EMPLOYMENT TRIBUNALS

Claimant: Mr. E. Huang
Respondent: Dplay Entertainment Ltd.

London Central by CVP **3 July 2023**

Employment Judge Goodman
Mr R. Baber
Mr D. Kendall

Representation:
Claimant: Anthony Korn, counsel
Respondent: Anya Palmer, counsel

RESERVED JUDGMENT

The respondent is ordered to pay the claimant the sum of £658.71 as compensation for unfair dismissal.

REASONS

1. In April 2023 the tribunal found that the claimant had been unfairly dismissed when he was selected for redundancy, because an intended third consultation meeting had not taken place. This was procedurally unfair. The hearing had been on liability issues, and we were asked not to make findings on **Polkey**, but rather to wait for submissions at a further hearing set for remedy, which was today.

2. For this hearing, in addition to the original hearing bundle, we had a supplemental bundle containing a further witness statement from the claimant, and a further brief statement from the respondent's HR manager, Hannah Lucile.

Polkey

3. It was agreed at the outset the tribunal would hear evidence and argument on the **Polkey** issue, and then give a decision before moving on to the more detailed calculation of remedy. That hearing had to be set back because Ms Lucile is in Seattle and it had been agreed that

she would be called not before 1 pm.

4. The issues we were asked to decide were :
   (1) had the process been carried out fairly, what was the chance that the claimant would have been dismissed for redundancy in any event, and if so when that would have been.
   (2) If there was a 100% chance he would have been dismissed by reason of redundancy, when would he have been dismissed.

5. We retired to consider a judgement and returned to give oral reasons. We have not been asked for written reasons (unlike on the deduction of notice issue below), but they are summarised here.

6. We held on the evidence today, in addition to the findings we made in the liability judgment, that at the third meeting Mr Saxena would have told the claimant that he was being dismissed. This is based on the evidence of Mr Saxena and Ms Lucille and their contemporary correspondence. We also held that the claimant expected that he would be dismissed at this meeting, not least because he referred to it in those terms in his letter of appeal. We could see no basis on which we would reopen our earlier findings and hold that Mr Saxena would or should have used the third meeting to hear more detailed representations by the claimant about the matters already contained in his slide deck, and then consider what to do. Nor did we consider that a fair decision would have involved the time given to the issues that was given to the claimant's appeal, so extending the dismissal date to 6 January 2022. Restating our finding, although the second meeting itself was rushed, Mr Saxena had ample time to read through the claimant's full presentation. He was well aware of the personalities in the team and the technical issues and so able to decide even after considering the claimant's proposal, that his decision on what to do with the teams was correct. In any case the chances of retaining the claimant was slender in view of his last slides. We also reject a submission that Mr Saxena would or should have retained the claimant to supervise the transition as Patrick Healey left. The claimant was in a higher grade, and would not be required to supervise, as the other team leader would do that.

7. On this evidence, we find that the meeting that the claimant did not attend at 3 pm on 22nd September 2021 would have been put off to the next day. Examining the emails on that day after the meeting, we see that Mr Saxena would have had time to send another meeting invitation, had that been his response to the claimant's failure to attend, and that he would have had time to attend to this the following day, when he spent some time drafting an announcement to the team about personnel changes following the claimant's departure. But the emails also tended to demonstrate that the claimant himself would have had time that day, as he spent some time in the morning

preparing emails. Even if he did have other meetings in the diary, we accept the evidence that Mr Saxena was anxious to make progress, because finding a technical solution to the app problem by the end of the year was a "make or break" issue for the respondent, and so would have instructed the claimant to attend his meeting and cancel others if necessary. Further, although the claimant probably did not attend the meeting on 22 September 2021 because that was the day he was to accompany his mother to a meeting with her consultant in view of her recent ill-health, there is nothing to suggest that anything else connected with his mother's health would have kept him away from work on other days. His earlier response about scheduling had been that he would be intermittently available, but that on the Wednesday he was due to see his mother's doctor. It was to be a zoom meeting, so there could be no difficulties with transport or timetables.

8. We concluded that the third consultation meeting would have taken place by the end of 23 September 2021, and that the claimant would have been dismissed in the same terms as the letter of dismissal dated 22nd September 2021.

Remedy

9. By section 119 of the Employment Rights Act 1996, a successful claimant must receive a basic award and a compensatory award for unfair dismissal. In this case, it is common ground that the basic award is met by the statutory redundancy payment the claimant received.

10. The compensatory award is governed by section 123, which states:

> "123 (1)Subject to the provisions of this section and sections 124,124A and 126, 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.

<u>A Day's Pay</u>

11. It was agreed that compensation for loss of one day's employment was £552.61 wages, net of tax and national insurance, plus £106.10 in employer pension contribution, free of tax, a total of £658.61.

<u>Loss of Statutory Rights</u>

12. The claimant asked for the customary award for loss of statutory rights, pointing out that although he had been able to find other employment with Google, he had been given notice of termination, and had not had the opportunity to accrue two years' service and the right to claim unfair dismissal. The respondent agreed the value of such an award at £500, but disputed the claimant had suffered loss, relying on **Puglia v C. James and Sons 1996 ICR 302**.

13. The tribunal concluded that it would not be just to make an award for loss of statutory rights. Had the claimant been employed a day longer,

he would have been fairly dismissed. One day more made no difference to his opportunity to accrue two years' service in alternative employment. Even without the unfairness, he would have found himself in a position where he was looking for a new job with no statutory protection for two years.

<u>Notice pay.</u>

14. The respondent contended that the money paid to the claimant in lieu of notice following termination should be deducted from the award of £658 61, so reducing it to nil. The claimant argued that had the claimant been fairly dismissed a day later, he would have received pay in lieu of notice in the same amount, and it was not just and equitable to deduct it.

15. Both sides took the tribunal to the decisions of the Employment Appeal Tribunal and of the Court of Appeal in **Addison v Babcock F.A.T.A. Ltd, (1986) IRLR 388 -EAT**, and **(1987) ICR 805- C.A**.

16. In that case an employee was unfairly dismissed on 20 July 1984 by reason of redundancy. The unfairness was that another plater should have been dismissed rather than the claimant. He was dismissed with a payment for a notice period he was not required to work, an ex gratia payment, and a redundancy payment. In January 1985 he found another job, though less well-paid, so there was a continuing partial loss of earnings. In August 1985 he obtained a finding of unfair dismissal with a compensatory award. It was held that he must give credit for the £704 notice pay he had received when calculating a compensatory award. By the time of the appeal in July 1986, it was known that the rest of the workforce had all been dismissed by reason of redundancy, with a payment in lieu of notice on 30 September 1985. The EAT held that the claimant need not give credit for the ex gratia payment he had received, because it was a gift, not related to the redundancy, nor need he give credit for the notice pay he received at dismissal. He was also awarded an extra payment for the fact that had he not been dismissed he would have accrued another week of notice entitlement, which should be added to the compensatory award as well as not deducting the earlier notice money. There was no appeal against the ex gratia payment decision. There was a successful appeal against not having to give credit for notice pay.

17. The Court of Appeal stated that in ascertaining loss arising from unfair dismissal "one has to discover what the employee would have received if he had not been unfairly dismissed". The line of cases stemming from **Norton Tool v Tewson** was discussed. That case was good authority for an employee not having to give credit for wages earned during the notice period. It did not however follow, as in **Clydebank** and **Finney**, that those who had *not* been able to find work in the

notice period need not give credit for the notice money. In **Addison**, the claimant had not had to give credit for his notice money, and had also been awarded the notice period he would have received in September 1985 had he not been dismissed in July 1984. That was double recovery. The compensation award period ending in September 1985 "cannot entitle him to be treated as receiving a second notice to terminate his employment with an accompanying period in which no credit may be given in respect of wages and in other employment".

18. Looking at the facts of this case, had the claimant been fairly dismissed (as on our finding he would) one day later, he would have received the same money for his notice period, but starting a day later. It would only be just and equitable to deduct notice money from his award if the compensatory award were to include the notice money he would have received on a fair dismissal later, as in **Addison**. But the award does not. He would have received notice money in both cases, but would also have received another day's pay with a fair dismissal. We concluded that the notice pay received should not extinguish the financial award.

Bonus

19. We record that the claimant abandoned a claim for apportioned discretionary bonus because, examining the rules of the scheme, when dismissed on 23 September he would (by a few days) not have accrued sufficient service in the calendar year to qualify for a payment.

Employment Judge Goodman
Dated 4 July 2023

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JUDGMENT AND REASONS' SENT to the PARTIES ON

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FOR THE TRIBUNAL OFFICE