Case Number: 2502422/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr K Cook**

Respondent: **Gentoo Group Limited**

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the judgment sent to the parties on 22 December 2021 is corrected as set out in block type at paragraphs 43 and 46

Employment Judge Shore

Date 17 January 2022

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: Mr K Cook

Respondents: Gentoo Group Limited

Heard: Remotely (by video link) **On:** 11 October 2021

Before: Employment Judge S Shore
NLM – Mr R Dobson
NLM – Mr P Chapman

Appearances

For the claimant: Ms H Iyengar, Counsel
For the respondent: Ms C Millns, Counsel

AMENDED RESERVED JUDGMENT ON REMEDY

The unanimous decision of the Tribunal is that:

1. No compensatory award in the claimant's unfair dismissal claim is payable by the respondent.

REASONS

Introduction

1. The claimant was latterly employed as Head of Compliance (Property Services) by the respondent for a continuous period that included a TUPE transfer, from 1 March 1992 until 16 May 2019, which was the effective date of termination of his employment for the stated reason of redundancy. The claimant started early conciliation with ACAS on 23 July 2019 and obtained a conciliation certificate on 6 August 2019. The claimant's ET1 was presented on 7 August 2019. The respondent is a social housing landlord responsible for approximately 30,000 homes. It has approximately 1,100 employees. This Tribunal delivered a

reserved Judgment and Reasons on liability that gave rise to this remedy hearing.

2. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996).

    2.2. Automatic unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996.

    2.3. Detriment on the ground that he had made protected disclosures (contrary to section 47B of the Employment Rights Act 1996), specifically that the respondent:

        2.3.1. Directed unfair criticism at the claimant in a Senior Management Team (SMT) meeting on 4 March 2019;
        2.3.2. Directed the claimant not to raise certain issues of compliance immediately following the meeting on 4 March 2019;
        2.3.3. Had, on or before 2 May 2019, proposed to the respondent's Appointments and Remuneration Committee that the claimant's redundancy be approved; and
        2.3.4. Rejected the claimant's appeal against dismissal on 28 June 2019 and made unfair criticisms of the claimant in the appeal rejection letter.

    2.4. Direct age discrimination (contrary to section 13 of the Equality Act 2010).

3. By our Judgment and Reasons dated 6 April 2021, we made the following unanimous decision on liability:

    3.1. The claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) was well-founded. The principal reason for his dismissal was redundancy. No basic award was therefore payable to the claimant, as he was paid an enhanced redundancy payment by the respondent.

    3.2. Following the guidance in the case of Polkey, we find that there was a 100% chance that the claimant would have been fairly dismissed by 6 June 2020, which would have taken his service beyond his 55th birthday and triggered no loss of enhancement to his pension.

    3.3. We found that there were three matters that we considered to constitute contributory conduct on the part of the claimant and which should reduce the compensatory award made in his favour.

3.3.1. The claimant attempted to delay the consultation process, which we find should reduce his compensatory award by 15%;

3.3.2. The claimant's conduct prior to his dismissal contributed to his dismissal by a factor of 25%;

3.3.3. There should be a 50% reduction in the compensatory award because the claimant failed to report a regulatory failure at the end of quarter 3 (Q3) of the 2018/2019 financial year, which could have led to his dismissal (under the principle in **W Devis & Sons Ltd v Atkins**); so

3.4. The compensatory award made to the claimant should be reduced by a total of 90%.

3.5. The claimant's claim of automatic unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996 was not well founded. We found that the claimant made no protected disclosures.

3.6. The claimant's claims that he was subjected to detriment short of dismissal were not well founded. We found that the claimant made no protected disclosures.

3.7. The claimant's claim of age discrimination was not well founded and failed.

Issues

4. The case management order of EJ Aspden dated 29 October 2019 set out the issues on liability in the case, but did not determine any of the issues to be decided in respect of remedy.

5. We were only concerned with determining remedy for the unfair dismissal element of the claimant's case, as this was the only head under which he was successful and we applied the provisions of section 111 to 124 of the Employment Rights Act 1996.

Housekeeping

6. The parties had produced a joint bundle for the original hearing, which we had before us. They also produced an agreed bundle of 24 pages for this hearing. If we refer to pages in the original bundle, we will just use the page numbers in square brackets (e.g. [107]). If we refer to any pages in the supplementary bundle produced for the remedy hearing, we will use the preface "SB" with the page numbers in square brackets (e.g. [SB107]).

7. After hearing closing submissions on liability on 12 March 2021, and after making our decision, the Tribunal made case management orders dated 6 April 2021 of our own motion that gave directions for this remedy hearing.

8. On 1 October 2021, the respondent made an application for reconsideration of the Tribunal's reserved Judgment and Reasons on liability in the case. We reproduce the application here:

> "*We thank the tribunal for its recent judgment dated 6 April 2021. We note that the judgment is clear and concludes at paragraph 104 that while the Claimant's claim for unfair dismissal succeeds, the compensation should be limited to an effective date of termination on 6 June 2019, and subjected to a reduction of 90% due to contributory conduct. This effective date of termination (6 June 2019) was 3 weeks after the date of the Respondent dismissing the Claimant and paid him in lieu of notice. We respectfully remind the tribunal that it was accepted as fact by the panel at the final hearing, that the Claimant was paid in lieu of his notice.*
>
> *Paragraph 2 of the judgment sets out the tribunal's findings were that there was 100% chance that the Claimant would have been fairly dismissed by 6 June **2020**. This is the only reference to 6 June 2020 throughout the judgment and we respectively suggest that this date should be 6 June 2019 in line with the remainder of the judgment, and the concluding remarks of paragraph 104. Paragraph 2 continues to set out that dismissal on 6 June [**2019**] would have taken the Claimant beyond his 55th birthday and triggered no loss of enhancement to his pension. The Claimant's birthday was 11 August 2019 and so an effective date of termination on 6 June 2019 would not have taken him beyond his 55th birthday. We therefore respectively query whether the word "not" is missing from this section in paragraph 2, therefore whether paragraph 2 should be amended accordingly to read:*
>
> > *"Following the guidance in the case of Polkey, we find there was a 100% chance that the claimant would have been fairly dismissed by 6 June **2019**, which would **not** have taken his service beyond his 55th birthday and triggered no loss of enhancement to his pension."*
>
> *At paragraph 76.20, the final sentence, while giving context to the tribunal's decision, does not appear to have taken account of the fact that the Claimant was paid in lieu of notice. We do not consider that this paragraph necessarily requires a review by the tribunal but seek only to respectively bring to the tribunal's attention those sections of the judgment which could be interpreted to give rise to some ambiguity.*
>
> *Paragraph 81 follows the tribunal's findings that the Claimant would have been able to attend a final consultation meeting by 6 June 2019. However, that paragraph then goes on to set out that at this meeting there would have been 100% possibility that the Claimant would have been fairly dismissed, as he would have rejected all and any alternative vacancies and would have taken the unreduced pension package which would have followed because he would have hit the benchmark on his 55th birthday before dismissal. Again, this paragraph does not appear to have taken into account the fact that the Claimant was paid in lieu of notice."*

9. The email was sent to me, as chair of the Tribunal that made the decision, and I determined that the reconsideration would be dealt with as a preliminary matter at the remedy hearing. The respondent had copied the claimant in on the application, but the parties had not had any discussions on the matter.

10. On 8 October 2021, the claimant applied by email for a stay of the remedy hearing pending the outcome of his appeal against our Judgment on liability. I refused this application, as appeal had not even been through the sift at the EAT.

11. The claimant's email also addressed the respondent's application for reconsideration. It was noted that the application was well out of time. It was also noted that the decision had been made to hear the application for reconsideration today. The claimant's preferred option was to stay both the remedy hearing and the application for reconsideration, but was content for the application for reconsideration to proceed at a later date, once the claimant had responded.

12. Both parties at this hearing were represented by counsel who had not represented them at the liability hearing. We were grateful for the assistance of both Ms Iyengar and Ms Millns.

13. We decided to proceed with both the application for reconsideration and the remedy hearing on 11 October, as the application for a stay was not renewed by the respondent and we found that the overriding objective was best served by dealing matters justly and fairly without delay and additional cost. Both parties indicated that they were ready and prepared to deal with the reconsideration application and the remedy issue.

14. We advised the parties that we would deal with the reconsideration application first and would then consider the issue of remedy. Once we had heard submissions, considered our decision and delivered our findings on the reconsideration matter, Ms Iyengar indicated that the claimant was content for us to determine the issue of remedy without his giving evidence: he had produced no witness statement. We therefore dealt with remedy on the basis of submissions from counsel. We were assisted by the clear submissions of counsel.

15. We finished hearing submissions at 3:30pm and advised the parties that we would be delivering a reserved Judgment and Reasons. I offer my personal apology to the parties and my colleagues for the delay in producing this Judgment and Reasons, which is due to my having an absence of several weeks due to ill health.

16. The hearing was conducted by video on the CVP application with no objection from either party.

Reconsideration

17. As can be seen from the respondent's application for reconsideration, reproduced above, the central issue was the uncertainty of the parties as to what the claimant's effective date of termination was. The importance of the EDT was huge, as it impacted on the claimant's ability to access his pension without deduction. Our decision was as follows.

18. The respondent's application for reconsideration was made outside the period of 14 days from which the reserved Judgment and Reasons were sent to the parties, as required by Rule 71 so was refused.

19. The Tribunal has the authority to reconsider its own decision on its own initiative by virtue of Rule 73. We advised the parties that we would do this after hearing their submissions on the wording of the Judgment and Reasons in this case dated 6 April 2021.

20. Our finding of fact in the liability Judgment and Reasons was that the claimant's effective date of termination of employment was 16 May 2019. This is date stated in the second page of the respondent's letter to the claimant of 16 May 2019 [page 331 of the original bundle]. It was never disputed that this was the EDT.

21. We found that the claimant had been unfairly dismissed for the reason of redundancy (paragraph 1 of our Judgment).

22. The meaning of paragraph 2 of our Judgment is that we found that if the respondent had carried out a fair redundancy dismissal, the claimant would have been dismissed by 6 June 2019, rather than 6 May 2019. The date of the effective date of termination is fixed. In this case, it is fixed at 16 May 2019. We accept that there is typographical error on paragraph 2 of our Judgment: it should have read "…the claimant would have been fairly dismissed by 6 June ***2019***". The slip rule applies and that date is amended. A certificate of correction shall be issued.

23. It was agreed evidence that it was the practice of the respondent to include the period of an employee's notice to their length of service for the purpose of calculating pension trigger points, notwithstanding what the employee's EDT was. That is the rationale of paragraph 76.20 of our Reasons. This paragraph was to illustrate the point that ***if*** the decision on the claimant's redundancy had been made at the Board meeting on 22 May 2019, rather than being made at the Appointments and Remuneration Committee on 2 May 2019, a dismissal on 22 May 2019 itself would have taken the claimant to 14 August 2019 for the calculation of his pension entitlement. That is 3 days after his 55th birthday.

24. Our reasoning opens up the possibility of an age discrimination claim, but we gave our reasons for rejecting the claimant's arguments in paragraphs 96 to 102 of our Reasons.

25. Our attention was brought to paragraph 81 of our Reasons. Our reasoning in that paragraph is that the claimant would have been able to attend a redundancy meeting on 6 June 2019 and would have been dismissed with a payment in lieu of notice on that date. His effective date of termination **would have been** 6 June, so that would mean that his 12 weeks' notice would have triggered the unreduced pension package.

26. Notwithstanding the evidence we heard about R's practice of counting PILON for retirement purposes, we also took note of the policy confirmed in the penultimate bullet of the redundancy consultation script [297].

27. The respondent had a policy of requiring staff to work their notice period (R's at-risk letter 3 May 2019 [300]), unless willing to sign a settlement agreement in return for PILON.

28. Our finding at paragraph 81 of our reasons was that the claimant would have accepted redundancy on 6 June, because he would have achieved no loss of pension, per the policy as expressed in the script and at-risk letter [297] and [300].

29. Given that it was undisputed evidence that the claimant knew what was riding on still being employed at his 55th birthday, if the claimant had been dismissed fairly on 6 June, he would not have signed a settlement agreement, if its impact would have been to end his service before his 55th birthday.

30. If the claimant had refused to sign a settlement agreement, the respondent's policy was to require him to work his notice. On a technical point, neither party suggested at the hearing that the at-risk letter, or the part of it that referred to a settlement agreement was privileged and should not have been seen by the Tribunal.

31. In summary:

    31.1. The claimant's EDT was 16 May 2019;

    31.2. He was procedurally unfairly dismissed;

    31.3. He would have been fairly dismissed by 6 June 2019;

    31.4. A dismissal on 6 June 2019 would have triggered the respondent's policy of adding an employee's notice period to their continuous service;

    31.5. In the claimant's case, that would have meant that his service, for LGPS purposes extended beyond 11 August 2019 (his 55th birthday);

    31.6. He would not have lost his enhancement to pension; and

    31.7. The contributory conduct deduction applies to any pension loss because it is an unfair dismissal claim and the loss flows from the unfair dismissal.

Remedy

32. At the start of the remedy part of the hearing, Ms Iyengar indicated that she had spoken to her instructing solicitors and it was accepted that it was now clear what the Judgment and Reasons on liability had said. We were asked to note that the claimant had appealed this decision on the basis of the percentage reduction and the dismissal of the claimant's age discrimination claim. We acknowledge that the claimant has a right to appeal our decision and the fact that he has had no influence on our decision on remedy.

33. Ms Iyengar very helpfully summarised the claimant's position. The claimant had two pension "pots". He is a member of the Tyne and Wear Pension Fund (part of the LGPS). His membership of that scheme was frozen in 2011, and he claims no loss as a result of his dismissal in respect of his benefits under that scheme.

34. The claimant had a second "pot" with the Tyne and Wear Pension Fund that was current as at the date of his dismissal. He has taken steps to ensure that he has no ongoing loss that can be attributed to his unfair dismissal after he attains the age of 67. He accepts that he will have no loss of lump sum.

35. His schedule of loss, therefore, seeks compensation for his loss of pension of £391,009.29. He seeks loss of earnings of three weeks' pay at £2,2550.00 per week and £250 for loss of statutory rights.

36. Ms Millns submitted that the respondent says that the claimant's net weekly wage was £2,340.89 [175 and 38-43]. We were reminded that the amount of compensation for unfair dismissal is that which we consider just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal, per section 123(1) of the Employment Rights Act 1996.

37. It was submitted that the simple contributions method should be applied to the claimant's pension loss. WE were reminded of the decision in **Digital Equipment Co Ltd v Clements (no 2)** [1998] ICR 258, in which case, the Court of Appeal clarified the rule on the order of deductions in Tribunal compensation awards. Ms Millns' specific point was that we should apply the contributory conduct reduction before we gave the respondent credit for paying an enhanced redundancy payment of £18.453.18, which Ms Millns defined as being any redundancy payment that is in excess of the statutory payment to which the claimant was entitled.

38. In making our decision, we considered the Fourth Edition of the Employment Tribunals Principles for Compensating Pension Loss (2021). We reproduce below, paragraph 5.32 of that document:

> *"5.32 The first type of DB case we consider appropriate for the contributions method is where the tribunal decides that the claimant's dismissal would have been very likely to occur within a relatively short period, bringing an end to their loss of earnings and loss of DB pension rights. For example:*
>
> *(a) A tribunal finds that a dismissal for redundancy was procedurally unfair but that a fair process, which might have taken longer, would almost certainly have led to the same outcome. In other words, the dismissal would still have occurred, but it would have only been delayed69. An illustration is given at Appendix 3 (see George).*
>
> *(b) Another example is a procedurally unfair dismissal for gross misconduct that would still have occurred at a later point if a proper procedure had been followed.*
>
> *Such scenarios are perhaps rare, but they provide a terminal point for all losses which, even for a claimant who was formerly in a DB scheme, point towards use of the contributions method. They represent what we might call, later in this chapter, a very high "withdrawal factor". However, if the tribunal is satisfied that there is a significant element of ongoing DB pension loss, the contributions method is unlikely to be appropriate. The*

> *contributions method is a better choice where, for example, the reduction under the "Polkey" principle, or because of contributory fault, is high.*
> *5.33 These Principles do not set in stone the period of loss that would be short enough to merit use of the contributions method in a DB case, since much will depend on the facts. As a rule of thumb, six months would very likely be a short period; twelve months would probably still be short; 18 months and above would probably not be short. As always, the parties will be free to make their arguments to the tribunal."*

39. In this case, it is now undisputed that the meaning of our decision is that if the respondent had employed a fair procedure, the claimant would have been fairly dismissed by 6 June 2019. That is a matter of three weeks after the date he was actually dismissed. We can therefore come to no other conclusion than the correct method of calculation of pension loss in this case is the contributions method. We considered the potential size of the claimant's claim if we used the complex method of calculation, but decided that the contributions method produced the just and equitable result in the particular circumstances of this case

40. We agree with Ms Millns' submission that the claimant's average weekly net pay was **£780.30** because that figure was corroborated by the documents in the bundle. We award the claimant **£780.30** multiplied by three weeks to reflect the additional period of employment that we find that a fair dismissal procedure would have afforded him. The total loss under that head is, therefore **£2,340.90**.

41. The figure of £250.00 for loss of statutory rights contended for by the claimant was not disputed by the respondent, so we make an award in that sum under that head of loss.

42. In terms of pension loss, we find that the just and equitable loss figure incurred by the claimant arising from his unfair dismissal, by using the contributions method is £865.22.

43. The total compensatory award calculation, therefore, is **£3,456.12**. W**e** then have to apply the deduction for contributory conduct of 90%, which reduces the total to **£346.61**.

44. We then turn to the issue of how to deal with the issue of the ex-gratia enhancement to the redundancy payment made to the claimant by the respondent. There is a statutory provision in section 123(7) of the Employment Rights Act 1996 that addresses the issue:

> *"If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award."*

45. In the case of **Digital (No 2)**, the Court of Appeal held that the correct calculation is to formulate the amount of loss, then apply the reduction (in that case it was a **Polkey** reduction) and then deduct the ex-gratia payment.

46. We find that the ex-gratia payment was not disputed and was £18,453.18. The ex-gratia payment therefore completely negates the sum of **£346.61**, so no compensatory award is payable.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
22 November 2021
Amended 21 December 2021