EMPLOYMENT TRIBUNALS

Claimant: Mr Jed Sanderson

Respondent: Jagex Ltd

Heard at: Cambridge Employment Tribunal (by CVP)

On: 28 February 2022

Before: Employment Judge Hutchings

Representation
Claimant: in person
Respondent: Ms Jennings (Counsel)

RESERVED REMEDY JUDGMENT

1. Following the liability judgment for unfair dismissal delivered orally on 28 January 2022 the judgment of the Tribunal on the remaining issue of remedy is:

   1.1. The claimant is awarded compensation for unfair dismissal as follows:

      1.1.1. Basic award of £1,016 gross adjusted by 50% for compensatory fault.
      1.1.2. Compensatory award of £0 due to a Polkey reduction.
      1.1.3. £500 for loss of statutory rights.

   1.2. Calculations for these figures are set out in the reasons for this judgment.

2. The Respondent shall pay the Claimant the total award of £1,008 compensation for unfair dismissal.

REASONS

The hearing

1. This hearing is a remedy hearing pursuant to a liability hearing which took place on 28 January 2022. At the conclusion of that hearing, I gave oral judgment in favour of the claimant in his claim for unfair dismissal.

2. The remedy hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46 of the Employment Tribunals Rules of Procedure. The Tribunal considered it as just and equitable to conduct the hearing in this way.

3. At the hearing the claimant represented himself. The respondent was represented by Ms Jennings of Counsel. Mr Lomax, the respondents Vice President, People Operations, also attended. For consideration as evidence, I had the agreed 246-page liability bundle and witness statements from the claimant and Mr David Lomax, Mr Neil McClarty and Mr Nick Deliueff of the respondent, all of which had been submitted for and considered at the liability hearing. In addition, I had a 37-page remedy hearing bundle. I heard submissions from Mr Sanderson and Ms Jennings, Ms Jennings also cross-examined Mr Sanderson. Any page references in this Judgment are references to the liability bundle.

Preliminary matters

4. The issues for the Tribunal were as follows:

   4.1. The respondent's request for reconsideration dated 11 February 2022. Pursuant to rules 70 and 71 of Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 'Rules') the respondent made a request for reconsideration of the liability judgement which I delivered orally on 28 January 2022. I was not aware of this request prior to the remedy hearing; it was brought to my attention as a preliminary matter by Ms Jennings. I agreed with the parties that the reconsideration request would be addressed as part of the decision for the remedy hearing. The points addressed in reconsideration are:

      4.1.1. Factual 'errors' in the oral judgment. I note that the respondent has not made a request for written reasons prior to this request for reconsideration so had not seen a copy of the oral transcript at the time of the request.

      4.1.2. The extent to which the compensatory award shall be reduced applying the principles in *Polkey v A E Dayton Services* [1987] IRLR 503, HL ('Polkey'). I have been asked by the respondent to reconsider my finding of a 25% reduction.

   4.2. The claimant's request for written reasons dated 20 February 2022. Pursuant to Rule 62 I received the request for written reasons on the same day as the remedy hearing. The request is in time, and I agreed with the parties to issue the written reasons for the liability hearing at the same time as the remedy judgment.

Issues on remedy

   4.3. Whether the Tribunal should make an order for reinstatement, a remedy sought by the claimant in his claim form. The claimant confirmed at the hearing this is a remedy he is still seeking. Therefore, I must consider:

      4.3.1. Whether it is practicable for the respondent to reinstate the claimant.

4.3.2. If the claimant caused or contributed to his dismissal, is it just to order.

4.4. If the Tribunal decides not to make an order for reinstatement, it must consider re-engagement:

4.4.1. Does the claimant want re-engagement? He does.
4.4.2. Is it practicable for the respondent?
4.4.3. If the claimant caused or contributed to his dismissal, is it just to order.

4.5. The amount of any basic award.

4.5.1. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4.6. The amount of any compensatory award.

4.6.1. The Tribunal agrees to reconsider the percentage reduction given in the liability judgment. Pursuant to the principles in Polkey, the Tribunal will reconsider the extent to which the compensatory award shall be reduced to take into account the possibility that, if the Respondent had applied a fair procedure, the Claimant would have been fairly dismissed in any event.
4.6.2. To what extent, if any, did the Claimant cause or contribute to his dismissal; and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award.
4.6.3. Was there any failure on the Claimant's part to mitigate his losses?

5. Whether there has been a breach of the ACAS Code by the respondent. The claimant alleges there was.

6. The claimant's schedule of loss refers to an amount for wrongful dismissal. There is no claim for wrongful dismissal before the Tribunal.

Relevant law – remedy for unfair dismissal

7. The law relating to unfair dismissal is in Part 10 of the Employment Rights Act 1996 (the 'Act'). Under section 113 the Tribunal may decide to make an order for reinstatement of the employee (section 114) or reengagement (section 115). Paragraph 4 summarises the test under these provisions.

8. Under section 118 financial compensation consists of a basic award and a compensatory award.

Basic award

9. The basic award is calculated by reference to a week's gross pay, age (determining the calculator for a week's pay), and the number of continuous years employment the claimant has worked for the respondent.

Compensatory award

10. The compensatory award is explained in s 123 of the Act:

> *(1) ... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

Duty to mitigate

11. When calculating the compensatory award, the calculation should assume that the employee has taken all reasonable steps to reduce his loss applying the same duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales. If the employer establishes that the employee has failed to mitigate, the Tribunal should reduce the compensatory award to cover only those losses which would have been incurred even if the employee had taken appropriate steps. The dismissed employee's duty to mitigate will be fulfilled if he acted as a reasonable person would do even if he had no hope of seeking compensation from his or her employer: *Archibald Freightage Limited v Wilson* [1974] IRLR 10.

Polkey reduction

12. Applying the Polkey principle if the dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award. This is relevant as, on liability, I found that there was significant procedural unfairness in the claimant's dismissal, and I have agreed to reconsider the percentage reduction in the liability judgment in this remedy hearing. I must consider the extent the claimant would have been dismissed in any event on the basis that the employer's procedural errors made no difference to the outcome.

13. In doing so I must be clear that it is the decision of the actual employer, in the case the respondent, not some hypothetical reasonable employer, dismissing this employee, the claimant, who must be assessed: *Grantchester Construction (Eastern) Ltd v Attrill* UKEAT/0327/12/LA. I must assess the percentage chance that the respondent would have dismissed in any event based on my assessment of the respondent's likely thought processes and the evidence available to that employer at the time of the dismissal.

Contributory fault

14. Pursuant to section 122(2) of the Act a Tribunal may reduce a basic award where it considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the award by any extent.

15. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. To fall into this category, the Claimant's conduct must be 'culpable or blameworthy'. In respect of the compensatory award, such conduct must contribute to the claimant's dismissal, rather than its fairness or unfairness.

16. A Tribunal should first assess the amount of loss under section 123(1) of the Act, then consider contributory fault. Where an initial reduction has been made under section 123(1), this might alter the extent of the reduction under section 123(6). Accordingly, it may turn out that the reduction from compensatory award under section 123(6) would be less than the reduction which is just and equitable to make to the basic award under section 122(2) of the Act.

17. The EAT in *Steen v ASP Packaging Ltd* UKEAT/0023/13, [2014] ICR 56 observed that a finding of 100% contributory conduct is unusual, albeit permissible, finding. A Tribunal should not simply assume that because there are no other reasons for the dismissal 100% contributory fault is appropriate. It may be the case, but the percentage may still be moderated in light of what is just and equitable: *Lemonious v Church Commissioners* UKEAT/0253/12 (27 March, 2013 unreported)

18. In *Rao v Civil Aviation Authority* [1994 IRLR 240 the Court of Appeal held that the same conduct can be considered under *Polkey* and contributory fault in assessing compensation. If there is a significant overlap in the factors taken into account for Polkey and contributory negligence, the Tribunal should consider expressly whether, in light of that overlap, it is just and equitable to make a finding of contributory fault. This is to ensure the claimant is not penalised twice for the same conduct *Lenlyn UK Ltd v Kular* UKEAT/0108/16/DM.

19. In assessing contribution, the Tribunal should:

    19.1. Identify the relevant conduct
    19.2. Assess whether it is objectively culpable or blameworthy
    19.3. Consider whether it caused or contributed to the claimant's dismissal
    19.4. If so, determine to what extent it is just and equitable to reduce any award.

Findings of Fact and conclusions

20. I accepted the Claimant's evidence, as set out in the remedies bundle, as follows:

    20.1. The Claimant started employment with the Respondent on 23 November 2015.
    20.2. His Effective Date of Termination was 28 August 2018.
    20.3. Therefore, he had 2 complete years' service at the EDT.
    20.4. The Claimant's annual gross salary was £33,000.
    20.5. His weekly pay was £633.40 gross or £496.56 net.
    20.6. The Claimant was aged between 22 and 41 years old throughout his employment.

Reinstatement / re-engagement

21. In his claim form Mr Sanderson has asked the Tribunal to consider reinstatement of his job with the respondent. When asked if he was still seeking this remedy Mr Sanderson confirmed he was. In oral submissions he told the Tribunal he had grown up playing computer games, including some of the respondent's games, and had always wanted to work in gaming. This was his

degree. He left his first job after university specifically to work with the respondent.

22. The respondent resists the request for reinstatement on the basis it is not realistic, it being 3 and half years since the claimant was dismissed, nor practicable: given the length of time Mr Sanderson's role has been filled and there are currently no suitable vacancies in the respondent's business. Ms Jennings referred to a breakdown of trust by the respondent, whose managers firmly believe the claimant's conduct contributed to his dismissal. For these reasons I find it is not practicable for the respondent to reinstate or re-engage the claimant.

Duty to mitigate

23. The Claimant commenced alternative employment on 13 December 2019 setting himself up as a freelance consultant. His losses stopped at that date. In cross examination Ms Jennings directed me to parts of the bundle where evidence, which is not disputed or refuted by the claimant, showed the timeline and substance of the claimants attempts to secure new employment. She pointed out his freelance role was 16 months after the date of his dismissal, submitting that Mr Sanderson did not discharge his duty to mitigate loss and that *'1 month was sufficient for Mr Sanderson to have secured alternative employment'.*

24. In evidence the claimant explained why he had not been able to secure alternative employment before deciding to work freelance. I see his explanation falling into 2 categories:

    24.1. His reasons for not being able to provide evidence of all jobs applications he claimed he has made; and
    24.2. Challenges faced with his applications.

25. First, Mr Sanderson explained following his suspension his devices were seized, making it difficult to access an email account which meant he was unable to access some application records. He explained he never received responses to some applications, using recruitment website which did not keep copies of applications on record; he only started screenshotting his applications when he realised that he would need evidence of applications to support his claim for unfair dismissal. Therefore, he explained any applications to which he did not receive a response made before the claimant was aware of the obligation to provide evidence in support of this claim are not evidenced in his remedy bundle. Mr Sanderson is a litigant in person who would not be aware of rules of evidence at the time; I have no reason to doubt his explanation.

26. Second, Mr Sanderson told the Tribunal that for the first 4 months post dismissal he applied only for roles in IT as this was his degree and he *'wanted to get back into* it'. Initially he focused on developer roles. He explained he did not apply for other jobs until after his appeal hearing, speaking of *'having faith that [the respondent] would get to the bottom of the case'.* He thought the decision to dismiss him would be reversed on appeal.

27. When challenged by Ms Jennings he said he was not qualified for wider IT roles, so this is the reason he had not applied for these kinds of roles initially. On oath Mr Sanderson's told me he was not successful in these claims due to

speculation on-line that he was the employee who had been dismissed by the respondent, that he had been 'named' on websites by some staff members who have since left the respondent.

28. I must be clear the respondent refutes that it has named the claimant and I found no evidence it did so. I note Mr Sanderson referred to employees who are no longer with the respondent. I find that the respondent made one announcement after the claimant's dismissal, which the Tribunal has seen; it does not name the claimant [246]. There may have been online speculation; however, there is no documentary evidence before the Tribunal to substantiate the claimant's explanation. The fact is he was not able to secure a job in IT. The claimant told the Tribunal that in 2019 he widened his search beyond IT roles, making 2 applications for bar staff roles he did not get and signing up to be a courier. He was not successful as he did not qualify for a vehicle lease agreement. In mid 2019 he says he *'took the initiative'* and changed his name. This presented a different challenge as it erased his job and portfolio history; it was at this point the claimant said he moved to freelance work.

29. Mr Sanderson's evidence brings an unusual flavour to consideration of the duty to mitigate. All claimants who are successful in unfair dismissal claims have a duty to seek other work. It is a well-known feature of employment tribunals that we must assess whether individuals have discharged that burden. It is also the case that that burden is not a particularly high bar and usually even attempts to find other work which have proved fruitless are sufficient to discharge that burden.

30. In deciding if Mr Sanderson had discharged the burden, I asked myself whether, considering these challenges, a 16-month period to secure alternative employment leads to the conclusion that the claimant had failed to mitigate his loss. It does not. It is evident that after his dismissal he struggled to find employment, despite making reasonable efforts to do so using recruitment websites, redirecting, and widening his search field when faced with rejections, ultimately setting up on his own with a new name. I find that the Claimant made reasonable efforts to mitigate his loss. In the circumstances it was unrealistic and unreasonable to expect for the claimant to secure alternative work within a month. However, given the unusual circumstances it is reasonable to expect Mr Sanderson to consider freelance work at an earlier stage, given the nature of his expertise lends itself to this type of work. I find a period of 6 months to secure alternative work reasonable.

Polkey

31. In reconsideration of Polkey, I reiterate my finding on liability that a significant procedural defect by the respondent rendered the dismissal unfair. The respondent could have arranged for someone other than Mr Lomax, who had sight of and raised his concerns with the offending email, to investigate the misconduct alleged. I found that the procedure fell significantly below the standards of fairness required of a reasonable employer and that as a result of the procedural defects identified in that judgment the dismissal was unfair within the meaning of section 98 (4) of the Act.

32. Given agreed reconsideration of the Polkey percentage at this hearing both parties addressed this in oral submissions. Mr Sanderson submitted that the respondent's investigation was *'founded purely on the basis of a suspicion of*

the person approach' with him being named to the individuals tasked with the investigation and disciplinary processes before any investigation. He submits this prevented those individuals from acting fairly and looking into flaws he alleges in the evidence. In essence the claimant's position is but for the email naming him the respondent's investigations would have reached a different conclusion, and he would not have been dismissed as the respondent would have *'found something to prove [his] innocence'*. It is clear from Mr Sanderson's submissions at the liability and remedy hearings that he firmly believes this would have been the case.

33. Ms Jennings refuted this. She referenced my conclusion on liability that the email dated 25 July 2018 which identified the Claimant as 'the likely suspect'. from the Respondent's Head of IT to Mr Lomax and Mr McClarty before they became involved as investigatory and disciplinary officers, constituted a significant failure in due process, rendering the procedure unfair. It was. The email refers to CCTV records, WIFI access records, records of the Claimant's logins into the Respondent's system and the need to tie this evidence together, I quote, 'the smoking gun in a sense' before continuing that 'based on … conversations with HR we have enough evidence to terminate the suspect.' This was a statement made before any investigating officer had been appointed. It was a statement made to the individuals subsequently appointed as investigating officer, Mr Lomax, and disciplinary officer, Mr McClarty.

34. She submitted that had a fair procedure been followed the respondent would still have concluded it was the claimant who was guilty of the misconduct on the basis that the respondent had concluded Mr Sanderson was responsible based on CCTV evidence before the claimant was named in the email. Ms Jennings referred me to an interview conducted by Mr Lomax in which a member of the IT team told Mr Lomax about internal investigations of log in times, authentication, and CCTV footage, led to one individual, the claimant. While this interview was conducted by Mr Lomax after he had seen the email, it seems from the interview notes these investigations took place around 19 and 20 July 2018, before the email was sent. Ms Jennings also referred me to Mr Lomax's witness statement, paragraph 18 which noted that *'since 20 July just one staff user ID had researched the compromised player accounts before the accounts were hijacked and that ID belongs to the Claimant.'* It was that analysis of a 2-stage authentication process that had identified the claimant as the only person to have accessed all the compromised accounts. Based in this evidence, the respondent submits a 100% reduction for Polkey as the respondent would have dismissed in any event if the email did not exist.

35. I have revisited my notes of the liability hearing; I have no notes of being specifically directed to page 166 or paragraph 8 of the witness statement, nor have I marked these in the bundle or on the statement being directed to them as a significant point in evidence. I appreciate they are significant now as the timeline of evidence is key, given my finding that the email is the seed of significant procedural defect. Considering the directions to this evidence by Ms Jennings I find that had a fair procedure been followed (and the email did not exist) the decision of the respondent as to whether the claimant was guilty of the misconduct alleged would have, likely, been the same.

36. Therefore, on reconsideration I would say that 100% the respondent would have dismissed such was their belief in their evidence.

Contributory fault

37. I was addressed by Ms Jennings on the issue of contributory fault under s.123 Act 1996. In cases such as this we often must look at contributory fault particularly where the dismissal that was subsequently found to be unfair was for misconduct reasons. I must consider whether I apply an element of contributory fault in the compensatory award in the unfair dismissal claim in these proceedings. The respondent submits an 80% reduction for contributory fault.

38. I must consider the extent it is just and equitable to reduce an award. The conduct alleged is the compromising of client player accounts, evidenced by linking 2 factor authentication of the claimant's log in corresponding to WIFI access of the claimant's account and his location in the building, evidenced by CCTV footage. Objectively this behaviour is culpable, however elements of the triage have been challenged. I find the linking of this behaviour through the triage of evidence contributed to the claimant's dismissal. While there are some questions around the location of the claimant on the CCTV footage, I find it is just and equitable to reduce the award by 50%.

ACAS Code

39. The claimant claimed breach of the ACAS code on the basis he was refused a companion at the investigatory meeting. Paragraph 4 of the ACAS Code provides:

    Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

40. While I find it is unreasonable to refuse someone being investigated for misconduct a companion at an early meeting, without a fair reason, the Code does not prescribe a companion at the investigation stage and so I find that there is no breach in this regard. In any event the claimant challenged this at the time: the respondent reversed its position and allowed a companion.

Decision

41. The request for reinstatement is refused. The passage of time, lack of vacancy and breakdown in the relationship of trust for the respondent means it is not practicable for the respondent to reinstate the claimant.

42. Given the breakdown of trust on the part of the respondent it is not practicable for the respondent to re-engage the claimant.

43. The Claimant is entitled to the following sums in compensation for unfair dismissal.

Basic award

44. A Basic Award of £1,016, calculated as: 2 full years' service x age multiplier of 1 x £508 (maximum week's pay allowable). The Tribunal notes that, when asked the respondent agreed the basic award in this sum at the hearing.

Compensatory award

45. Loss of earnings for 24 weeks, to account for the period of mitigation, at £496.56 net, total £11,917.44. Given my finding that, had the procedure been fair (and the offending email did not exist), there is a 100% chance that the respondent would have dismissed the claimant in any event, the compensatory award is reduced to £0.

46. The claimant contributed to his dismissal and his compensation is reduced by 50% under section 122(2) and 123(6) of the Employment Rights Act 1996.

Loss of statutory rights

47. The Claimant claimed £500 for loss of statutory rights. I award this sum given that the Claimant will have to work for two years to regain protection unfair dismissal.

Summary of award

48. The claimant's total award for his claim for unfair dismissal is: £1,016 @50% + £500 = £1,008.

Employment Judge **Hutchings**

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11 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS