EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs S Goodison	**v**	**V High Speed Two Limited (HS2)**

Heard at: Central London Employment Tribunal

On: 28 April 2023

Before: Employment Judge Brown

Members: Ms S Aslett
Mr R Baber

Appearances:

For the Claimant: Mr A Otchie, Counsel
For the Respondents: Mr S Liberadzki, Counsel

REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **It was 75% likely that the Claimant would have resigned in any event, so the compensatory award for unfair dismissal should be reduced by 75%.**

2. **A 20% uplift to the award is appropriate for Breach of the ACAS Code Of Practice No. 1.**

3. **The Respondent shall pay the Claimant a total award of £7,647.92 for unfair dismissal comprising:**

    a. **A basic award of £3,264;**
    b. **A compensatory award of £3,109.27 (to which the Polkey deduction has already been applied);**
    c. **An uplift of 20% on both.**

REASONS

Preliminary

1. By a judgment promulgated on 7 December 2022 the Tribunal decided that the Respondent unfairly constructively dismissed the Claimant and that the issue of whether the Claimant would have resigned, in any event, and not in response to any fundamental breach of contract by the Respondent, would be addressed at this remedy hearing.

2. It also decided that The Respondent did not subject the Claimant to direct or indirect race discrimination, race harassment, or victimisation, so this remedy hearing is to consider compensation for unfair dismissal only.

Issues

3. The issues in the remedy were agreed as follows:

    a. What is the appropriate Polkey reduction to be applied to any compensatory award to reflect the likelihood that the Claimant would have resigned in any event?

    b. The period of loss in the compensatory award – and whether the Claimant's new employment broke the chain of causation of loss.

    c. The appropriate period of future loss after that new employment ended.

    d. Whether an ACAS code uplift should be made and, if so, how much?

4. The Tribunal heard evidence from the Claimant

5. There was a bundle of documents.

6. Both parties made submissions.

7. The Tribunal permitted the Respondent to add 5 job advertisements as documents to the Bundle. The Claimant's Schedule of loss, dated 26 January 2023 did not say, in terms, that she sought to recover loss of earnings until retirement. Paragraph 2.3 of her Schedule of loss claimed loss of earnings only until 1 June 2023. In her witness statement, however, which the Tribunal was told was exchanged last week, she claimed loss of earnings until retirement, saying that she would not be employed again before her retirement date. Due to the change in the Claimant's claim for loss, the Tribunal decided that it would be fair to allow the Respondent to produce the job advertisements, to challenge the way the Claimant now put her case in her witness statement. Any prejudice to the Claimant caused by the later production of documents could be avoided by giving her time to consider the documents and inviting her to give evidence on them both in chief and in cross examination.

Relevant Facts

8. The Claimant was employed by the Respondent from 10 April 2017 until 13 August 2021.

The Liability Judgment

9. The Tribunal refers to its liability judgment in this case. In the liability judgment, the Tribunal found as follows:

    a. On 3 August 2020 the Claimant submitted two formal grievances, pp971-976; 977-981.

    b. On 26 August 2020, Osita Madu was appointed to investigate the Claimant's grievances, p1007.

    c. The Claimant went on a period of sick leave from 3 September 2020 due to work related stress and anxiety, p1008 and 1040.

    d. On the Claimant's return to work, she was referred to Occupational Health ("OH"). An OH report was provided on 2 October 2020, p 1093. The report advised," [The Claimant reports she has been absent since the 03/09/20 due to the onset of symptoms associated with stress and anxiety, which she can attribute solely to work-related. [The Claimant] reports there are ongoing grievance cases which she has raised. [The Claimant] reports high levels of anxiety, weight loss and trouble sleeping as a result… she feels well prepared, and is keen for the grievances to be resolved. She reports she has returned to work."

    e. The report also advised, "… it is my clinical opinion, that [the Claimant] is fit for work within her substantive post. Taking into consideration the ongoing grievances and impact this is having on her mental health, a reduction in working hours is advised whilst the situation remains unresolved. A reduction of 20% of her working hours per week would be suitable." P1093.

    f. The Claimant attended a first grievance meeting with Mr Madu, on 9 October 2020, p1109-1124. A second grievance meeting was held on 13 October 2020, pp1132-1145.

    g. The Claimant presented a revised, second formal grievance on 17 November 2020 pp 1227-1233; 1234-1241.

    h. Mr Madu interviewed Kimberley Royer-Harris on 17 November 2020, pp1242-1251; Donovan Bailey on 20 November 2020, pp1260-1268 and Elena Argirova on 26 November 2020, pp 1272-1279. He interviewed Lynsey Rice on 30 November 2020, pp1323-1327; and Neil Simmonds on 15 December 2020, p1402-1407.

    i. The Claimant had a third grievance meeting on 27 November 2020, pp1280-1299; 1300-1320. The Claimant had a fourth grievance meeting on 17 December 2020, pp1411-1421; 1422-1433.

    j. OH produced a further report on 16 December 2020, p1408. The report said that the Claimant remained fit for work with the adjustment of a reduction in working hours by 20% per week. It also said, "Early resolution of the workplace issues will aid recovery and prevent any

further deterioration of health." It said that there had been a deterioration in the Claimant's health while the grievance procedure remained ongoing, p1409.

k. On 17 January 2021 the Claimant emailed Osita Madu saying, "I am almost at breaking point and it is unfair that I should have to .. be continual exposed almost daily to Laura Day's poor behaviours, which continues to have a detrimental impact on my mental and physical well-being.. me being in this role is fast becoming untenable. I would really appreciate it if you, as my Grievance Manager, could treat this as high priority and do all in your powers …to bring this grievance process to an end as soon as possible." P1506.

l. On 22 January 2021 the Claimant emailed Stephanie Elton, who had recently become Shaf Aslam's manager, and others saying, "Going forward, please can you let me know what measures HS2 intends to put in place, until the conclusion of these grievances in order to avoid any further deterioration to my mental and physical wellbeing" p1513.

m. Sue Fursey, who was a Union representative, also wrote to Ms Elton and John Whitefoot, Head of Employee & Industrial Relations, on 25 January 2021 saying, "I am very concerned about Sharon's health –The current situation she is trying to navigate with Shaf and Laura regarding her salary, whether or not she is under attendance management (she has not been advised that she is), the issue she is having with Laura regarding additional workload while on reduced hours, and the ongoing grievance are having an extremely detrimental affect on her. Any guidance or assistance at this point in time would be very much appreciated."

n. On 29 January 2021 the Claimant was informed that Osita Madu had sadly suffered a family bereavement and there could be a delay in the grievance. Pamela McInroy was appointed grievance manager, in place of Osita Madu, on 8 February 2021, p1646.

o. On 12 February 2021 Ms McInroy interviewed Amanda Boikovs, p1660-1670; Kimberley Royer-Harris, pp 1693-1702 and Laura Day, pp1677-1692. She interviewed Natalie Penrose on 1 March 2021, p1717-1726.

p. Kate Wilson took over from Pamela McInroy as grievance manager on 30 March 2021, p1955.

q. On 20 April 2021 John Whitefoot emailed Osita Madu, Pamela McInroy, Kate Wilson and Shaf Aslam, amongst others, saying, "URGENT The Sharon Goodison grievance is now entering its nine month. This is entirely unacceptable. Accordingly, I have asked Kate [Wilson] to support Pamela [McInroy] in expediting a resolution." p1873.

r. The Respondent's Grievance Policy, p76, provided, under the heading, Principles, "HS2 will make every effort to deal with grievances as quickly as possible." It also provided, "No decisions on the outcome of a formal

grievance raised under this policy will be made before the case has been investigated" , p79.

s. The Claimant was sent a grievance outcome report dated 11 August 2021, p2022-2045; 2048-2050.

t. The report upheld parts of the Claimant's grievance: Allegations 5, 7, 9.1, 9.2, 11, 14 9 (partially) and 16.

u. The Claimant resigned without notice of 13 August 2021, p2054-2057. In her letter of resignation she said, "You should be aware that I am resigning in response to a repudiatory breach of contract by HS2 detailed in the informal and formal grievances I have raised. I therefore consider myself constructively dismissed." The Claimant set out her criticisms of the grievance report.

v. The Claimant continued, "2. Fundamental breach of contract, Breach of Duty of Care: Relevant, Statutory, Common Law, Implied, Expressed HS2 Grievance Policy – Section 1 - "Ensure that individual grievances are dealt with fairly, consistently, and promptly" Grievance 1 – Failure to follow HS2 Processes before, during and after Evolve and Grievance 2 -Failure to follow HS2 Policies & Processes, in line with the Equality Act 2010, including s149 Public Sector Duties the Human Rights Act 2011 Article 14 submitted on 03/08/20 and 17/11/20." She said that she had attended 4 grievance hearings.

w. The Claimant said that she had raised concerns about "Breach of Duty of Care, Omission to Act", saying she had raised concerns on 9 occasions since her grievance was submitted on 3 August 2020 about "the continuous bullying and hostile environment I was experiencing working the CSE – Strategic Partnerships Team and the impact it was having on my mental and physical well-being", "and nothing has been done."

x. She said, "I now consider that my position at HS2 is untenable and my working conditions intolerable, leaving me no option but to resign in response to your breach." P2057.

y. The Claimant told the Tribunal in evidence that she had resigned when she received the grievance. In submissions, she said that the grievance outcome was the final straw.

z. The Claimant relied on a number of alleged fundamental breaches of contract in saying she had been constructively dismissed.

aa. The Tribunal found that the Respondent did breach its fundamental duty of trust and confidence to the Claimant by "its wholly unreasonable delay in providing a grievance outcome to her. The delay was over a year in length, between 3 August 2020, when she first submitted her grievance, and 11 August 2021, when the grievance outcome was provided to her."

bb. The Tribunal noted that parts of the Claimant's grievance were eventually upheld: Allegations 5, 7, 9.1, 9.2, 11, 14 9 (partially) and 16 and that the Respondent's Grievance Policy, p76, provided, under the heading, Principles, "HS2 will make every effort to deal with grievances as quickly as possible." The Tribunal considered that the Respondent had failed to do deal with the Claimant's grievance as quickly as possible. This failure was all the more serious in light of Occupational Health advice that the Respondent should provide, "Early resolution of the workplace issues" to "aid recovery and prevent any further deterioration of health." The December OH report advised that there had already been a deterioration in the Claimant's health while the grievance procedure remained ongoing, p1409. (allegations 2.2.2 and 2.2.5). The Tribunal considered that the Respondent's delay in providing a grievance outcome was not explained or justified. There were long gaps in the chronology of the grievance. There were serious delays under each of the grievance mangers, Mr Madu, Ms McInroy and M Wilson.

cc. The Claimant and her Union representative reminded Mr Madu and others in January 2021 that the grievance was having a negative effect on her health. Given that the Respondent had been also told by Occupational Health in December that the Claimant's health had deteriorated during the grievance, the Tribunal found that it was wholly unreasonable and unsafe for the Respondent to fail to provide an outcome to the grievance for a further 8 months.

dd. However, the Tribunal did not find that the following matters had occurred and/or amounted to fundamental breaches of contract, entitling the Claimant to resign in respect of them:

i. Failing to move the Claimant or change her line management during the grievance process,

ii. Alleged failure to investigate the Claimant's grievance in accordance with its policy by not interviewing Miriam Wolff, by its treatment Suzanne Crouch's evidence, or by allegedly ignoring emails showing discrimination or bullying;

iii. Alleged failure to provide a reasonable and satisfactory recommendations in the Grievance Investigation Outcome Report received by the Claimant on 11th August 2021

iv. John Whitefoot allegedly informing the Claimant's union representative on 12 August 2021 that if the Claimant was going to appeal the grievance outcome, she would need to 'provide completely new evidence'. [GOC ¶1(b)(i)]

v. Allegedly appointing the Claimant to the Compliance Manager role without her permission, thereby removing her from the 'at risk' pool during the 'Evolve' restructure and putting her at a disadvantage in that she no longer had priority status when

applying for other available roles, including the Senior Compliance Manager role.

vi. Laura Day allegedly making unreasonable requests of the Claimant to take on additional responsibilities on 05/01/21

vii. Allegedly reducing the Claimant's salary by 20% on 04/01/21.

viii. Allegedly unilaterally giving the Claimant additional responsibilities relating to Goods Receipting, which amounted to a change to the Claimant's contract of employment, without discussion or agreement.

ee. The Tribunal concluded that the Claimant did, partly, resign in response to the Respondent's fundamental breaches of contract; its failure to provide a reasonably prompt response to her grievance, which it partly upheld; its failure conclude the grievance in contravention of Occupational Health report advice to provide "Early resolution of the workplace issues" to "aid recovery and prevent any further deterioration of health, p1409.

ff. However, the Tribunal found, on the Claimant's evidence to the Tribunal, and from the contents of her letter of resignation, she also resigned in response to many other matters which were not fundamental breaches of contract by the Respondent.

Findings of Fact at the Remedy Hearing

10. The Claimant was constructively dismissed on 13 August 2021. She was aged 56 at that date. She had been employed for 4 years. Her gross annual pay at the Respondent was agreed at £68,073.68. Her gross weekly pay at the Respondent was agreed at £1,309.11.

11. The basic award was agreed at £544 (statutory cap) x 4 x 1.5 = £3,264.

12. Loss of statutory rights was agreed at £500.

13. It was agreed that the Claimant received £953.25 net pay weekly at the Respondent and that the Respondent made a pension contribution of £157.09 weekly.

14. The total of these figures was £1,110.34.

15. In April 2021, a recruiter had contacted the Claimant regarding potential Cabinet Office Commercial Lead roles. The Claimant attended the Government Commercial Function (GCF) Assessment Centre and achieved a B Grade and, in early May 2021, was interviewed for the Assistant Strategic Partnering Manager (ASPM) role.

16. On 10 June 2021 the Government Commercial Function wrote to the Claimant offering the Claimant a 22 month fixed term contract, with a guaranteed permanent position if she achieved an A Grade within that fixed term. The letter said,

"… you were recently successful in achieving a B grade result in an open competition for the role of Assistant Strategic Partnering Manager/ GCO Commercial Lead. GCO T&Cs within the GCO. Whilst GCO requires candidates to achieve an A grade result to be eligible to be offered a permanent role, it is willing to offer you a temporary position, with a view to you working towards achieving full accreditation within the next 22 months.

You will be employed on a Fixed Term basis by the Government Commercial Organisation (GCO) on GCO terms and conditions. Your salary will be £70,925.00 per annum and your start date is to be agreed. As the GCO is a business unit within the Cabinet Office, your employment will be governed by Cabinet Office policies unless they are superseded by a GCO policy, in which case GCO policies will apply. Cabinet Office and GCO policies are non-contractual.

Your appointment will be on a Fixed Term basis for a period of 22 months from the commencement date, while you work towards full accreditation. GCO will work together with the department within which you are posted Ministry of Defence to support you in working towards full accreditation over the next 22 months. Full accreditation will require you to achieve an A at ADC within the next 22 months. In the event that you achieve an A accreditation within that time-frame, GCO confirms that you will be eligible to be offered a permanent role of Assistant Strategic Partnering Manager/ GCO Commercial Lead. GCO T&Cs and access the PRP scheme. If you do not achieve an A within this time frame, your contract will automatically terminate on the termination date in accordance with the termination provisions in your contract."

17. The Claimant did not accept or reject the formal conditional offer at that time.

18. The Tribunal accepted the Claimant's evidence that she did not, at that time, accept the offer because she was concerned that the role was a 22-month Fixed Term Contract, with no certainty that she would be achieve the required A grade in order to be offered a permanent position, and she was also concerned about the amount of travel required by the ASPM role because of her rheumatoid arthritis.

19. The Claimant has had arthritis since 2019, although she provided the Tribunal with very little medical evidence of this. There was no GP, or other medical, report about its effects on her. In the Bundle for the liability hearing, a GP print-out recorded that she was under the care of a rheumatology clinic at Chase Farm hospital and had generalised joint pains all over her body.

20. The Claimant worked almost exclusively from home while employed by the Respondent. Before the covid pandemic, she commuted to the Respondent's Euston office once a week.

21. After the Claimant resigned from the Respondent, she contacted the Government Commercial Function to ask if the ASPM role was still available.

22. The Claimant spoke with Mrs Alexandra Bailey, the Director of the Strategic Partnering Programme (SPP) and informed her of the Claimant's arthritis. Ms Bailey agreed adjustments to allow the Claimant to work 70% by MS Teams and 30% in person. In this conversation, Mrs Bailey said, however, that the Claimant would be required to

attend any meetings that were of a highly sensitive nature in person, either at the Ministry of Defence (MoD) Main Building in London, and/or in Bristol.

23. The Claimant started a new job with the Cabinet Office on 1 November 2021, on a 22-month Fixed Term Contract. Her work was mainly for the Ministry of Defence. She had been unemployed in the interim and received no other income until 30 November 2021.

24. Her total loss of earnings: from 13 August 2021 to 1 November 2021 was agreed at £9,533.04.

25. Her net weekly pay in her Cabinet Office role was agreed at £1,053.47 for the whole period of employment.

26. It was agreed that her new employer also made pension contributions of £40.92 per week from November 2021 to July 2022, and £42.04 per week from August to November 2022.

27. The total payment by way of wages and deferred pay - pension contributions - in her new employment was £1,094.39 from November 2021 to July 2022.

28. She therefore sustained a loss of £15.95 weekly – or a loss of £829.40 a year - in that period.

29. Between August 2022 and November 2022 the Claimant was paid a total of £1,053.47 (wages) + £42.04 (deferred pay) = £1,095.51.

30. In that period, she suffered a loss of £14.83 weekly.

31. Accordingly, in her new Cabinet Office job, there was an ongoing loss.

32. The Claimant resigned from her Cabinet Office job at the end of August 2022, with her notice expiring on 30 November 2022.

33. On 24 February 2022 Russia invaded Ukraine. The Claimant told the Tribunal that resulted in significant pressure on the Ministry of Defence to ensure timely procurement. The Claimant was initially required to attend 70% of meetings and client visits in person. This required travelling. By August 2022, the Claimant's role required her to attend 95% of meetings in person at the MoD Main Building in London and/or onsite at various UK military establishments.

34. The Claimant told the Tribunal that the unforeseen travel requirements involved in the ASPM role, coupled with her arthritis, were having a serious adverse effect on her health and she felt that she could not continue.

35. There was no medical evidence regarding limitations on the Claimant's ability to travel caused by her arthritis condition.

36. The Claimant told the Tribunal that she had not been able to attend training, due to work pressures, to enable her to achieve an assessment centre A grade, in order to be offered a permanent role by the Cabinet Office.

37. She told the Tribunal that, when drafting her initial schedule of loss, she had been confident that she would find alternative work by the end of her fixed term contract.

38. On all the evidence, the Tribunal was unable to determine, on the balance of probabilities, what was the reason the Claimant resigned from her Cabinet Office role. If her arthritis meant that she was unable to continue in that role, the Tribunal would have expected to see some medical evidence confirming this. Given that the Claimant had not made any progress towards achieving an A grade at the assessment centre, the Tribunal considered that the Claimant may have decided to look for a permanent role at a different employer.

39. The Claimant has only worked in four permanent positions, since starting full time employment in 1983. She accepted her job with the Respondent, with the intention to remain employed with the Respondent and retire, aged 60. She will be 60 years of age on 19 November 2024. The Claimant is currently unemployed.

Relevant Law

Compensatory Award

40. By s123 Employment Rights Act 1996.

"(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 con,sequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal. …".

Mitigation

41. When calculating the compensatory award in an unfair dismissal case, the calculation is based on the assumption that the employee has taken all reasonable steps to reduce their loss. If the employer establishes that the employee has failed to take such steps, the compensatory award should be reduced to cover only losses which would have been incurred if the employee had taken appropriate steps.

42. Sir John Donaldson in *Archibald Feightage Limited v Wilson* [1974] IRLR 10, NIRC said that the dismissed employee's duty to mitigate their loss will be fulfilled if they acted as a reasonable person would do if they had no hope of seeking compensation from their employer.

Remoteness

43. In *Whelan and anor v Richardson* [1998] ICR 318, EAT, the EAT said that, if, at the date of the remedies hearing, the employee has found alternative permanent

employment which pays at least as much as the job from which he or she was dismissed, then the tribunal should only assess the employee's loss from the date of dismissal to the date on which he or she started the new job.

44. In *Dench v Flynn and Partners* [1998] IRLR 653, CA, the Court of Appeal held that an employer's liability for the loss suffered by an unfairly dismissed employee does not *necessarily* cease once the employee commences new employment, of a permanent nature, at an equivalent salary. The Court acknowledged that, in many such cases, the loss consequent upon the unfair dismissal will cease. Nevertheless, it said that obtaining equivalent permanent employment should not always be treated as ending the loss caused by the unfair dismissal, as that could sometimes lead to an award which is not just and equitable. An example is where the new employment appears to be permanent but, through no fault of the employee's, proves to be of only a short duration. The Court of Appeal ruled that, in such a case, the reason why the subsequent employment ended will be an important consideration. If the employee simply resigned for no good reason, or was dismissed for incompetence or misconduct, for example, a tribunal is likely to conclude that any losses the employee had subsequently suffered were not attributable to the original unfair dismissal.

ACAS Code of Practice

45. Where an employee is successful in a claim listed in Schedule A2 to TULR(C)A 1992 the tribunal has power to increase or decrease, as the case may be, by up to 25 % an award of compensation, where it has found that the employer, or employee, unreasonably failed to comply with a requirement of a relevant ACAS Code of Practice: *s207A TULR(C)A 1992*.

46. In *Allma Construction Ltd v Laing* UKEATS/0041/11 (*25 January 2012, unreported*) Lady Smith suggested that a tribunal should approach an ACAS uplift in the following way: 'Does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Do we consider that that failure was unreasonable? If so, why? Do we consider it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? If we consider that the award *ought to be increased,* by how much ought it to be increased? Why do we consider that that increase is appropriate?'

47. *Guidance on quantifying an award was given by Griffiths J in Slade v Biggs* [2022] IRLR 216, EAT, at [77] where it was suggested that the ET should pose the following questions

"i) Is the case such as to make it just and equitable to award any ACAS uplift?

ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%. Any uplift must reflect "all the circumstances", including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality

iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate

adjustment, if any, to the percentage of those awards in order to avoid double-counting? This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise.

iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made. Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is "just and equitable in all the circumstances", and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is "just and equitable" by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested."

48. The aim of the uplift is at least partly punitive, *Brown v Veolia ES (UK) Ltd* UKEAT/0041/20 (6 July 2021, unreported).

49. The ACAS Code of Practice No1: Disciplinary and Grievance Procedures (2015) provides, at paragraph [40], "Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay …".

Discussion and Decision

Mitigation

50. The Tribunal decided that the Claimant had mitigated her loss by accepting a fixed term contract with the Cabinet Office in November 2021. That role almost completely extinguished her losses, save that there was an ongoing pension loss. The Tribunal considered that the pension loss was caused by her unfair dismissal and that it was just and equitable for the Claimant to recover compensation for that ongoing loss.

51. However, the Tribunal was not able to conclude, on the balance of probabilities, what was the reason the Claimant left her Cabinet Office job.

52. Insofar as the war in Ukraine changed the requirements of the Claimant's new role, it was difficult to see how this was something which was caused, or foreseeable, as a result of her unfair dismissal by the Respondent.

53. Applying *Dench v Flynn and Partners* [1998] IRLR 653, CA, the Tribunal considered that the Claimant's resignation from that job was therefore not something which could be said to have resulted from the Respondent's actions.

54. It would not be just and equitable for the Respondent to compensate the Claimant for loss of earnings arising from her leaving her Cabinet Office role.

55. The only loss which was foreseeable, even after she resigned from her Cabinet Office role, was the ongoing loss of pension, which had continued during the time she was employed by the Cabinet Office.

Polkey Deduction

56. The Tribunal considered what was the likelihood the Claimant would have resigned in any event.

57. The Respondent contended that the Claimant had clearly been looking for other work while employed by the Respondent. It also contended that, if she had been given the same outcome to her grievance in January 2021, it was inevitable that she would have resigned, as her hostility towards her manager was already entrenched.

58. The Tribunal noted that, despite being offered a job in May 2021, the Claimant did not resign at that time. That suggested that she did want to stay in her employment with the Respondent. The Tribunal considered that the offer of alternative work made little difference to the Claimant's decision to leave the Respondent.

59. Her resignation came when she received the grievance outcome.

60. The grievance outcome rejected the Claimant's allegations of discrimination and bullying in her current role. It did not offer her an automatic change in role. At that point, therefore, she was in a job she did not want, managed by someone she felt resentment towards. The Tribunal noted that, despite Ms Day's attempts to establish a fresh working relationship when she started managing the Claimant, the Claimant had immediately objected to numerous actions by Ms Day, including her allocation of work, and the Claimant had reasserted allegations of race discrimination against Ms Day. These were not justified, but the Claimant had already made them by January 2021.

61. The Tribunal concluded that there was evidence that the Claimant was already alienated from her manager and her work environment in January 2021. It was highly likely that she would have resigned then, in any event, had she received the same grievance outcome, before any unreasonable delay had occurred.

62. The Respondent's Grievance Policy, p76, provided "HS2 will make every effort to deal with grievances as quickly as possible." There was good reason for this. From the Tribunal's workplace experience, unresolved grievances fester and erode trust between employer and employee.

63. The Tribunal took into account that the very lengthy delay in providing the Claimant with a grievance outcome would almost inevitably have resulted in the Claimant becoming more disaffected and entrenched in her hostility to her manager and the company.

64. Her letter of resignation to the Respondent, written in August 2021, was not necessarily an accurate representation of the Claimant's attitude and beliefs in January 2021.

65. There was not an insignificant chance that the delay made a difference to the Claimant's decision to resign.

66. On all the facts, including the Claimant's alienation from her manager at an early stage, but taking into account the damage that an unresolved grievance would also have caused to work relationships, the Tribunal considered that it was much more likely

than not that the Claimant would have resigned, in any event, had there been no delay in the grievance outcome. Nevertheless, in the Tribunal's assessment, the delay was still a factor which affected the Claimant's decision.

67. The Tribunal decided that the Claimant was 75% likely to have resigned, notwithstanding the delay to the grievance outcome.

Future Loss

68. The Claimant would have had ongoing loss of deferred pay – pension – even if she had stayed in the Cabinet Office role.

69. She intended to retire, aged 60. Her ongoing loss of deferred pay would have ended on 19 November 2024.

ACAS Uplift

70. The ACAS Code of Practice on Discipline and Grievances at Work (2020) provides, at paragraph [40], "Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay …".

71. The Respondent failed to communicate its decision without unreasonable delay.

72. It its liability judgment, the Tribunal found, of the unreasonable delay in communicating the grievance outcome to the Claimant, "[369] … the Respondent's delay in providing a grievance outcome was not explained or justified. There were long gaps in the chronology of the grievance. There were serious delays under each of the grievance mangers, Mr Madu, Ms McInroy and M Wilson." … "[374] Given that the Respondent had been also told by Occupational Health in December that the Claimant's health had deteriorated during the grievance, it was wholly unreasonable and unsafe for the Respondent to fail to provide an outcome to the grievance for a further 8 months."

73. The Tribunal considered, given the seriousness of the breach and the risks it posed, that it was just and equitable to award an ACAS uplift.

74. The Respondent did not breach the Code of Practice in other ways.

75. While there was only one breach, it was particularly egregious and damaging. The Respondent was a large employer with considerable resources, including Human Resources employees. The Tribunal concluded that the appropriate uplift must be near the top of the scale.

76. Allowing a discount for the fact that there was not a wholesale breach of the Code, the Tribunal awarded a 20% uplift for breach of the ACAS Code.

77. Taking into account the amount of the award, that percentage uplift (about £1,275 – see further below) was not disproportionate in absolute terms.

Calculations

78. The Tribunal made a Basic Award in the agreed sum of £3,264.

79. The Claimant's total loss of earnings from 13 August 2021 to 1 November 2021 was agreed at £9,533.04

80. From 1 November 2021 to 31 July 2022 she suffered a loss of £15.95 weekly: 39 weeks x £15.95 = £622.05.

81. Thereafter the Claimant continued to suffer a loss of £14.83 weekly, caused by the deficit in pension contributions. The Tribunal decided that that loss would have continued until the Claimant retired. It heard no evidence of any higher pension which the Claimant might have obtained had she stayed at the Cabinet Office.

82. The Tribunal did not find that the Claimant's loss of earnings after her resignation from the Cabinet Office, effective from November 2022, was caused by the Respondent.

83. It therefore awarded ongoing loss of pension, only, for 2 years and 16 weeks from 31 July 2022 to retirement on 19 November 2024, at £14.83 per week. (104 +16 = 120) x £14.85 = £1,782.

84. Loss of Statutory Rights was agreed at £500.

85. Total loss caused by the unfair dismissal was therefore £9,533.04 + £622.05 + £1,782 + £500 = £12,437.09.

86. Applying the 75% Polkey deduction to that: £12,437.09 x 0.25 = £3,109.27. The compensatory award was £3,109.27.

87. Applying the Uplift for breach of ACAS CoP No1: ((Basic Award + Compensatory Award) x 1.2) = ((£3,264 + £3,109.27 = £6,373.27) x 1.2) = £7,647.92.

88. The total award for unfair dismissal is £7,647.92.

Employment Judge **Brown**

Date: 12 May 2023

SENT to the PARTIES ON

12/05/2023

FOR THE TRIBUNAL OFFICE