[2022] UKFTT ** (TC)**

TC *** V**

INCOME TAX – ITEPA 2003 section 401 – taxpayer received £6 million payment from former employer in settlement of Employment Tribunal proceedings and claims relating to taxpayer's prior employment and its termination – taxpayer's employment had been terminated a year before receiving the payment – was the settlement payment indirectly in consequence of, or otherwise in connection with, the termination? – Held: yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/01960

BETWEEN

SHIVANI MATHUR **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ZACHARY CITRON
MR NOEL BARRETT

The hearing took place on 15-17 December 2021. The form of the hearing was V (video). A face to face hearing was not held because of the pandemic. The documents to which we were referred were an electronic hearing bundle of 2,217 pdf pages and an (updated) authorities bundles of 561 pdf pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

David Goldberg QC, instructed by Macfarlanes, for the Appellant

Akash Nawbatt QC and Joshua Carey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

OVERVIEW

1. The appeal was principally about whether a payment of £6 million from her former employer in settlement of Employment Tribunal ("**ET**") proceedings was received by the appellant ("**Ms Mathur**") *indirectly in consequence of*, or *otherwise in connection with*, the termination of her employment a year earlier (the italicised words being the key provisions of s401(1) Income Tax (Earnings and Pension) Act 2003 ("**ITEPA**")).

2. References in this decision to sections (or "s"), chapters and parts are to sections, chapters and parts of ITEPA, unless otherwise indicated.

EVIDENCE

3. The hearing bundle contained Tribunal documents, Ms Mathur's witness statement dated 26 February 2021, relevant documents from the parties' lists of documents, a copy of the bundle for a preliminary hearing in the ET on 21-22 January 2016 (running to nearly 1,000 pages) and correspondence between the parties. We also heard oral evidence from Ms Mathur.

4. We treated Ms Mathur's evidence with a degree of caution (and specific instances of where we did not accept her evidence are referred to in the "Discussion" section below) as, in a number of respects, she was giving her opinion on matters, or recalling details of events that took place five or more years ago; and in our view, in some matters, her opinions and memories of details were not necessarily reliable, given her interest in the outcome of this case. In those instances where we had doubts, we asked ourselves if Ms Mathur's evidence was corroborated by contemporaneous documentation or by more objective (as regards the outcome of this appeal) sources of evidence (such as the respondents in her ET proceedings); and, if her evidence was not so corroborated, we put less weight on it.

FINDINGS OF FACT

5. We make the following findings of fact, as well as further findings of fact in the "Discussion" section below, on the evidence before us and the balance of probabilities.

The termination of Ms Mathur's employment (April 2015)

6. On 30 April 2015, Ms Mathur's employment was terminated by her employer, DB Group Services (UK) Limited (the "**Employer**"), a company in the group headed by Deutsche Bank AG (the **"Bank"**). We will refer to this as the "**Termination**". Ms Mathur had been continuously employed by the Employer for nearly seven years (since July 2008); and was a managing director in the Corporate Bank and Securities division of the Bank at the time of the Termination.

7. A week earlier, on 23 April 2015, in connection with an investigation by the New York State Department of Financial Services ("**DFS**"), a regulator of the Bank, into the manipulation of interbank offered rates, the Bank had entered into a negotiated settlement with DFS which included a consent order (the "**consent order**"). The consent order was made under New York Banking Law and was an agreement between DFS and the Bank. It was approved by the Bank's management board on the day of its release. It contained a monetary settlement – a civil monetary penalty of $600 million payable by the Bank. The "Employee Discipline" section of the consent order read as follows:

> "71. As a result of the investigation, numerous employees that were involved in the wrongful conduct discussed in this Order, including those in management positions, have been terminated, disciplined or are otherwise no longer employed by the Bank, as a result of their misconduct.
>
> 72. Ten of the individuals centrally involved in the misconduct were terminated as a result of the investigation. Four of these employees were reinstated pursuant to a German Labour Court determination, and two of them remain at the Bank. Three individuals were placed on leave and subsequently their positions were made redundant as a result of restructuring. At least eleven individuals involved in the misconduct left the Bank before the investigation began. At least six individuals were subject to various forms of discipline including reduction in bonus, receipt of a warning letter, notation in a personnel file, and mandatory remedial meetings, management counseling and targeted communications and compliance trainings.
>
> 73. However, certain employees involved in the wrongful conduct remain employed at the Bank. The Department orders the Bank to take all steps necessary to terminate the following seven employees, who played a role in the misconduct discussed in this Consent Order but who remain employed by the Bank: one London-based Managing Director, four London-based Directors, one London-based Vice President, and one Frankfurt-based Vice President. If, after taking whatever action is necessary to terminate these employees, a judicial or regulatory determination or order is issued finding that such action is not permissible under local law, then this employee shall not be allowed to hold or assume any duties, responsibilities, or activities involving compliance, IBOR submissions, or any matter relating to U.S. or U.S. Dollar operations.
>
> 74. Additionally, the four terminated employees that were reinstated due to the German Labour Court decision who remain at the Bank shall not be allowed to hold or assume any duties, responsibilities, or activities involving compliance, IBOR submissions, or any matter relating to U.S. or U.S. Dollar operations."

8. On the same day (Thursday 23 April) Ms Mathur was told by the Bank that she was one of the seven employees "who played a role in the misconduct" per paragraph 73 of the consent order (the ("**Misconduct Employees**") and was placed on a period of temporary paid leave while the Bank considered next steps in the light of the consent order.

9. As to why Ms Mathur was amongst the Misconduct Employees, Ms Mathur's US lawyer told her this by email dated 30 April 2015:

> "I had a brief call with Paul Weiss [the Bank's lawyers] and I asked for any color as to how and why [Ms Mathur] was chosen by DFS. Paul Weiss made it clear that they had very limited information and "what you see is what you get," but told me the following:
>
> - DFS has tremendous leverage over the Bank – they supervise the Bank's license in New York.
>
> - While DFS entered the case very late, they made it clear from the beginning that they were seeking individual liability for what they called "personal accountability."

- Like with other regulators, the Bank was obligated to provide documents to DFS. This generally included documents from U.S. servers as a subset of what was given to other regulators (the exceptions being anything due to data privacy laws). But, DFS may have received additional material from other regulators, such as the CFTC, DOJ, or even the FCA. The Bank does not know the nature of the sharing arrangements.

- DFS reviewed the Bank's material and provided a list of names to the Bank on the Sunday night before the Thursday settlement. The list included [Ms Mathur]'s name. DFS/Bank discussed the request and DFS said they had a "zero tolerance" for anyone who made requests for higher or lower rates."

10. Ms Mathur instructed Stephenson Harwood, a City law firm, for employment law advice on Monday 27 April 2015.

11. The Termination letter from the Employer to Ms Mathur dated 30 April 2015 said the following:

> (1) "The [Employer] has given careful consideration to the [consent order] and has determined that the instruction is clear. We believe that this amounts to a substantial reason for termination."
>
> (2) "The Bank appreciates that the decision to dismiss you in light of the [consent order] may cause you financial hardship. Accordingly, the Bank is prepared to offer you compensation for termination of employment. You will be required to sign a Settlement Agreement with the Bank (copy enclosed), which requires that you obtain legal advice from an England or Wales qualified lawyer as to the terms and effect of the Settlement Agreement and, in particular, its effect on your ability to pursue your rights before an Employment Tribunal".

12. The compensation offered in the accompanying draft "settlement agreement" was the sum of £82,135 "for the termination of your employment with the [Employer]". Clause 5 of the draft ("Waiver") said the agreement was in full and final settlement of claims Ms Mathur may have for a list of matters including unfair dismissal, discrimination, harassment, etc.

13. The Bank calculated the figure of £82,135 by reference to what it considered the maximum compensation Ms Mathur could recover (based on the formula at the time) in the event of a successful unfair dismissal claim – also known as the "unfair dismissal cap".

14. Ms Mathur did not accept the Bank's offer to settle for £82,135.

15. A meeting that Ms Mathur was due to have with the head of UK employee relations at the Bank on 23 April 2015 was cancelled due to her being put on temporary paid leave of absence (due to the consent order) on that day. The background to that meeting is given in the emails summarised in Appendix 1 to this decision.

The ET proceedings: August 2015-May 2016

16. On 14 August 2015 Mathur commenced ET proceedings against the Bank, the Employer and two individuals who were senior Bank employees (one of whom, "**PL**", was the global head of human resources for the Bank). The 'grounds of claim', prepared by specialist employment law counsel (Mohinderpal Sethi) and running to 30 pages, comprised complaints of:

(1) inequality of terms (for work of equal value) under the Equality Act 2010;

(2) harassment related to sex under the Equality Act 2010;

(3) direct discrimination on grounds of sex under the Equality Act 2010;

(4) victimisation under the Equality Act 2010;

(5) whistleblowing detriments under the Employment Rights Act 1996;

(6) automatically unfair dismissal because Ms Mathur made protected disclosures under the Employment Rights Act 1996; and

(7) ordinary unfair dismissal under the Employment Rights Act 1996.

17. Section 11 ("The Claims") of the 'grounds of claim' (following the numbering above) is reproduced in Appendix 2 to this decision. It will be seen from this that

(1) claims (1) to (5) related to the period of Ms Mathur's employment; following Mr Goldberg QC's skeleton argument, we shall use the word "**discrimination**" (and "**discriminatory**") as shorthand for the conduct complained of in those claims;

(2) claims (6) and (7) related to the Termination;

(3) claims (3) and (4) included the Termination as part of the complaint.

18. Ms Mathur claimed that she had suffered discrimination at the hands of a "white male cartel" at the Bank.

19. On 16 September 2015, the Bank, advised by Baker & McKenzie, another City law firm, and a leading employment law counsel (Christopher Jeans QC) filed a response, defending all Ms Mathur's claims in a 22-page 'grounds of resistance' document.

"Scapegoating" arguments

20. Part of Ms Mathur's case was that she had been "scapegoated" in the sense that she had been included amongst the Misconduct Employees whereas, she said, other, more senior individuals at the Bank bore greater responsibility for the misconduct described in the consent order and had been "protected". She made the argument thus in her response (which she had been directed by the ET to make), on 22 November 2015 (running to 85 pages), to the respondents' request for further information, under the heading "General Matters", at paragraph 1.8:

> "1.8.1 Despite being one of the higher revenue generators and with consistently high performance appraisals, it is clear that [Ms Mathur] has been subjected to a sustained campaign of harassment, direct discrimination and inequality of pay terms, that she has made [protected acts/protected (whistleblowing) disclosures] about the same, and other significant matters, and that she has suffered victimisation and detriments as a result.
>
> 1.8.2 This campaign, and her complaints about it/other significant matters, continued from the start of her employment up to and including her dismissal, and were the real reason for her ultimate dismissal.
>
> 1.8.3 [Ms Mathur] was, in the unguarded words of the Bank's own European head of Press and Media Relations, "*thrown under the bus*" to satisfy the Bank's desire to: settle actions brought by an overseas regulator; protect its

senior male management "Male Cartel" or "Inner Circle"; and avoid further prosecution and even larger fines."

21. In our discussion below we shall refer to the arguments summarised in the preceding paragraph as the '**scapegoating'** arguments.

Schedule of loss directed by ET and "stigma" arguments

22. On 13 November 2015, Ms Mathur served a 'schedule of loss' in response to the ET's order that she provide a properly itemised statement of the compensation and any other remedy sought. The schedule

(1) stated that it had been prepared on the basis of the financial information currently available to Ms Mathur – it said she had not received from the Bank details of her "male comparators' " fixed and variable payment and benefits entitlements; and so Ms Mathur

(a) was unable to particularise her losses arising from her unequal pay and/or pay discrimination claim; and

(b) did not know what her final salary, benefits and bonus would have been had she not been subject to unequal pay, discrimination, etc.

Accordingly, Ms Mathur's losses were calculated using her gross 2014 salary and benefits figures and an average of her annual bonuses over the seven years of her employment; and the figures set out in the schedule of loss would need to be recalculated once Ms Mathur's true entitlements to salary, bonus and benefits were known;

(2) acknowledged that certain of the sums claimed would be subject to tax to the extent that they exceed £30,000;

(3) stated that, as a result of the stigma she suffered on the labour market and the irreparable damage to her reputation as a result of the Bank's treatment of her leading to and including her public dismissal, Ms Mathur did not expect to obtain equivalent or similar work to that she had performed for the Bank for the remainder of her normal working life (in our discussion below, we shall refer to this as the **'stigma'** argument);

(4) quantified loss of earnings from the Termination to the expected hearing dates as £1,151,114 and losses from that expected hearing date to retirement (at 65) as £14,693,631.67; the total of these figures was a "compensatory award" of about £15.8 million;

(5) said that losses arising from inequality and direct discrimination on pay were "TBC" "(subject to disclosure)";

(6) quantified non-financial loss as £69,250 (principally £33,000 for injury to feelings, £20,000 for injury to health, and £15,000 for aggravated damages);

(7) presented "total amount claimed" (before adjustments such as 25% uplift for failure to comply with ACAS code, interest, and gross up of taxable element in excess of £30,000) as just over £15.9 million. The "total award" figure (including adjustments that were known) was just under £20 million.

23. A two day preliminary hearing in the ET was set down for 21-22 January 2016 to decide:

(1) whether any of the claims were brought out of time and should be dismissed; and

(2) which of the respondents the various claims should proceed against.

"Culmination" arguments

24. On 7 January 2016, Ms Mathur served her witness statement for the ET preliminary hearing (running to 78 pages). At paragraph 8.4, the statement said the "unlawful treatment" she suffered at the Bank was "thoroughly consistent in character" and "ultimately boiled down to" the following:

(1) pay discrimination;

(2) non-promotion;

(3) marginalisation/exclusion/deliberate lack of co-operation/instructions to colleagues not to work with her;

(4) problems with her mandate;

(5) bogus complaints and false negative feedback;

(6) unilateral changes to her role, re-allocation/reduction in her duties and responsibilities, and offers of inferior roles;

(7) delays, unresponsiveness and lack of support;

(8) others taking false credit for her work;

(9) reneging on her appointment to an executive committee;

(10) general bullying, aggression, derogatory and offensive conduct; and

(11) ultimately her suspension and unfair dismissal.

25. At paragraph 8.12 Ms Mathur's statement stated:

> "My dismissal and the action of the Respondents in connection with my dismissal, form an integral and inseparable part of the overall state of affairs I found myself working in and the unbroken chain of unlawful treatment to which I was subjected".

26. At paragraph 183, in a very similar vein, she stated that

> "my dismissal and the actions of the Respondents in connection with my dismissal forms an integral part of the overall state of affairs I found myself working in and the unbroken chain of Unlawful Treatment to which I was subjected".

27. Ms Mathur's counsel's 40-page skeleton argument for the ET preliminary hearing, dated 21 January 2016, stated at paragraph 2.8:

> "Ms Mathur's dismissal was, in fact, an integral part of the Bank's Unlawful Treatment, with the DFS Consent Order a convenient pretext for getting rid of her without having to deal with her complaints. At the time of her dismissal, all of Ms Mathur's issues were outstanding and some were purportedly under active investigation. This much is confirmed by the Respondents in paragraphs 5.15 and 5.17 of their Grounds of Resistance. Her claims of pay discrimination and the Mis-Marking of Books were being investigated at the time she was dismissed in April 2015, with her compensation (including the most recent pay decision in February 2015) under review by the Bank's

> Employee Relations ("ER") team. That investigation was never completed. Further, Ms Mathur was dismissed less than a week after she refused, on ethical grounds, to sign off accounts on which there had been unauthorised trading by a colleague who was not an FCA Approved Person. Ms Mathur's refusal to sign off these accounts threatened to cause difficulties for the Bank with its regulators."

28. At paragraph 4.24 the skeleton argument stated: "Ms Mathur's claim is that her dismissal was not unrelated to these outstanding issues; on the contrary the Bank dismissed her in material part because of them and/or her disclosures."

29. In our discussion below we shall refer to the arguments summarised in the preceding five paragraphs as the '**culmination'** arguments (i.e. that the Termination was the culmination of longstanding discriminatory conduct against Ms Mathur).

30. The "scapegoating" and "culmination" arguments came together thus in paragraph 221 of Ms Mathur's witness statement for the ET preliminary hearing:

> "I do not believe that I was the "*London-based Managing Director*" identified in the [consent order]. Alternatively, if I was named by the Bank, then I was made a scapegoat, yet another manifestation of the discriminatory state of affairs under which I laboured for nearly six years, and/or retaliation to my protected disclosures."

Bank witnesses' statements for ET preliminary hearing

31. In her witness statement for the ET preliminary hearing, dated 7 January 2016, PL said this in the context of steps she took after 23 April 2015 to effect the Termination:

> "Given that the [consent order] had already been finalised and that the wording of the requirement was clear, I concluded that there was no practical alternative but to dismiss all seven employees named in the [consent order], including [Ms Mathur]." (paragraph 14)
>
> "We had to dismiss [Ms Mathur] because she was identified in the [consent order]." (paragraph 28)

32. In his witness statement for that preliminary hearing, also dated 7 January 2016, the co-general counsel of the Bank said this:

> "Under paragraph 73 of the [consent order] the Bank was required to "take all steps necessary to terminate" the employment of seven employees. One of those seven individuals (i.e. the person referred to as "one London-based Managing Director") was Ms Mathur."

33. The ET preliminary hearing listed for 21-22 January 2016 was postponed at the Bank's request.

"Revised" schedule of loss

34. The parties held a "without prejudice except as to costs" meeting on 9 February 2016 but made no substantive progress towards settlement.

35. In preparation for that meeting, Ms Mathur sent the Bank a statement with a "revised" schedule of loss, marked up to show changes from the schedule of loss produced (at the direction of the ET) on 13 November 2015. The statement said this about the figures in the "revised" schedule of loss:

> "1.3 … in her Schedule of Loss (dated 13 November 2015), Ms Mathur set out in detail what her past and projected losses are. The preparation of that Schedule was severely hampered by the Bank's refusal to provide relevant financial data about Ms Mathur's comparators (despite the requests for information made in correspondence, see the letters of 16 October and 2 November 2015). As a result, no figures could be included in the Schedule for Ms Mathur's losses in respect of pay inequality and pay sex discrimination. The Bank has therefore known for some time, that the figures in the Schedule of Loss would only increase once those losses could be calculated.
>
> 1.4 The preparation for this meeting has been similarly hampered by the Bank's selective and piecemeal approach to the provision of financial data which is unquestionably relevant and will have to be disclosed as the case progresses in any event.
>
> 1.5 Despite these difficulties, which are of the Bank's own making, Ms Mathur has endeavoured to re-calculate her past and projected losses based on the limited financial data that has been provided. She is happy to share those re-calculations with the Bank on a without prejudice basis.
>
> 1.6 Without more information, Ms Mathur cannot be more precise at this stage. The Bank, of course, has the benefit of the full set of financial data. It is therefore for the Bank to justify at this meeting why Ms Mathur's figures are incorrect."

36. The more material changes in the "revised" schedule of loss were:

(1) assumed retirement age was 55, rather than 65;

(2) it quantified losses arising from inequality and direct discrimination on pay – as nearly £38.5 million ("TBC subject to disclosure"), calculated as "historic pay inequality/discrimination" (£16.8 million) plus "future pay inequality/discrimination" (£31 million), and subtracting the approximately £9.5 million "compensatory award" (to avoid double counting); and

(3) the "total amount claimed" was just over £48 million. The "total award" figure (including 25% uplift for failure to comply with ACAS code) was just under £60 million.

The settlement: May 2016

37. A mediation meeting took place on Friday 6 May 2016; Naomi Ellenbogen QC was the mediator. Attendees included Ms Mathur and her lawyer from Stephenson Harwood, and Elliot Bates, the lead employment lawyer at the Bank, and the Bank's head of UK human resources business advisory. At the start of the mediation, the Bank offered Ms Mathur £2.1 million; Ms Mathur asked for £15 million.

38. A settlement agreement (the "**Settlement Agreement**") was signed by Ms Mathur and the Employer early on the morning of 7 May 2016 . Clause 1 said as follows:

> "1. BACKGROUND
>
> 1.1. [Ms Mathur]'s employment with the [Employer] (and any [Bank company]) terminated on 30 April 2015 (the 'Termination Date'). The [Employer] has already paid [Ms Mathur] a sum in lieu of her 13 weeks' notice period, any accrued but untaken holiday and expenses (less any

> deductions for income tax and National Insurance Contributions as required by law).
>
> 1.2. [Ms Mathur] issued proceedings against the [Employer], [the Bank], [the Bank] London, [PL] and [JR] for unfair dismissal, sex discrimination, unequal pay, harassment related to sex, victimisation and protected disclosure detriments in the Employment Tribunal on 14 August 2015 under case number 2202143/2015 (the "Tribunal Proceedings").
>
> 1.3. Following discussions between the parties, this Agreement sets out the terms on which [Ms Mathur] has agreed to withdraw the Tribunal Proceedings and compromise all of the claims [Ms Mathur] has or may have against the [Employer], any [Bank company], or any of its or their present or former directors, officers or employees (including, without limitation, [PL] and [JR] together, the "Relevant Persons") in respect of [Ms Mathur]'s employment and its termination."

39. Clause 2.1 of the Settlement Agreement provided for payment (the "**Settlement Payment**") to Ms Mathur of £6 million (the "**Settlement Sum**") "(less such income tax and national insurance contributions if any as [the Employer] is obliged by law to deduct)" "by way of damages". The clause stated that the parties believed that the first £30,000 of the Settlement Sum could be paid to Ms Mathur without deductions for income tax and national insurance. The payment was made without admission of liability by the Employer or the Bank.

40. The Employer deducted of £2,677,460 (the "**Deducted Sum**") from the Settlement Payment under PAYE when making payment to Ms Mathur. This was because it was not prepared to accept any risk in relation to the tax position of the Settlement Payment. It did, however, agree (in clause 2.4) to provide Ms Mathur with reasonable access to any documentation that she may reasonably require to prepare and file any tax return or to dispute any liability for tax etc.

41. Clause 3 required Ms Mathur to give over certain regulatory documents to the relevant regulatory advisers; to return documents relating to the ET proceedings to Stephenson Harwood for shredding or retention; and to return other Bank property in her possession.

42. Under clause 4 the Employer agreed to pay the reasonable fees incurred by Ms Mathur in connection with taking advice on the Termination and the ET proceedings up to a maximum of £400,000 including VAT. The invoice was to be sent directly to the Bank.

43. Stephenson Harwood sent an invoice for £400,000 including VAT to the Bank in respect of their advice to Ms Mathur; and the Bank paid this bill.

44. Clause 5 stated that the Settlement Agreement related to and was in full and final settlement of the ET proceedings and any and all claims Ms Mathur had or may have against the Employer or the Bank for 13 types of legal claim which included breach of contract, unfair dismissal, equal pay and discrimination. Under the clause, Ms Mathur agreed to withdraw the ET proceedings.

45. Clause 6 governed what the parties were to say if approached by the press for a statement regarding Ms Mathur, her employment with the Bank, the Termination or the ET proceedings:

> (1) Ms Mathur was allowed to state "My Employment Tribunal claim has been resolved"; to explain by way of background that the ET claim had been withdrawn as the

parties had reached a settlement on confidential terms; and to state "As such, I am unable to provide further comment save to confirm that throughout my employment with the Company and at the point of my dismissal the Bank had not initiated or taken any disciplinary action against me" (and the Employer was allowed to confirm this). If true, Ms Mathur was also allowed to state "To the best of my knowledge and belief to date, no conduct proceedings have been initiated or taken against me personally by any regulator";

(2) the Employer was allowed to state "Ms Mathur's Employment Tribunal claim has been resolved"; and to explain by way of background that the ET claim had been withdrawn as the parties had reached a settlement on confidential terms. The Employer was not allowed to make any comment on the requirement of the DFS to dismiss Ms Mathur.

46. Ms Mathur agreed to accept £200 in return for the confidentiality obligations in the clause, which included

(1) keeping the terms of the Settlement Agreement confidential (other than to her family and advisers)

(2) not making any statement (of fact, belief or opinion) which directly or indirectly disparaged, was inimical to, or damaged the reputation and standing of the Employer or the Bank;

but these were both subject to a proviso that included not preventing Ms Mathur from making "a statement in connection with any Court or other legal or regulatory proceeding relating to her role during her employment with the [Employer or the Bank] that is necessary in order for her to establish, exercise or defend any legal right of hers".

How the Settlement Sum was arrived at

47. The Settlement Sum was arrived at during the day-long mediation by "horse trading" negotiation; it was not broken down into further amounts or paid by reference to any specific heads of Ms Mathur's claims; and Ms Mathur's schedule of loss (either in its original form as produced at the direction of the ET, or the "revised" form prepared for the "without prejudice" meeting on 9 February 2016) played no part in the negotiations at the mediation meeting. The Settlement Sum was simply the figure that was agreed in order to settle.

48. The Settlement Sum was the subject of emails between Ms Mathur and Mr Bates of the Bank on 23 August 2019. Ms Mathur said she "would like to discuss with you the possibility to submit some evidence (with your consent) to demonstrate to [HMRC] that the payment made by [the Bank] to me was in fact related to the claims pertaining to the period during employment". In response, Mr Bates said:

> "The settlement figure (of circa £6m) was arrived at following the mediation discussions as a "global" figure to settle all of the claims (against the bank, and the two individuals against whom you also lodged claims [JR] and [PL]) and to bring the matters to an end: it wasn't arrived at by adding the unfair dismissal cap against an amount separated to each of the others heads of claim. Before the mediation, I think the bank had made a settlement offer to you of just over £2m, and you had sought ~£15m.

> The settlement sum therefore did not look at just the unfair dismissal cap as being your future losses and everything else as being related to the pre-dismissal matters; not least because your claim was that the unfair dismissal cap should not apply – e.g. that the dismissal was itself discriminatory and thus the cap would not apply to future losses.
>
> There is no document or formula that was used to calculate the portion of your claim that related to your dismissal (and therefore future losses) vs the non-dismissal related matters (such as the equal pay claim, and your discrimination claims regarding previous years' variable comp (or bonus) decisions). The figure that was agreed had regard to our desire to reach an amicable resolution of the dispute without incurring further costs, management time and also further potential publicity."

49. Ms Mathur said this in her witness statement at paragraph 9.4:

> "My evidence is that the Settlement Payment arose from negotiations based on the discrimination and victimisation I experienced during my employment with [the Employer] and the wish of the wider Deutsche Bank organisation to avoid the embarrassment which it would have experienced at a difficult time for the Bank had my claims become public. There was no science to the calculation of the Settlement Payment: none of it was attributable to any particular head of claim; it was just a negotiated figure achieved by skilful negotiation which turned what could be seen as a moral claim into cash. Another way of looking at it is that my claims and I were each a nuisance to the Bank and they paid me £6m to get rid of the nuisance."

The Bank's 2016 accounts

50. The Bank's 2016 accounts stated that the "highest severance payment granted to an individual" in 2016 was €4 million.

Ms Mathur's 2016-17 tax return

51. In her self-assessment tax return for the 2016-17 tax year, Ms Mathur sought repayment of the Deducted Sum. On 30 January 2020, following an enquiry into Ms Mathur's return, HMRC issued a final closure notice in which the HMRC officer amended Ms Mathur's tax return (the "**Amended Return**") in line with his decision, which was: "The payment of £6,000,000 you received following the termination of your employment with the Bank is chargeable under s401 ITEPA 2003 except for an element of £44,000 which I can accept as being in relation to your discrimination claims during employment and therefore unrelated to the termination."

52. The figure of £44,000 was applied in the closure notice because that was the top of the upper band (the most serious cases) per the *Vento* bands for ET awards for injury to feelings.

53. Ms Mathur notified her appeal against the Amended Return to the Tribunal on 6 May 2020.

LAW

ITEPA

54. ITEPA imposes income tax on *employment income*, being *general earnings* (dealt with in Part 3) and *specific employment income* i.e. an amount that counts as employment income by virtue of, inter alia, Part 6 (which deals with employment income other than earnings or

share-related income). Chapter 3 of Part 6 deals with payments and benefits on termination of employment etc: the following provisions fall within that chapter.

55. Section 401 (Application of this Chapter) provides:

> (1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—
>
> (a) the termination of a person's employment,
>
> (b) a change in the duties of a person's employment, or
>
> (c) a change in the earnings from a person's employment,
>
> by the person, or the person's spouse or civil partner, blood relative, dependant or personal representatives.
>
> (2) Subsection (1) is subject to subsection (3) and sections 405 to 414A (exceptions for certain payments and benefits).
>
> (3) This Chapter does not apply to any payment or other benefit chargeable to income tax apart from this Chapter.
>
> (4) For the purposes of this Chapter—
>
> (a) a payment or other benefit which is provided on behalf of, or to the order of, the employee or former employee is treated as received by the employee or former employee, and
>
> (b) in relation to a payment or other benefit—
>
> (i) any reference to the employee or former employee is to the person mentioned in subsection (1), and
>
> (ii) any reference to the employer or former employer is to be read accordingly.

56. Section 403 (Charge on payment or other benefit) provided (at the relevant time):

> (1) The amount of a payment or benefit to which this Chapter applies counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold.
>
> (2) In this section "the relevant tax year" means the tax year in which the payment or other benefit is received.
>
> (3) For the purposes of this Chapter—
>
> (a) a cash benefit is treated as received—
>
> (i) when it is paid or a payment is made on account of it, or
>
> (ii) when the recipient becomes entitled to require payment of or on account of it, and
>
> (b) a non-cash benefit is treated as received when it is used or enjoyed.
>
> (4) For the purposes of this Chapter the amount of a payment or benefit in respect of an employee or former employee exceeds the £30,000 threshold if and to the extent that, when it is aggregated with other such payments or

benefits to which this Chapter applies, it exceeds £30,000 according to the rules in section 404 (how the £30,000 threshold applies).

(5) …

(6) In this Chapter references to the taxable person are to the person in relation to whom subsection (1) or (5) provides for an amount to count as employment income.

57. Section 406 (Exception for death or disability payments and benefits) provided (at the relevant time):

> This Chapter does not apply to a payment or other benefit provided—
>
> (a) in connection with the termination of employment by the death of an employee, or
>
> (b) on account of injury to, or disability of, an employee.

58. Section 413A (Exception for payment of certain legal costs) provides:

> (1) This Chapter does not apply to a payment which meets conditions A and B.
>
> (2) Condition A is that the payment meets the whole or part of legal costs incurred by the employee exclusively in connection with the termination of the employee's employment.
>
> (3) Condition B is that either—
>
> (a) the payment is made pursuant to an order of a court or tribunal, or
>
> (b) the termination of the employee's employment results in a settlement agreement between the employer and the employee and—
>
> (i) the settlement agreement provides for the payment to be made by the employer, and
>
> (ii) the payment is made directly to the employee's lawyer.
>
> (4) In this section—
>
> . . .
>
> "lawyer" has the same meaning as "qualified lawyer" in section 203(4) of the Employment Rights Act 1996 or article 245(4) of the Employment Rights (Northern Ireland) Order 1996;
>
> "legal costs" means fees payable for the services and disbursements of a lawyer.

Case law

Crompton (Special Commissioners)

59. In *Crompton v HMRC* [2009] UKFTT 71 (TC) the taxpayer was in the Territorial Army and received a compensation payment for the actual financial losses he suffered as a consequence of failings of army selection boards (when he applied for other posts within the army, but was wrongly rejected). Subsequent to those failings, he was made redundant and left the Territorial Army.

60. The Special Commissioner held that s401(1)(a) did not apply to the compensation payment: there was no link, joint or bond between the compensation payment and the termination of the taxpayer's employment with the army. The payment was for the selection boards' unfair treatment of the taxpayer but that did not lead to his leaving the army. He left the army either of his own volition or by way of redundancy and not because of his failure to be selected for posts for which he had applied. Accordingly, the compensation payment was not connected with the termination of the taxpayer's employment within s401(1)(a).

61. At [36] of the decision, the Special Commissioner said:

> "I reject the contention that the possibility that Mr Crompton, on his own admission, might not in fact have pursued the claim if he had stayed in the army forms such a link. He might or might not have pursued it. He certainly had not decided that he would not pursue the complaint if he stayed in the army. Even if I assume he would not have pursued the claim if he had stayed in the army the fact that he left was only a circumstance that occasioned his decision to make the claim. It had nothing to do with the merits of the claim or whether it would succeed. That circumstance does not constitute a linkage between the payment and the termination of his employment of the sort envisaged by the legislation."

Colquhoun (Upper Tribunal)

62. In *HMRC v Colquhoun* [2011] STC 394 (UT), another case about s401, the Upper Tribunal said:

> "*Structure of relevant statutory provisions*
>
> [11] The essentials of the statutory provisions with which we are concerned were originally enacted in s 37 of the Finance Act 1960 as an anti-avoidance measure to bring within the charge to income tax a variety of arrangements which made provision for payments as compensation for loss of office, in commutation of pension rights, in relation to changes in terms of employment and similar arrangements. The statutory scheme then, as now, provided for a threshold (then £5,000 and now £30,000) and a long list of exemptions to the payments caught by the anti-avoidance provisions. The exemptions were contained in s 188, ICTA and are now to be found in ss 405–414, ITEPA. It is inherent in the scheme that aggregation will apply where more than one payment has been made.
>
> [12] The statutory language of s 148(2) [the statutory predecessor to s401] has been broadly drawn. That can be seen from the use of words and phrases such as 'indirectly' and 'otherwise in connection with'. 'Otherwise' may simply mean 'in any way' and is consistent with the parliamentary intention to catch a wide range of payments. In *Walker* [*v Adams* [2003] STC (SCD) 269] a compensation payment awarded for constructive dismissal of a former employee fell within the charge to the extent that it related to loss of income but not to the extent that it compensated for injury to feelings. Special Commissioner O'Brien observed (in an appeal relating to s148, ICTA) that: '[t]he word "otherwise" shows that the relevant connection or link may be looser than would be required for a strict causation test.' While we are not entirely clear what is meant by a 'strict causation test' we agree with the general sentiment that the word 'otherwise' does not restrict the scope of s148(2) and is entirely consistent with a broad approach to the application of

> the phrase 'in connection with'. As [counsel for HMRC] submitted, the language could hardly be less prescriptive."

Moorthy (Court of Appeal)

63. In *Moorthy v HMRC* [2018] STC 1028, following the taxpayer's dismissal from his employment on grounds of redundancy, he brought proceedings in the ET against his former employer for unfair dismissal and unlawful age discrimination. Those proceedings were compromised on terms that the taxpayer agreed to accept 'an *ex gratia* sum of £200,000 by way of compensation for loss of office and employment', without any admission of liability by the former employer, in full and final settlement of his existing claims and any other claims arising out of or connected with his employment or its termination. There was no suggestion that any part of the settlement payment related to anything which occurred before the date when the chain of events was set in motion which led to the taxpayer's selection for redundancy and the termination of his employment.

Section 401

64. Regarding s401, the Court of Appeal held that the First-tier Tribunal ("**FTT**") and the Upper Tribunal were correct in holding that the entirety of the payment to the taxpayer fell within the language of s401(1)(a). The payment was at the very least connected with the termination of the taxpayer's employment, and the tribunals had been entitled so to find. It did not matter that the payment was made to the taxpayer after his employment had ceased or that it might have been a payment, in whole or part, of a capital nature. Part of the purpose of s401 was to avoid the need for enquiries of that nature, by deeming any payments that fell within the statutory language to be employment income charged to tax under ITEPA.

65. Henderson LJ said this at [48] about the scope of s401:

> "Counsel for Mr Moorthy also advanced a bold submission that the language of s 401 is not in fact widely drawn, and if Parliament had intended any or all connections to suffice, it would not have used the specific terms 'in consideration or in consequence of ' to limit the residual words in s 401(1). In my judgment, this submission puts the matter the wrong way round. The word 'otherwise' before 'in connection with' shows that the kinds of connection envisaged by the section must be wider than the specific examples given of payments and other benefits received directly or indirectly in consideration or in consequence of the termination of a person's employment (or a change in the duties of or earnings from that employment). In any event, it is unnecessary for present purposes to explore the outer limits of the kinds of connection which Parliament had in mind, because (as I have already said) it is obvious on any reasonable view that the entirety of the £200,000 received by Mr Moorthy was connected with the termination of his employment."

66. Henderson LJ also noted (at [49]) that counsel for the taxpayer had referred to a number of possible factual scenarios, with a view to showing that the approach of the tribunals below was in some way anomalous, and also took the court in detail to some of the earlier cases (at first-tier level) considered by the Upper Tribunal. Henderson LJ did not find this exercise helpful, however, because cases of the present type are very fact-specific, and what matters is always the application of the statutory language in s 401(1)(a) to the facts found in the particular case.

Section 406

67. Henderson LJ concluded thus as regards s406, at [79]:

> "It seems to me that to treat an award of damages for injured feelings, in respect of actionable discrimination on grounds of age, as falling within the exemption in s 406 would accord with the natural meaning of the language of the section, would provide parity of treatment with similar awards made in a continuing employment relationship, and would not be objectionable on policy grounds. The *Vento* guidelines show that such awards, if made by a court or tribunal, must be relatively modest in amount, and any attempts to obtain exemption for much larger sums under the guise of a settlement of a discrimination claim would no doubt be rigorously scrutinised by the FTT. The absence of any policy objection to the exemption of payments within the *Vento* guidelines is brought out by the fact that, until quite recently, HMRC themselves appear to have accepted in many cases that s 406 does indeed apply in those circumstances, and by their offer in the present case to allow exemption for £30,000 of the payment made to [the taxpayer] in order to reach a settlement with him."

68. The *Vento* guidelines were explained thus at [19]:

> "As the Upper Tribunal explained, the 'upper *Vento* range' was a reference to the guidance on the assessment of damages in discrimination cases given by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318. Giving the judgment of the court, Mummery LJ said at [65]:
>
> > 'Employment tribunals and those who practise in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.
> >
> > (i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
> >
> > (ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
> >
> > (iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.'
>
> Mummery LJ added, at [66], that there is considerable flexibility within each band, allowing tribunals to fix what they consider to be fair, reasonable and just compensation in the particular circumstances of the case."

69. At [60], Henderson LJ said he "did not understand it to be disputed" that s406 would apply to "the appropriate portion of a global sum paid by an employer in settlement of" a claim

in the ET for damages for injury to feelings. In *Moorthy* itself, apportionment of the settlement payment to s406 (if taxpayer prevailed on the issue in principle) was not in dispute:

> "At earlier stages in this litigation, [the taxpayer] seems to have pursued the unrealistic contention that the whole amount should be treated as falling within s 406. Such an argument could never have succeeded, in view of the constraints imposed by the *Vento* guidelines and the obvious fact that, on any objective appraisal, a large part of the sum paid to [the taxpayer] must have been intended to compensate him for loss of future earnings and other employment-related benefits. By the end of the hearing before us, however, [counsel for the taxpayer] was able to confirm on instructions from her client that he would accept the figure of £30,000 which HMRC had originally proposed. We do not understand this to be opposed by HMRC, if they lose on the issue of principle. It would accordingly be unnecessary to remit the case to the FTT on the apportionment issue." (from [55])

Upper Tribunal - apportionment

70. The Upper Tribunal noted this at [55] of its decision in *Moorthy* [2016] STC 1178:

> "We acknowledge that there is some force in [taxpayer's counsel]'s submission that there appears to be an anomalous distinction between payments of compensation for discrimination before termination, which in [*A v HMRC* [2015] UKFTT 189 (TC)] were held not to be taxable as earnings under s62 ITEPA, and such compensation paid in connection with termination which, on our view of s401, counts as earnings. However, in our judgment, that is a consequence of such payment being deemed to be earnings by s 401. It is true that this may require an amount of compensation to be apportioned between events which occurred before and after termination so that they can be treated differently for tax purposes. But we do not consider that such apportionment would be impossible or excessively difficult. The need to carry out such an exercise does not, in our judgment, compel a different construction of the words of s 401, which are clear."

Tilley v Wales

71. In *Tilley v Wales* [1943] AC 386 (House of Lords), the taxpayer entered into an agreement with his employer under which he was paid £40,000 in return for the employer being released from paying his pension and reducing his salary. It was held that so much of the £40,000 as related to commutation of pension was not subject to income tax, but that so much as was paid in compromise of the reduction of salary was. Lord Porter said this at the end of his judgment, at p398:

> "It only remains, therefore, to see whether the sum attributable to the release of the pension can be separated from that payable for the reduction of salary. It was only faintly argued on behalf of the Crown that such a division was not possible, but it was said that there were no materials on which such a calculation could be made inasmuch as the cessation of the salary and the commencement of the pension were dependent on many unascertainable matters, among others on the appellant's choice of the time of his retirement. No doubt, there are difficulties, but the resultant figure seems no more incalculable than, say, the length of time during which an injured workman would have continued to earn wages had he not received his injury, a period

difficult no doubt to ascertain, but one which has constantly to be estimated in dealing with cases of personal injury."

APPELLANT'S SUBMISSIONS IN BRIEF

72. Ms Mathur's case was built on the following view of the facts:

(1) Had the ET proceedings gone to a full hearing, Ms Mathur would have received

(a) nothing for unfair dismissal claims (the Termination was not unfair or wrongful (as it was made in compliance with the consent order) and, in any event, even if unfair, compensation would have been limited by the "unfair dismissal cap");

(b) nothing in respect of financial loss because she had no proof of the loss;

(c) a limited amount (constrained by the *Vento* guidelines) for injury to feelings.

(2) But Ms Mathur had a "moral claim" against the Bank, based on discrimination, which she managed to monetise. The "moral claim" had a "nuisance value" (reference was made to a 1967 Court of Appeal case, *Scott v Ricketts*, in which these terms were used; the issue in the case was whether payment to settle such a claim fell within Case VI of Schedule D; it was held that it did not, just as payment to settle a "legal" claim would not). In the "court of public opinion", Ms Mathur had a tale to tell which would resonate with a large audience and, even if, in law, the cost to the Employer of the ET proceedings being heard might not be significant, there were other risks in allowing that to happen that the Bank would not wish to take.

73. The evidence presented as supporting this view was:

(1) that of Ms Mathur herself;

(2) provisions of employment law relating to unfair dismissal, in particular the following from Part X (Unfair Dismissal) Employment Rights Act 1996:

(a) s98 Employment Rights Act 1996 (set out in Appendix 3 to this decision), especially s98(1)(b), saying that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held";

(b) s124 of that Act (also set out in Appendix 3), which sets a limit on a "compensatory award" under s123, subject to certain exceptions; the limit is expressed as a formula, but we were told that, in Mathur's case, it came to approximately the sum offered in the Bank's Termination letter (referred to as the "unfair dismissal cap");

(c) Employment Appeal Tribunal unfair dismissal cases such as

(i) *Scott Packing & Warehousing v Patterson* [1978] IRLR 166, where it was held that an employer did not act unreasonably by bowing to the demands of their best customer;

(ii) *Bouchaala v Trusthouse Forte* [1980] ICR 721, where is was held that a genuine but erroneous belief that it was impermissible to employ someone could be "some other … reason" for dismissal.

74. It was submitted that the origin, or genesis, of the Settlement Payment was, therefore, not Ms Mathur's "legal" claims made in the ET proceedings, but her "moral" claims; and that the negotiations leading to the Settlement Agreement broke any causative link between the Termination and the Settlement Payment.

75. It was submitted that the relationship between the Termination and the Settlement Payment was one of coincidence.

76. It was submitted that the following points also distanced the Settlement Payment from the Termination:

(1) the Settlement Payment was made to settle proceedings against the respondents in Ms Mathur's ET proceedings, only one of whom was the Employer;

(2) the Settlement Payment was made by way of damages and, not, for example, as compensation for loss of office;

(3) the claims made in the ET proceedings were largely based on actions that pre-dated by a considerable time, and were unrelated to, the Termination;

(4) the Settlement Payment was not recorded as a severance payment in the Bank's annual report for 2016, the year in which it was paid (if it had been a severance payment, it would have had to be recorded in that report);

(5) in her evidence, Ms Mathur said she understood, from discussions with the individuals concerned, that the other six Misconduct Employees had, like her, received letters from the Bank offering compensation of £82,135 - and at least two or three accepted and received that amount (and no more) – it was submitted, that this was evidence that the Settlement Payment (to the extent it exceeded £82,135) was unconnected to the Termination;

(6) the Settlement Payment was paid as a result of negotiations in relation to the ET proceedings more than 12 months after the Termination, so that it was divorced in time and in content from the Termination.

77. It was submitted that this case was analogous with *Crompton*, where the causes of the payment (army selection boards' failures) was unconnected with the taxpayer's leaving his employment with the army. In both cases, the "commercial genesis" of the discrimination claims was distinct from the termination of employment.

78. If the Tribunal were to find that the Settlement Payment fell within s401(1), then it was submitted, in the alternative, that s406 applied: the main evidence cited was paragraph 3.9 of Ms Mathur's witness statement for these proceedings, which stated:

> "As a result of this state of affairs, from October 2013 I had periods of stress, anxiety and depression. This was apparent to some of my colleagues, for example, [KH] (the head of press and media relations for the UK, Europe and Africa) who remarked that it "broke [her] heart…to see [me] so broken by this place". I also sought medical help which records the impact the Bank's treatment of me was having on my mental health."

79. Ms Mathur was referring to the following 4 October 2013 email to her from KH:

> "This is a wonderful article! You have so much beautiful talent! Can I send it to the rest of the Women Warriors with a note that it's high time we all caught up?
>
> It broke my heart today to see you so broken by this place. How have people been allowed to bash all the vibrancy and energy out of someone like you? Nobody should ever be made to feel so wretched. I know you don't want to discuss what's happening - and I salute you for your discretion - but I am infuriated by whoever or what ever elaborate organisational politicking has left you feeling so defeated. Whatever poison is being dished out to you, it's making you sick. Please do see a doctor and make your health your first priority. And please don't ever feel alone. We don't have to talk, even if you just want to take a walk with someone or sit in a park with someone - I always be there.
>
> Be kind to yourself and take good care of you!"

80. Ms Mathur was also referring to an email to her from Roodlane Medical dated 7 October 2013, which said:

> "Afternoon
>
> I've discussed your situation with the lead doctor here, Dr [T] (also involved with occupational health)
>
> He says:
>
> " offer support / to refer to therapist and sign off in controlled fashion if she is not able to work - and encourage her to try and sort it out as ultimately she needs to resolve with her boss so encourage her to speak to HR – OH referral has to come through them and what OH would be advising would be to 'sort it out' which is either something she can do herself or with the assistance of HR"
>
> So, basically, it looks as if you will have to approach your occupational health dept. I'm afraid.
>
> I hope that things improve for you."

HMRC'S SUBMISSIONS IN BRIEF

81. HMRC submitted that the Termination was an integral part of the claims Ms Mathur compromised in exchange for the Settlement Payment. The Settlement Payment was therefore paid, at least, "otherwise in connection" with the Termination. In circumstances where the parties agreed a global Settlement Sum and did not calculate or apportion the Settlement Sum by reference to the individual claims, it was not open to Ms Mathur or the Tribunal to do so retrospectively. Consequently, the whole sum (except for the first £30,000) was chargeable under s403.

82. HMRC submitted that the Settlement Agreement was itself compelling evidence of the necessary connection between the Settlement Payment and the Termination. The Settlement Agreement was also contemporaneous evidence of the parties' own understanding that the Settlement Payment was connected to the Termination, as the first £30,000 was paid tax-free in accordance with s403 and the agreement was structured so as to take advantage of the s413A exemption for legal costs incurred in connection with the Termination.

83. HMRC submitted that there was no contemporaneous evidence to support any contention that the Settlement Sum was paid to compensate Ms Mathur for any injury (to feelings or other injury). This is not surprising in circumstances where ET compensation for injury to feelings and personal injury is determined by reference to the *Vento* guidelines and Chapter 4 of the Judicial College Guidelines respectively. This was reflected in Ms Mathur's schedule of loss, which sought £33,000 for injury to feelings and £20,000 for injury to health.

DISCUSSION

Matter under appeal and general approach

84. Ms Mathur was assessed (per the Amended Return) on the basis that all but £44,000 of the £6 million Settlement Payment was subject to income tax by operation of s403, read with s401. In this appeal it was argued on her behalf that the excess of the Settlement Payment over £44,000 (the "**disputed amount**") was not subject to income tax. The Tribunal's powers in this appeal include reducing the assessment in the Amended Return if we decide that Ms Mathur was overcharged; but otherwise that assessment stands good (s50 Taxes Management Act 1970).

85. Our core task in this appeal is to interpret certain statutory provisions, in particular sections 401, 403 and 406. We remind ourselves that the "ultimate question" in statutory interpretation, as Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35] (cited by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 at [36]). is "whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

86. The difficulty in this case arises because s401(1)(a) poses a question – was the Settlement Payment received by Ms Mathur directly or indirectly in consideration or in consequence of, or otherwise in connection with, the Termination? – that was not expressly addressed in the Settlement Agreement or other contemporaneous documentation.

87. The commercial essentials, as expressed in the Settlement Agreement, can be expressed quite shortly: the Settlement Payment, a single undifferentiated lump sum, was "damages" – i.e. monetary compensation for loss or damage – in return for Ms Mathur settling the ET proceedings and all claims in respect of her employment and its termination.

88. It is clear from the Settlement Agreement that the Settlement Payment was not received by Ms Mathur directly or indirectly *in consideration of* the Termination. Nor do we consider that the Settlement Payment was received by Ms Mathur *directly in consequence of* the Termination; rather, it was received by her in consideration of, and directly in consequence of, her settling.

89. More difficult, however, are the questions as to whether the Settlement Payment was received by Ms Mathur

(1) indirectly in consequence of, or

(2) otherwise in connection with

the Termination.

90. In our view, these questions are to be decided objectively. Mr Goldberg QC submitted that Ms Mathur's perspective was to be preferred, as a matter of law, to that of the Employer or the Bank, as the statute speaks of a payment or other benefit being "received" in a prescribed

manner. We do not accept this reading of s401: whether a payment or other benefit is received in a prescribed manner is not decided exclusively from the perspective of either payer or recipient, but on an assessment of all the evidence in the round; where there is conflicting evidence, that is to be resolved by the Tribunal weighing and evaluating that evidence, with an eye to the burden of proof, as it would do for any other evidential conflict.

91. We now turn to making further findings of fact that will assist in answering the questions just outlined.

Flaws in the appellant's version of events

92. In our assessment of the evidence, there are two significant flaws in the version of events put forward by Ms Mathur in these proceedings (see [72] above).

Underplays arguments that the Termination was itself discriminatory

93. The first is that it significantly underplays Ms Mathur's arguments in the ET proceedings that the Termination was itself discriminatory – indeed, the culmination of the alleged longstanding discriminatory conduct over the course of her employment. These were her "scapegoating", "culmination" and "stigma" arguments (see [21, 22(3) and 29] above). Mr Bates of the Bank reminded Ms Mathur of the significance of those arguments in the August 2019 correspondence when he said that:

> "your claim was that the unfair dismissal cap should not apply – e.g. that the dismissal was itself discriminatory and thus the cap would not apply to future losses".

94. We put particular weight on this evidence of the Bank's perception of Ms Mathur's arguments in the ET proceedings – and in particular the Bank's perception that the "unfair dismissal cap" was not necessarily a bar to an award greater than that offered by the Bank in the Termination letter – as it comes from a party that was closely involved in the ET proceedings but has no stake in the tax issue currently being adjudicated.

95. These "Termination as discriminatory act" arguments tied in with the large sums derived from loss of post-Termination earnings set out in Ms Mathur's schedule of loss: in the original version, produced at the direction of the ET, post-Termination loss of earnings amounted to £15.8 million, the lion's share of the "total amount claimed". In the "revised" version of the schedule of loss prepared for the "without prejudice" meeting between the parties on 9 February 2016 (which did not achieve settlement), lost post-Termination earnings were double this amount (£31 million), representing about two-thirds of the revised "total amount claimed".

96. In her evidence before this Tribunal, Ms Mathur sought to distance herself from the "Termination as discriminatory act" arguments she made in the ET proceedings, on the grounds that she advanced these arguments prior to seeing the witness statements produced by the Bank for the preliminary ET hearing in January 2016 (relevant extracts from which are at [31-32] above), in which senior Bank employees stated (under oath) that the Termination was required by the consent order and so the Bank had no choice but to dismiss her. When she saw those statements, she claimed in these proceedings, she decided that her "Termination as discriminatory act" arguments did not have force.

97. We are not persuaded, either that Ms Mathur in fact changed her mind about her "Termination as discriminatory act" arguments upon seeing the Bank's witness statements, or that the content of those statements was a material rebuttal of those arguments: as regards the

need for the Bank to abide by the consent order, the statements did not say anything materially different from what the Bank had been arguing all along; moreover, Ms Mathur's "Termination as discriminatory act" arguments went well beyond disputing whether she was really one of the Misconduct Employees – her arguments challenged the fairness and propriety of her inclusion as a Misconduct Employee, alleging that the Bank came to the defence of members of the "white male cartel" in its negotiation of the consent order with DFS, but did not do this for Ms Mathur, even though, she said, she had been a whistleblower and, as regards any misconduct, had been acting on the instructions of superiors (whom the Bank was protecting, she alleged).

98. We place greater weight in these matters on Ms Mathur's witness statement for the preliminary ET hearing, than on her evidence in these proceedings (where they clash), because the former (i) was significantly closer in time to the events in question; and (ii) was made without the tax law questions now at issue at the forefront of Ms Mathur's mind, such that her earlier statement was less given to memories and opinions being influenced by the effect on her own tax position.

99. More generally, we also note and take into account

(1) the absence of contemporaneous documentary, or independent expert, evidence, or of witness evidence from those involved in giving her legal advice at the time, to support Ms Mathur's contention that her legal case in the ET proceedings was weak; and

(2) the fact that, over the course of the ET proceedings, Ms Mathur incurred at least £400,000 in legal expenses and engaged a premier-league legal team (as did the Bank) – all of which indicate that she had a substantive legal case.

100. We thus find, contrary to the version of events advanced on her behalf in these proceedings, that, up to and including the point of settlement, Ms Mathur continued to believe in the strength of her legal arguments in the ET proceedings, including important arguments that the Termination was itself discriminatory, backing significant claims (of at least £15 million) for post-Termination earnings in her schedule of loss; and that the Bank recognised her as having a substantial legal case for significant damages (not necessarily constrained by the "unfair dismissal cap") during that time (whilst of course vigorously disputing it).

101. We further find that

(1) the Bank's "public relations" concerns about a public hearing (in the ET) of Ms Mathur's complaints was a material factor in reaching settlement – in this, we agree with the appellant's case, as it is backed by what Mr Bates of the Bank said in correspondence with Ms Mathur in August 2019, as well as clause 6 of the Settlement Agreement, which indicates a high level of sensitivity to publicity about Ms Mathur, the Termination and the ET proceedings; but

(2) contrary to the appellant's case, and in keeping with the findings above about the importance of Ms Mathur's "Termination as discriminatory act" arguments, those "public relations" concerns were at least as much about the allegedly discriminatory nature of the Termination, as the allegedly discriminatory nature of conduct that preceded, and had no connection with, the Termination.

102. We thus are not persuaded by the assertion made on Ms Mathur's behalf that, because the Termination and the consent order were already "in the public eye", the Termination was

not a factor in these "public relations" considerations for the Bank – on our view of the evidence, what Ms Mathur was alleging in her "Termination as discriminatory act" arguments was that there was a highly damaging "back story" to her being included as one of the Misconduct Employees, being that she had been "thrown under the bus" by the "white male cartel" at the Bank – and there was no evidence before us that allegations like these were "in the public eye".

103. In making these further findings, we have again noted and take account of the absence of contemporaneous documentary, or independent expert, evidence to support Ms Mathur's contention that the Bank's "public relations" concerns at the time related only to alleged discriminatory conduct prior to, and unconnected with, the Termination.

104. For completeness, in making all these findings, we have taken into account

(1) the fact that the maximum amount paid as a severance payment as shown in the Bank's 2016 accounts was €4 million i.e. less than the Settlement Payment. However, we do not afford this fact much overall significance in this case, as

(a) it does not tell us how the Settlement Payment was accounted for by the Bank - no evidence was presented in this regard;

(b) no evidence was put before us about the relevant parameters of a "severance payment" for relevant accounting purposes – for example, could a payment made in May 2016 be a "severance payment" for accounting purposes if it related to a severance more than a year before? Could a payment compensating for the discriminatory nature of a severance be a "severance payment"?

(2) Ms Mathur's evidence that at least two or three of the six other Misconduct Employees accepted the amount offered in the Bank's Termination letter. Again, however, we do not afford this evidence material significance in this case as, even if we assume its accuracy, we were not presented with evidence about these individuals and whether dismissal in their cases was unfair or discriminatory; nor do we have such evidence about the three or four individuals who, by implication of Ms Mathur's evidence, may have received more than the amount offered in the Bank's Termination letter (or as to how much they ultimately received).

Overlooks the Termination as trigger for the ET proceedings and their settlement

105. The second significant flaw in the version of events put forward by Ms Mathur is that it overlooks the importance of the Termination as the trigger point, catalyst and enabling event for her bringing proceedings in the ET 3½ months later, and settling them (in return for the Settlement Payment) about 9 months after that.

106. In part we view the Termination as triggering Ms Mathur's bringing of ET proceedings because, as found above, in addition to the claims for unfair dismissal, a significant part of Ms Mathur's claims in the ET was arguments that the Termination was itself discriminatory.

107. But even as regards those parts of the ET proceedings that related solely to allegedly discriminatory events prior to the Termination – in our view the Termination was the trigger for those claims being made, and then settled.

108. The starting point is that we find that, prior to the Termination, Ms Mathur had been deeply reluctant to pursue claims of discrimination with any degree of formality whilst still

employed at the Bank – she had been unwilling to initiate an internal formal grievance procedure, let alone commence ET proceedings. Ms Mathur explained her position thus in her witness statement for the ET preliminary hearing, in the concluding section:

> 227. … throughout my employment with the Bank, I endeavoured to resolve my issues using the Bank's internal processes. I felt it was important that there were authoritative voices within the Bank who were prepared to criticise its potentially unlawful or irregular activity. Very senior figures within the Bank often emphasised that it was committed to changing its "culture". I also felt a keen responsibility, as one of the few prominent women at the Bank, to stand my ground and try to improve matters for all women, and to show that the Bank could be a responsible employer without having to resort to more formal action, like suing the Bank as [RH] had advised me to do if I did not like what I was hearing. I had hoped that the reassurances and promises I received over the years would be translated into action, and that I could play my part to end the discriminatory state of affairs and help create a climate in which internal criticism was encouraged, rather than stifled. That hope turned out to be misplaced.
>
> 228. In a global institution as prominent as the Bank, and at a time when the conduct of large financial Institutions has come under close public and regulatory scrutiny, I felt this was a matter of public and not just personal importance. This was the main reason why I did not bring these proceedings the first time I suffered discrimination or harassment. …"

109. Later in that statement Ms Mathur said this:

> "233. … it is important to remember that the Bank itself has tried to intimidate me out of bringing a claim on more than one occasion. In mid-2014 Ms Thorogood made it pointedly clear to me that the Bank had the full legal department at its disposal should I raise a more formal complaint or bring a claim … The Bank's own former Global Head of Diversity and Women issues, Ms Taylor, told me that I "would not win" a lawsuit if I brought one ... The expectation of acrimonious and costly legal proceedings, based on these threats, was unquestionably a deterrent. It is also important to remember that, when I rejoined the Bank 2008, I had been out of work for over a year and the market conditions for financial services professionals, like me, have been through a very tough and turbulent few years. I liked my actual job content and very much wanted to keep it. As I have explained at paragraph 227 above, I wanted to, and believed it was appropriate both for someone in my position and for an institution of the standing of the Bank, to try to resolve matters between ourselves, internally and informally. I had also observed first-hand what had happened to some individuals who had gone down more formal routes and ended up leaving the Bank (some because they felt that they were forced out). I wanted to be part of real and meaningful change within the Bank and I fundamentally disagreed with what the likes of [RH] wanted me to believe, that is, that an institution like the Bank is free to dish out the most appalling treatment to its employees and that their only options are to put up with things and stay or leave and take their chances with finding comparable employment in a difficult market, or sue. Unfortunately for me, the Bank found another option: to avoid having to deal with my issues by dismissing me."

110. We note the evidence that Ms Mathur consulted Mishcon de Reya, another City law firm, on employment-related matters in September/October 2014: after a meeting, she told them she had told managers at the Bank that she had consulted a lawyer "only because of the letter they [the Bank] wrote but that my intention is still to resolve this amicably". The letter referred to appears to be the letter to Ms Mathur from the Employer of 20 August 2014 regarding a number of issues including the mandate of Ms Mathur's current role, her reporting line and the potential vacancy in another business within the Bank.

111. In our assessment of the evidence, there was no change to this deep-seated reluctance to take formal action against the Bank for discrimination, down to the time of the Termination. In particular, Ms Mathur's planned meeting with the Bank's head of UK employee relations on 23 April 2015 (cancelled when Ms Mathur was put on temporary leave due to the consent order) was not, in our view, evidence of a substantive change of approach on Ms Mathur's part – she said as much in her email to RH, the member of the Bank senior management with whom she spoke on 18 March 2015 – "*Leaving [the Bank] for a competitor or file a lawsuit as you mentioned, are furthest from my mind - I have been a loyal employee of [the Bank] and I on my part will continue to be so."* It was that conversation with RH that led to the setting up of a meeting with the head of UK employee relations on 23 April – but that meeting was not, on the evidence of contemporaneous emails (set out in Appendix 1), a formal grievance procedure – indeed, as Ms Mathur made clear in one of the emails (that of 21 April 2015), the meeting was an inquiry at the Bank's request, not hers.

112. The Termination transformed the position: most of the reasons for Ms Mather's deep reluctance to take formal action against the Bank for discrimination – her sense of responsibility to others at the Bank, her concerns about the impact on her prospects, having seen what happened to others who pursued grievances formally – fell away. The Termination opened the way for the highly effective negotiating posture vis-à-vis the Bank presented in the appellant's case – and which we, in general terms, accept: that Ms Mathur positioned herself as a "nuisance" to the Bank and negotiated the Settlement Payment as the price to make her "go away". This negotiating stance would, as a practical and realistic matter, have been very difficult, if not impossible, without the Termination.

113. It is in our view telling, and in keeping with the evidence more generally, that the Termination was the subject of first sub-clause of the first clause of the Settlement Agreement, headed "Background", followed by a sub-clause about Ms Mathur's bringing the ET proceedings, and a third and final sub-clause summarising the settlement: these three events were, in substance as well as in this contemporaneous documentation, the key background to the making of the Settlement Payment.

114. We do not therefore accept the version of events put forward in the appellant's case, that the Termination was a "coincidence" as regards the Settlement Payment; rather, it was the triggering event and catalyst for the bringing of the ET proceedings, and enabled Ms Mathur to take the highly-effective "nuisance claim" negotiating posture that led to the settlement and the Settlement Payment.

Applying s401(1)

115. Having made these further findings of fact as part of analysing what we regard as significant flaws in the version of events in the appellant's case, we now turn to the core task of applying the statutory words, construed purposively, to the facts, viewed realistically.

116. In our view, the facts of this case open up two avenues of potential 'connection', in line with the statutory language in s401(1), between the Termination and the Settlement Payment.

117. One avenue of connection arises from our factual finding that the Termination was the trigger and catalyst for Ms Mathur bringing the ET proceedings (which were settled by the making of the Settlement Payment), and put Ms Mathur in the position to take a "nuisance claim" negotiating position in securing settlement. In our view, this factual matrix answers to the statutory language of Ms Mathur receiving the Settlement Payment *indirectly in consequence of* the Termination: the bringing of the ET proceedings was, substantively and realistically, in consequence of the Termination; and the Settlement Agreement, including its negotiation, was, in the same way, in consequence of the ET proceedings.

118. For the avoidance of doubt, we do not accept the appellant's contentions

(1) that the negotiations leading to settlement of the ET proceedings somehow interrupted the consequential chain between Termination and Settlement Payment: as set out above, the settlement negotiations were in consequence of ET proceedings, which were themselves in consequence of the Termination; or

(2) that there was particular significance in the fact that the ET proceedings were against two individual senior employees at the Bank, as well as against the Employer and the Bank.

119. If we are for some reason wrong to have found that the facts of this case mean that Ms Mathur received the Settlement Payment *indirectly in consequence of* the Termination, we would have found, in the alternative, that, due to the same factual matrix, she received it *otherwise in connection with* the Termination.

120. It would also be true to say that, had the Termination not occurred, Ms Mathur would not have received the Settlement Payment; however, in our view, this "but for" approach is not sufficient to satisfy the statutory words, construed purposively – if, as Mr Goldberg QC argued through a hypothetical example at the hearing, a claim would never had been brought had the claimant not suffered a cycling accident, and so had the time (off work) to bring the claim, we agree with Mr Goldberg that it would not be right to conclude that, by that reason alone, the claim was brought *indirectly in consequence of* or *otherwise in connection with* the cycling accident. A "but for" test might be satisfied in such a case, but, looking at the facts realistically, the claim is not substantively connected to the cycling accident: one can easily imagine other ways a claim might have been brought by a claimant who was short of time (such as finding someone else to assist). Here, when viewing the facts realistically, there is in our view a substantive consequential relationship, albeit indirect, between the Termination and the Settlement Payment – it is not easy imagine how such a payment would otherwise have been received, had the Termination not occurred, given our findings about the "triggering" and "catalyst" effect of the Termination.

121. In taking this view of the statutory wording, we are not following the Special Commissioner in *Crompton*, who commented at [36] of that decision that a circumstance that occasions a claim leading to a payment, but has nothing to do with the merits of the claim or whether it would succeed – such as the fact that the claimant's employment terminated, and he would never have claimed had he remained employed – does not constitute linkage between the payment and the termination of the sort envisaged by s401(1). In the light of the emphasis on the breadth of the statutory language made in decisions of higher authorities subsequent to

Crompton – the Upper Tribunal in *Colquhoun* at [12], affirmed by the Upper Tribunal and Court of Appeal in *Moorthy* (at [52] and [40] respectively) – we do not believe that the restriction applied by the Special Commissioner – that a circumstance occasioning a claim leading to a payment must relate to the merits of the claim – should be followed. Rather, this Tribunal must look at all the facts of the case, realistically, and decide whether they answer to the statutory words. In the particular circumstances of this case, for the reasons we have given, in our view they do.

122. Although this first "avenue of connection" between the Settlement Payment and the Termination is sufficient to conclude that s401(1)(a) applies to the disputed amount, there is another such avenue, arising from our finding that the Termination was central to significant claims made by Ms Mathur in the ET proceedings: not just to her unfair dismissal claims but also to her claims based on discriminatory conduct by the Bank; and that, in the perception of both parties to the negotiations that led to the settlement, those claims had legal substance and were supported by significant figures in Ms Mathur's schedule of loss.

123. The question that arises as regards this avenue of connection is whether the disputed amount should be apportioned as between (i) payment received in settlement of claims relating to the Termination (the "**first portion**") and (ii) payment received in settlement of other claims (the "**second portion**"), on the basis that only the first portion satisfied the requirement of being received *indirectly in consequence of* or *otherwise in connection with* the Termination.

124. We note that in *Moorthy* the Upper Tribunal did not consider that apportionment of an amount of compensation between events which occurred before and after termination of employment, reflecting the different tax treatment of compensation for discrimination before termination, as against compensation paid in connection with termination, would be impossible or excessively difficult.

125. In this case there are real evidential difficulties in apportioning the disputed amount between the first portion and the second portion in a realistic and commercial way, given that

(1) the Settlement Payment was a single undifferentiated lump sum;

(2) Ms Mathur's schedule of loss (either in the form produced at the direction of the ET, or the later "revised" form prepared for a "without prejudice" meeting between the parties) played no part in the negotiation of the Settlement Sum;

(3) there was no factual evidence before the Tribunal, such as papers held by Ms Mathur or the Bank, or witness evidence from either of them, to support an apportionment;

(4) there was no expert evidence before the Tribunal to support an apportionment; and

(5) neither party in these proceedings attempted such an apportionment, or gave a formula for doing so – rather, each adopted an "all or nothing" approach.

126. In our view these evidential difficulties can only be resolved by asking ourselves whether the party with the burden of proof in this case, the appellant, has produced evidence sufficient to persuade us that a certain amount of the disputed amount should be apportioned to the second portion. We answer this in the negative, because, apart from arguing that *the whole* of the disputed amount should be apportioned to the second portion (which we reject), the appellant produced no persuasive evidence or arguments to support any other position.

127. Even if the foregoing reasoning is flawed, such that a material part of the disputed amount could, on the evidence before us, realistically be apportioned to the second portion, we consider, on the facts of this case, that the amount so apportioned would nevertheless still fall within s401(1), given our conclusions as to the first "avenue of connection" (see [117 and 119] above).

128. In summary, therefore, we find that s401(1)(a) applies to the whole of the disputed amount.

Appellant's alternative argument: s406

129. Payments falling within s401(1)(a) may nonetheless not be subject to income tax under Chapter 6, if they fall within one of the provisions to which s401(1) is subject – including s406, an exception for payments provided on account of (inter alia) injury to an employee. The Court of Appeal in *Moorthy* decided that an award of damages for injury to feelings made by the ET to a successful claimant for age discrimination would clearly fall within the ambit of s406. The court commented that such awards, if made by a court or tribunal, must be relatively modest in amount, applying the *Vento* guidelines; it observed that attempts to obtain exemption for much larger sums under the guise of a settlement of a discrimination claim should be rigorously scrutinised by this Tribunal.

130. We note here that

(1) in the Amended Return, £44,000 of the Settlement Payment was treated as compensation for injury to Ms Mathur's feelings – reflecting the top of the upper band per the *Vento* guidelines (for ET awards for injury to feelings) – and not brought into charge to income tax;

(2) the third party evidence proffered in this case for injury to Ms Mathur's feelings (see [79-80] above) was thin, consisting of an email from a sympathetic (non-medical) colleague (who attributed Ms Mathur's serious upset to "organisational politicking") and a short email from a health service provider concluding that the matter needed to be taken up with the "occupational health" department, both from early October 2013;

(3) Ms Mathur's schedule of loss (in both its versions) quantified £33,000 for "injury to feelings" and £20,000 for "injury to health".

131. On the basis of the above, we find £44,000 of the Settlement Payment was an appropriate amount to allocate to injury to Ms Mathur; as this was already excluded from the disputed amount, we conclude that no further part of the disputed amount falls within s406.

CONCLUSION

132. For the reasons given above, we find that disputed amount is chargeable to income tax as employment income by reason of s403, read with s401(1)(a); the assessment in the Amended Return accordingly stands good and the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

133. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 09 March 2022

APPENDIX 1: SUMMARY OF EMAILS WITH BACKGROUND TO CANCELLED MEETING ON 23 APRIL 2015

1. From a member of Bank senior management, "**RH**", to colleagues (but not Ms Mathur) dated 18 March 2015:

> "The call with Shivani went ok I guess. Effectively we agreed to disagree. She accepted that she was well treated comp-wise on a relative basis, but that her absolute number was too low. I told her that the bank disagreed with that view. After going back and forth on this point for some time, I told her that I would review her salary if that was possible in the coming months but I was very clear that she should not expect a positive outcome from the review. Eventually I told her that if the discrepancy about her compensation continued to bother her she really only had 3 options: accept the compensation and move on, look for somewhere else to work either internally or externally, or raise a formal grievance. Given that she has written this note after our conversation it would seem she has decided upon a fourth option."

2. Immediately under this was an email from Ms Mathur to RH, which started as follows:

> "Thank you for your call today which i greatly appreciate. These conversations are always difficult and i appreciate your explanation that I am considered a highly valued employee which was reflected in paying me up 15 pet when the pool was down 25.
>
> Leaving [the Bank] for a competitor or file a lawsuit as you mentioned, are furthest from my mind - i have been a loyal employee of [the Bank] and i on my part will continue to be so.
>
> While i am not ungrateful that i was one of the few paid up 15 pct this year, this needs to be put in the right perspective …."

3. Ms Mathur updated PL on the conversation she had with RH, by email on the evening of 17 March 2015, and asked for "fair and equitable treatment" on her pay since 2014. PL responded by email on 26 March, as follows:

> "Dear Shivani
>
> Thank you for your email.
>
> I have also caught up with [another Bank human relations employee] regarding the below and understand that you have also asked similar questions to [RH] (in your email of 18 March to him, which you forwarded to Steph).
>
> It is not clear from your email but there is a suggestion that you may have been underpaid because you are a woman. I have therefore asked UK Employee Relations (ER) to look into the points you have raised about your 2014 compensation, and I will ask that they will respond to you.
>
> I have agreed with [the Bank human relations employee] that she can tell [RH] that ER will be looking into those points.
>
> Someone from ER will be in touch with you. Bearing in mind that the Easter break is coming up, it may take a little while for them to come back to you.
>
> [The Bank human relations employee] has also explained that she continues to be in touch with you regarding [review of Ms Mathur's profit and loss account]. "

4. On Tuesday 21 April 2015, the head of UK employee relations sent an email to Ms Mathur as follows:

> "Dear Shivani
>
> I wanted to reach out to you to confirm that I have been appointed to consider the concerns you raised in relation to your "total compensation" (and I have seen copies of the emails you sent to [PL and [RH] in relation to this). You may recall that I am the UK Head of Employee Relations (which is a part of Human Resources, although we are not aligned to any particular business division) and we have exchanged voicemails previously.
>
> I would be grateful if you would confirm whether you have any availability to meet with me on Thursday or Friday of this week or early next week so that we can discuss your concerns? I will be able to arrange a room for us in Appold Street. Since it would be helpful if we have a note-taker, I will, as is normal, ask Ubiquis to take a note of the meeting.
>
> In addition, If you would like to bring along a companion to join you at the meeting for support, please let me know.
>
> I look forward to speaking with you in due course."

5. Ms Mathur responded within an hour as follows:

> "Thank you for reaching out. How is 10 am Thursday for you?
>
> I must make it clear at the outset, that this inquiry has been initiated by [Bank] management - not by me.
>
> I have simply asked management for transparency of my comp vs my peers who also reported to the same boss as I and have a similar performance and similar number of years of experience.
>
> They have chosen to be transparent about sharing the percentile I am at out of people paid up on the year, which I appreciate, I am sure that the bank will also therefore be willing to share not just what percentile I stand at in being paid up on the year, but also what percentile I stand at in absolute terms.
>
> This of course will be taking into consideration the outstanding performance I have demonstrated.
>
> This is what I had asked them for."

6. The head of UK ER responded later that day as follows:

> "Dear Shivani
>
> Unfortunately Thursday morning ls beck to back for me. How about Thursday at 4pm or Monday at 11.30am. l will book a room In Appold Street (4th floor) and you should ask for me at reception.
>
> I would like to get a better understanding of your concerns and you can talk me through your emails to [PL and RH] and who you think are your peers for these purposes. I will then consider how best to take your concerns forward.
>
> I look forward to meeting with you, Separately, please would you let me know if you will be bringing a companion to the meeting with you?"

APPENDIX 2: SECTION 11 OF MS MATHUR'S 'GROUNDS OF CLAIM' IN THE ET: "THE CLAIMS"

In what follows,

- *non-relevant personal information has been removed and replaced with "…"*
- *"PAs" means protected acts and "PDs" means protected (whistleblowing) disclosures*
- *"EqA" means Equality Act*

"Ms Mathur complains of:

11.1. Unequal Pay under s64 and 127 of the EqA 2010:

(1) Ms Mathur was employed on work that was equal to the work that specific male comparators ("the Male Comparators") did within the meaning of s64(1) EqA 2010.

(2) Ms Mathur's work was equal to that of the Male Comparators in that it was of equal value to the work of the Male Comparators because under s65(6) it:

(a) Was neither like the work of the Male Comparators nor rated as equivalent to the work of the Male C:omparators; but

(b) Was nevertheless equal to the work of the Male Comparators in terms of the demands made on Ms Mathur by reference to factors such as effort, skill and decision-making.

(3) Throughout her period of employment with the Bank, Ms Mathur was paid significantly less than the Male Comparators within the meaning of sl27(1) EqA 2010. This is despite her exceptionally high performance, revenues, contribution, seniority and consistently good performance reviews.

(4) Ms Mathur's total compensation comprised:

…

(5) Over the period of her employment, Ms Mathur received discretionary bonuses in the region of 0.3% to 3% of her revenues. In contrast, peers such as … received discretionary bonuses equal to around 8% to 11 % of their revenues.

(6) The Bank's 2013 Annual Report revealed that the Bank paid its Code Staff/Material Risk Takers ("MRTs", of which Ms Mathur was one of 1219 Bank employees, excluding board members, who were also MRTs), on average, a total compensation in excess of EUR 1.3 million. Furthermore, the Bank has also published in its 2014 Annual Report that in excess of 800 employees were paid more than EUR 1 million in FY2014. It appears that whilst Ms Mathur was, by the Bank's own objective and acknowledged measures, one of the highest revenue- producing MRTs, she was one of the lowest paid MRTs.

(7) It is apparent from the Bank's Annual Reports for 2013 and 2014, which contain pay details for the Bank's 'material risk takers' (of which Ms Mathur was one) that, when viewed in conjunction with her high performance, she has been paid significantly lower than her male peers, including the Male Comparators.

Without limitation and subject to further disclosure, presently the Male Comparators include: ….

11.2. Harassment related to sex under s26(1) and 40 EqA 2010:

(1) Ms Mathur relies upon the alleged treatment set out above and in her numerous communications with the Bank as separately and/or cumulatively amounting to unwanted conduct ("the Harassment Detriments").

(2) The Respondents engaged in unwanted conduct related to the protected characteristic of sex contrary to s26(1) EqA 2010.

(3) Such conduct had the purpose or effect of violating Ms Mathur's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her contrary to s26(1) EqA 2010.

(4) The Respondents are liable as employer or principal under s109, as employee or agent under s110, for instructing, causing or inducing contraventions under s111, or for aiding contraventions under s112.

11.3. Direct discrimination because of sex under sl3(1) and 39 of EqA 2010:

(1) Ms Mathur relies upon the alleged treatment set out above and in her numerous communications with the Bank as separately and/or cumulatively amounting to less favourable treatment including dismissal ("the Discrimination Detriments").

(2) The Respondents treated Ms Mathur less favourably than each of them treated or would have treated others and did so because of the protected characteristic of sex contrary to s13(1) EqA 2010.

(3) The Respondents are liable as employer or principal under s109, as employee or agent under s110, for instructing, causing or inducing contraventions under s111, or for aiding contraventions under s112.

11.4. Victimisation under s27 and 39 EqA 2010:

(1) Ms Mathur did the acts, or the Respondents believed that she had done (or might do) the acts, set out above and in her numerous communications and external agencies/regulators with the Bank which are relied on as separately and/or cumulatively amounting to PAs within the meaning of s27(1).

(2) The Respondents subjected Ms Mathur to the detrimental treatment including dismissal ("the Victimisation Detriments") because she did the PAs, or the Respondents believed that she had done (or might do) the PAs contrary to s27(1).

(3) The Respondents are liable as employer or principal under s109, as employee or agent under sll0, for Instructing, causing or inducing contraventions under s111, or for aiding contraventions under s112.

11.5. Protected disclosure detriments under s43B and 478 of the Employment Rights Act 1996 ("ERA 1996")

(1) Ms Mathur relies on the alleged disclosures of information set out above and in her numerous communications with the Bank and external agencies as separately and/or cumulatively amounting to PDs. These included her disclosures of financial wrongdoing,

breaches of employment contract, unequal pay, harassment, discrimination and victimisation, both in relation to herself and others.

(2) Ms Mathur made disclosures of information in good faith (insofar as this was a statutory requirement before 25 June 2013) which, in her reasonable belief, were made in the public interest (insofar this became a statutory requirement from 25 June 2013) and tended to show one or more of the failings set out in section 43B(1) ERA 1996.

(3) Ms Mathur made the disclosures to her employer or other person in accordance with the requirements in ss43C-43H ERA 1996.

(4) Ms Mathur relies on the alleged detriments set out above and in her numerous communications with the Bank and external agencies as separately and/or cumulatively amounting to detriments and/or a course of detrimental treatment ("the Whistleblowing Detriments").

(5) Ms Mathur was subjected to the Whistleblowing Detriments by the Bank, another worker of her employer in the course of that other worker's employment, or by an agent of her employer acting with its authority within the meaning of s47B(1)- (lA) ERA 1996.

(6) The Bank, its workers and/or agents, subjected Ms Mathur to the Whistleblowing Detriments on the ground that she had made one or more of the PDs contrary to s47B(1).

11.6 Automatically unfair dismissal because Ms Mathur made protected disclosures under s43B and 103A of ERA 1996

(1) The sole or principal reason for Ms Mathur's dismissal by the Bank was that she had made one or more PDs contrary to s103A ERA 1996.

11.7. Ordinary unfair dismissal under s94 and 98 of ERA 1996:

(1) Ms Mathur's dismissal by the Bank was unfair under s94 and 98 ERA 1996, having regard to fact that:

(a) The Bank cannot show that the sole or principal reason for the dismissal was a potentially fair reason within the meaning of s98(1); and/or

(b) The Bank acted unreasonably in the circumstances in treating any potentially fair reason as a sufficient reason for dismissing Ms Mathur within the meaning of s98(4).

(2) At the time of dismissal, amongst other matters, the Bank:

(a) Used the DFS Consent Order as a convenient and timely "pretext" on which to dismiss Ms Mathur who was selected as a scapegoat;

(b) Did not in fact genuinely believe that there was some other substantial reason for dismissing Ms Mathur or that she was guilty of misconduct;

(c) Did not have reasonable grounds for believing that there was some other substantial reason for dismissing Ms Mathur or that she was guilty of misconduct;

(d) Had not carried out any, let alone any reasonable, formal disciplinary investigation of its own into the circumstances said to justify dismissal;

(e) Could not be said to have relied upon any external investigation and findings specifically regarding Ms Mathur's conduct;

(f) Failed to take into account Ms Mathur's clean disciplinary record and good performance record;

(g) Failed to consider any sanction short of dismissal; and

(h) Deliberately refused to afford Ms Mathur any opportunity whatsoever to appeal against the decision that she be dismissed."

APPENDIX 3: SOME PROVISIONS OF EMPLOYMENT RIGHTS ACT 1996 REFERRED TO IN THE APPELLANT'S CASE

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(5). . . .

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

124 Limit of compensatory award etc.

(1)The amount of—

(a) any compensation awarded to a person under section 117(1) and (2), or

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

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

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

(a) £78,962, and

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

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

(2) …

(3) In the case of compensation awarded to a person under section 117(1) and (2), the limit imposed by this section may be exceeded to the extent necessary to enable the award fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(4) Where—

(a) a compensatory award is an award under paragraph (a) of subsection (3) of section 117, and

(b) an additional award falls to be made under paragraph (b) of that subsection,

the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(5) The limit imposed by this section applies to the amount which the employment tribunal would, apart from this section, award in respect of the subject matter of the complaint after taking into account—

(a) any payment made by the respondent to the complainant in respect of that matter, and

(b) any reduction in the amount of the award required by any enactment or rule of law.