claim nor to specific Respondents. From his point of view from late 2019 he has felt low and anxious. We note that in 14 April 2021 he received an offer of employment and in mid-2021 he stopped taking medication.

237. Tribunals may have regard generally to the level of compensation awarded in personal injury cases. Mr Cowie has not put his case as one of personal injury, we do not have expert medical evidence and it is not the case that Tribunals should attempt to read across precisely from the Judicial College Guidelines for personal injury, but we have had regard in to the level of damages for psychiatric damage, as a point of reference rather than determining the precise amount in this case.

238. We have taken account of the effect on the Claimant. We that happily he has been able to commence work in another role which we infer from the limited information we have about it is a demanding role requiring a relocation back to the USA. We find that in the case of the Claimant there is an element of stoicism in getting on with things. That is to his credit, and in the context of his claim for financial losses demonstrates that he mitigated his losses.

239. We find that the injury to feeling was significant but not at the top end of the scale of the cases that the Tribunal deals with. The Tribunal finds that the injury to feeling this case is toward the upper end of the middle *Vento* band as updated for claims brought from April 2020 onward.

240. In our assessment the appropriate level of compensation is **£20,000** for injury to feeling.

241. All four Respondents are jointly and severally liable for this award.

Aggravated damages

242. The Claimant claims £6,000 aggravated damages. In the schedule of loss the reason for this is:

> "The Claimant claims aggravated damages based on the extent of the detriment and upset that he has suffered after a 38-year career; the serious nature of the Company's unlawful treatment of him; the Respondents' complete failure to apologise at this point; the nature of the victimisation imparted upon him; and the Respondent's failure as yet to take any action against the perpetrators of the discrimination and victimisation.

243. Guidance on awarding aggravated damages was provided by the Employment Appeal Tribunal in the case of *Commr of Police Metropolis v Shaw* [2012] ICR 464 EAT (endorsing test from *Alexander v Home Office* [1988] ICR 685):

> "... compensatory damages may and in some instances should include an element of aggravated damages where, for example, the defendant may have behaved in high-handed, malicious, insulting or oppressive manner in committing the act of discrimination"

244. It may be appropriate award to make a separate award for aggravated damages where conduct is based on prejudice, animosity, despite or vindictiveness if the Claimant is aware of the motive or by subsequent conduct

such as where a case is conducted in an unnecessarily offensive manner or serious claimant is not taken seriously.

245. Underhill J in *Shaw* doubted whether it was necessary to make a separate award for aggravated damages, although this Tribunal acknowledges that that is sometimes the approach that Tribunals take.

246. As to the extent of the detriment and upset, the Tribunal has factored this in to the level of the award for injury to feeling. Although the award for injury to feeling is dwarfed by the financial losses in this case, the award of £20,000 is not a trivial sum and in the context of other cases would be seen as being substantial.

247. This litigation has been fought robustly on both sides and it is right to say that there has been little by way of conciliation.

248. We do not find however that there is any particular feature of case that suggests high-handed, malicious, insulting or oppressive conduct that has demonstrably added to the degree of distress suffered by the Claimant that was inevitably suffered by him in the losing of his job after a career with the Corporate Respondents for so many years. In these circumstances we are not going to make an additional award for aggravated damages.

Interest

249. Interest on injury to feeling is calculated at 8% on the date of discrimination to the date of assessment (1,240 days).

250. Injury past financial losses will be calculated at 8% from the midpoint between 1 August 2019 and the date of assessment.

LEGAL COSTS

251. Legal costs are referred to in the scheduled loss [R/95].

252. This is not a fully argued costs application, and we make no determination upon it.

253. The parties of course will be aware that costs do not “follow the event” in Employment Tribunal litigation and the costs jurisdiction is restricted by the Tribunal rules. The parties may wish to reflect before pursuing a costs application given that criticisms could be made in respect of the conduct of both sides in this litigation.

FINALISING FINANCIAL LOSSES

Settlement

254. The decisions on quantum and points of principle decided by the Tribunal in this remedy decision mean that there should not be a significant amount of uncertainty and the case should be capable of settlement.

255. Parties are encouraged to see whether they can agree these sums without further reference to the Tribunal.

Net income

256. The parties are requested to attempt to agree the relevant **net** figures for both the income that Mr Cowie would have received in employment and the income that he has received post-termination based on our findings above.

LTIP/Dividends

257. The parties are requested to assist identify the *net* LTIP vesting/dividend losses in the four different periods of loss identified by the Tribunal discussed in detail above.

Grossing up

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.

CASE MANAGEMENT ORDER

1. The Claimant shall by **18 January 2023** provide a Schedule, in an Excel compatible file, providing clear calculations and totals:

   1.1. Reflecting the judgment sums above;

   1.2. Providing net figures in pounds sterling for post-termination income from Imerys (with supporting evidence) and the assuming future contracting work;

   1.3. Calculating interest on past losses;

   1.4. Deducting 5% from future losses for accelerated receipt;

   1.5. Applying ACAS uplift;

   1.6. Grossing up, with details of calculations.

2. The Respondent shall by **8 February 2023** respond to the Schedule indicating whether any points are in dispute and if so providing its own calculations.

3. By **22 February 2023** the parties shall jointly submit an Excel sheet to the Tribunal either with entirely agreed figures for judgment to be entered or if there are points in dispute, what the dispute is and relevant references. The parties should indicate whether in their view a further hearing is required or whether this can be dealt with as a paper exercise.

Employment Judge Adkin

Date 22 December 2022

WRITTEN REASONS SENT TO THE PARTIES ON

.10/01/2023

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.