EMPLOYMENT TRIBUNALS

Claimant: **Mr W. Sigismund**

Respondent: **Financial Conduct Authority**

Heard at: **East London Hearing Centre**

On: **26 June 2023 and**
10 July 2023 (in chambers)

Before: **Employment Judge Massarella**
Miss S. Harwood
Mr S. Woodhouse

Representation
Claimant: Mr E. Kemp (Counsel)
Respondent: Ms J. Shepherd (Counsel)

RESERVED JUDGMENT ON REMEDY

The Tribunal's judgment on remedy is as follows:

1. **the Claimant's application for re-engagement is refused;**

2. **had there been no unfairness in the conduct of the Claimant's appeal against dismissal, there is a 100% chance that his employment would ended in any event;**

3. **the Claimant is entitled to an award for loss of statutory rights in the amount of £500;**

4. **no further sums are awarded by way of compensation.**

REASONS

The judgment on liability

1. By a judgment sent to the parties on 30 September 2022, the Tribunal concluded as follows:

    1.1. the Claimant made the protected disclosures identified by the Tribunal in its reasons by reference to the following issues: PID 5 (the 2013 and 2014

documents only); PID 6a (the 2010 graphic only); PID 7; PID 8; PID 9 (the June 2011 email and interview only); PID 12 (the October 2013 email only); PID 17; PID 18 (the January and April 2017 documents only); PID 20; PID 22; PID 23; and PID 26;

1.2. the other matters relied on by the Claimant were not protected disclosures;

1.3. the Claimant's claims of detriment on the ground that he made public interest disclosures (s.47B Employment Rights Act 1996 ('ERA')) failed because they were not well-founded and/or because the Tribunal lacked jurisdiction in respect of them (in circumstances where they were presented out of time, when it was reasonably practicable to present them in time) and they were dismissed;

1.4. the Claimant was not automatically unfairly dismissal (s.103A ERA) by reason of having made protected disclosures, and that claim was dismissed; he was dismissed for redundancy, alternatively some other substantial reason (restructuring);

1.5. the Claimant's claim of ordinary unfair dismissal (s.94 ERA) succeeded: the dismissal was unfair, having regard solely to the Respondent's failure properly to consider the main ground in his appeal against dismissal;

1.6. unless remedy could be resolved by agreement, or addressed by written submissions, there would be a remedy hearing to determine the compensation to which the Claimant was entitled, including consideration of the extent to which it should be reduced by reason of *Polkey* and/or contribution.

The remedy hearing

2. The remedy hearing was listed for a day in person. We were provided with an agreed bundle of 491 pages and detailed and helpful written submissions from both Counsel. We had statements, and heard oral evidence, from the Claimant and, on behalf of the Respondent, from Mr Marcus Adams (Head of HR Policy and Delivery) and Mr Howard Bolton (Senior HR Business Partner at the material time). All three witnesses were cross-examined. We then heard concise oral submissions from both Counsel. The Tribunal met on another day to deliberate.

3. We are again grateful to both Counsel for their assistance and for their constructive approach to completing the hearing within the allotted time.

4. We make the following findings of fact and draw the following conclusions. The relevant law is set out under each sub-heading.

Re-engagement

The law

5. The remedies for unfair dismissal include an order for re-instatement or re-engagement (s.113 Employment Rights Act 1996 ('ERA')).

6. An order for reinstatement is an order that 'the employer shall treat the complainant in all respects as if he had not been dismissed' (s.114 ERA). The Claimant in these proceedings does not seek reinstatement.

7. An order for re-engagement is dealt with by s.115 ERA, which provides that:

> **(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.**
>
> **(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—**
>
> > **(a) the identity of the employer,**
> >
> > **(b) the nature of the employment,**
> >
> > **(c) the remuneration for the employment,**
> >
> > **(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,**
> >
> > **(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and**
> >
> > **(f) the date by which the order must be complied with.**

8. S.116 ERA deals with the order in which reinstatement and re-engagement should be considered and provides that certain material considerations should be taken into account when deciding whether to make such an order. It provides that:

> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—**
>
> > **(a) whether the complainant wishes to be reinstated,**
> >
> > **(b) whether it is practicable for the employer to comply with an order for reinstatement, and**
> >
> > **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.**
>
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
>
> **(3) In so doing the tribunal shall take into account—**
>
> > **(a) any wish expressed by the complainant as to the nature of the order to be made,**
> >
> > **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
> >
> > **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
>
> **(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.**

> **(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.**
>
> **(6) Subsection (5) does not apply where the employer shows—**
>
> > **(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or**
> >
> > **(b) that—**
> >
> > > **(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and**
> > >
> > > **(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.**

9. 'Practicable' in this context means that reinstatement or re-engagement is not merely possible but 'capable of being carried into effect with success' (*Coleman and Stephenson v Magnet Joinery Ltd* [1975] ICR 46 at 52B-C). The Tribunal should look at the circumstances of each case and take a 'broad common-sense view' (*Meridian Ltd v Gomersall* [1977] ICR 597). Whether it is practicable includes taking into account the size and resources of the employer (*Davies v DL Insurance Services Ltd* [2020] IRLR 490, per Choudhry J at [24b]).

10. In *Rao v Civil Aviation Authority* [1992] ICR 503, the EAT gave the following guidance (*per* Wood J at 513):

> **'An industrial tribunal must use its experience and common sense, looking at what has happened in the past and what can reasonably be anticipated for the future, always maintaining a fair balance, that which is, in all the circumstances, fair, just and reasonable between the parties […] It is always unwise to seek to define rules for different factual situations, but factors which have influenced decisions in the past are: the fact that the atmosphere in the factory is poisoned […]; the fact that the employee has displayed her distrust and lack of confidence in her employers and would not be a satisfactory employee on reinstatement […].'**

11. In *Kelly v PGA European Tour* [2021] ICR 1124 at [43] onwards, Lewis LJ cited with approval the approach of the EAT in *United Lincolnshire Hospitals NHS Foundation Trust v Farren* [2017] ICR 513:

> **'The way in which employment tribunals should approach the issue of practicability in this context was considered by the Employment Appeal Tribunal in *Farren* [2017] ICR 513. There, the employer, an NHS trust, believed that a nurse had administered medication to patients without prior prescription, contrary to the trust's policy. The employment tribunal had accepted that the employee had administered drugs in breach of the trust's policy but considered that the employee had long service, had undertaken training and understood the importance of the policy on administration of medication and, in the view of the tribunal, the employee could be trusted to act properly in an environment other than an accident and emergency unit, given her experience, record and professional commitment. On appeal against that conclusion, the Employment Appeal Tribunal held:**
>
> > **"40. That, however, was not the correct question for the tribunal. As the case law makes clear (see Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680, para 10 , cited at para 24 above), it had to ask whether this employer genuinely believed that the claimant had been dishonest, and—per the**

Employment Appeal Tribunal in United Distillers & Vintners Ltd v Brown (unreported) 27 April 2000 , para 14 (see para 25 above)—whether that belief had a rational basis. It was, after all, this employer—not some other and certainly not the employment tribunal—that was to re-engage the claimant. The issue of trust and confidence had to be tested as between the parties in order to determine, even on a provisional basis, whether an order for re-engagement was practicable, whether it was capable of being carried into effect with success, whether it could work. The trust might have reached a conclusion as to the claimant's honesty by an impermissible route in its dismissal decision and might also have drawn the wrong inference at the rehearing, but the tribunal still needed to ask, as at the date it was considering whether to order re-engagement, whether it was practicable or just to order this employer to re-engage the claimant. It thus was the trust's view of trust and confidence— appropriately tested by the employment tribunal as to whether it was genuine and founded on a rational basis—that mattered, not the tribunal's.

[…]

"42. What we consider the tribunal did have to do was to consider, as at that point in time, whether the trust had made good that which it said made it impracticable or unjust to order re-engagement; that it could no longer have trust and confidence in the claimant. Given the tribunal had found that the claimant had committed the act of misconduct in question, that might not seem to have been an obviously irrational position, but, as Mr Bourne accepted in oral argument, it was not the only question. The tribunal also needed to consider whether the trust had made good its case that trust and confidence could not be repaired, whether its belief in her dishonesty was such that a re-engagement order was unlikely to be carried into effect with success. The tribunal was thus entitled to scrutinise whether the trust's stated belief was genuinely and rationally held, tested against the other factors the tribunal considered relevant. It was, however, still a question to be tested from the perspective of the trust, not that of another employer, still less that of the tribunal: was it practicable to order this employer to re-engage this claimant? And, unfortunately, we do not feel able to conclude this was the approach adopted by the tribunal. We consider that paras 48–49, in particular, set out the conclusions reached by the tribunal itself, standing in the shoes of the employer, testing the question of practicability from the tribunal's perspective rather than asking what was practicable as between these parties, the parties to the re-engagement order it was considering making. That being so, we consider we are bound to allow this appeal and set aside the order."

I consider that that approach is the one that employment tribunals should adopt in considering whether it is practicable to order re-engagement in cases where an employer asserts that the conduct of an employee was such as to have led to a breakdown in trust and confidence between the employer and employee. The question is whether the employer had a genuine, and rational, belief that the employee had engaged in conduct which had broken the relationship of trust and confidence between the employer and the employee.'

12. Lewis LJ continued (at [46]):

'Similarly, an employee may have engaged in conduct which did not, of itself, cause or contribute to dismissal, but which an employer may genuinely and rationally believe means that it can no longer rely upon the integrity of the employee and is unable to have trust or confidence in the employee in future if he were to be re-engaged. The present facts are an example of such a claim. The claimant here secretly recorded meetings between him and Mr Pelley. That did not contribute to the dismissal because the respondent was not aware of the recordings at the time of the dismissal (if the conduct had caused or contributed to the dismissal, section 116(3)(c) of the Act requires the employment tribunal to consider whether it would be just to order re-engagement). Again, the tribunal will have to test whether the employer genuinely believes that the employee cannot

> **be trusted to work for the employer in future and whether there is a rational foundation for that belief. It would not be appropriate to seek to restrict the type of conduct capable of leading to such a conclusion to a category defined, or described, as extreme cases. Rather, the nature of the conduct may well be a factor that is relevant to the assessment of whether the belief is genuinely held, or whether there is a rational basis for the belief. If, for example, the conduct was insignificant or involved minor misconduct, or occurred a long time ago, that may be a factor pointing to a conclusion that the belief that the employer cannot trust the employee to work for him is either not a genuine reason for objecting to re-engagement or is a belief that has no rational basis.'**

13. In conducting this exercise, the Tribunal is bound to consider any relevant findings of fact it made at the liability stage in deciding whether it was practicable to order re-engagement (*per* Lewis LJ at [48]). By way of example, Lewis LJ said this at [50]:

> **'In the present case, the employment tribunal had made relevant findings of fact at the liability stage. As summarised at paras 14–17 above, the employment tribunal decided as a fact that Mr Pelley had formed the view that the claimant would not be able to perform the role of commercial director in the structure that he was putting in place. Furthermore, the tribunal found that that was not an after the fact rationalisation of the position. It found as a fact that Mr Pelley formed that view on the basis of his own observations of the claimant, and from the negative feedback received from other employees and board members. The employment tribunal was obliged to take those facts into account in deciding whether the respondent genuinely believed that the claimant did not have the capability to perform at a senior level if re-engaged and whether that belief was rationally based. The employment tribunal would be obliged to reach decisions consistent with the facts as found by it unless there were good and cogent reasons for departing from its findings of fact. The Employment Appeal Tribunal did not err in its approach to this matter.'**

14. Finally, Lewis LJ made the following observations (at [56]) as to the extent to which the exercise is 'provisional' at this stage:

> **'Furthermore, the fact that the case law refers to the assessment of practicability at the stage of making the order as being provisional ought not to be mis-interpreted. The role of the employment tribunal is to determine whether to exercise its discretion to order re-engagement under section 116(2) of the Act. In doing so, it must take account of whether it is practicable for the employer to comply with an order for re-engagement. That assessment will not necessarily be a final, conclusive determination of practicability as an employment tribunal considering the award of compensation under section 117(3)(a) of the Act, if the order was not complied with, may also consider whether it was practicable to order re-engagement. In that sense, the initial assessment of practicability at the time of making an order for re-engagement may be described as "provisional" as the assessment may be subsequently revisited. That is recognised in McBride [*v Scottish Police Authority* [2016] ICR 788] itself at para 37 where Lord Hodge JSC refers to it as provisional and as a "prospective assessment of the practicability of compliance and not a conclusive determination". But it still involves an assessment, on the facts as at the date of making the order for re-engagement, whether it would be practicable for the employer to comply with the order and re-engage the claimant by the time specified in the order.'**

15. In a brief judgment in the same case, Underhill LJ made the following observations (at [69]):

> **'I agree that the appeal should be dismissed for the reasons given by Lewis LJ. […] I add a few words on one point. Although I agree with paras 44–46 of Lewis LJ's judgment I would be sorry if the question of the "practicability" of reinstatement or re-engagement became subject to too many glosses. In**

> **particular, I am wary of tribunals becoming too focused on the language of "trust and confidence", which may carry unhelpful echoes from its use in other contexts. In this context it simply connotes the common sense observation that it may not be practicable for a dismissed employee to return to work for an employer which does not have confidence in him or her, whether because of their previous conduct or because of the view that it has formed about their ability to do the job to the required standard. Of course any such lack of confidence must have a reasonable basis. The important point made by the Employment Appeal Tribunal in *United Lincolnshire Hospitals NHS Foundation Trust v Farren* [2017] ICR 513 is that while that is an objective question it must be judged from the perspective of the particular employer: that reflects a proper recognition that an employment relationship has got to work in human terms. However, each situation must be judged on its particular facts.'**

16. It is not permissible for a Tribunal to order re-engagement on terms that are significantly more favourable than those which the employee would have obtained had reinstatement been ordered (*Rank Xerox (UK) Ltd v Stryczek* [1995] IRLR 568 (*per* Judge Butter QC at [17]). Further, the EAT stated that it is, in general, undesirable for a Tribunal to order re-engagement in respect of a specific job, as distinct from identifying the nature of the proposed employment (at [16]). However, in *Lincolnshire v Lupton* [2016] IRLR 576, Simler J held (at [22]):

> **'Although tribunals have a wide discretion as to the terms of an order for re-engagement, those terms must be specified with a degree of detail and precision […] To require simply that the employment must be comparable is not adequate to identify specifically and with provision into what role the council is ordered to re-engage the claimant.'**

17. If an employer fails to comply with an order for re-instatement or re-engagement, the Tribunal will then calculate the amount of compensation payable in respect of the unfair dismissal and the employer must pay an additional award of compensation (calculated in accordance with s.117 ERA) unless 'the employer satisfies the tribunal that it was not practicable to comply with the order' (s.117(4) ERA). In that way, an employer has a second opportunity to persuade the employment tribunal that an order of re-instatement or engagement is not practicable.

18. We were also referred to the case of *Manchester College v Hazel* [2014] ICR 989 as being authority for the proposition that one factor which should not be taken into account is the fact that no compensation would have been awarded for the unfair dismissal on the basis of the *Polkey* principle. However, is not clear to us that the case (in which *Polkey* is not mentioned) is, in fact, authority for that proposition. Given our conclusions on practicability and contribution, however, we are not obliged to decide the point.

<u>Practicability: the Claimant's position</u>

19. Mr Kemp submits that, at this late stage in his career, a re-engagement order 'may be the Claimant's last chance to work in his field of expertise again'. Mr Kemp identified two roles/groups of roles that the Claimant considered to be the most suitable: Manager – Wholesale Banks Sector Team; and Senior Economist/Economist/Technical Specialist Roles in Wholesale Financial Markets. The Claimant addressed the suitability of those roles in his witness statement. Mr Kemp observed that the Claimant met the essential and desirable

criteria for these roles; and that they had the same top end salary as his previous job.

Practicability: the Respondent's position

20. The Respondent accepts that there are suitable roles into which the Claimant could be re-engaged, all else being equal.

21. However, the Respondent contends that it is not practicable for it to comply with an order for re-engagement because it does not have confidence that the Claimant would be satisfied with any role which did not provide him with the seniority/importance, to which he considers he is entitled.

22. Further, the Respondent contends that it is apparent that the Claimant still harbours deep-seated and long-held grievances against the FCA as an organisation and that those grievances are not confined to the individuals historically employed by it.

23. The Respondent believes that those deep-seated grievances, combined with the Claimant's exceptionally high estimation of his own abilities and his unrealistic expectations as to the level of which he deserves to be employed in the FCA, will be a barrier to a successful employment relationship between the Claimant and the Respondent in the future.

Is the Respondent's position genuinely held?

24. We heard evidence from two witnesses on behalf of the Respondent.

25. Mr Bolton was Senior HR Business Partner in 2017/18, with responsibility for Risk and Compliance Oversight. He supported Ms Frohn in the restructuring exercise. He attended some of the meetings with the Claimant during that exercise, in which the Claimant made it clear that he would not accept the Technical Specialist role. He also recorded the fact that the Claimant did not apply for an alternative role but considered that he ought to be automatically placed into a senior role, such as a Senior Manager, albeit expanded from the usual remit. Mr Bolton regarded those positions as unreasonable.

26. Mr Bolton states that it became apparent to him that the Claimant 'had a completely unrealistic view of his own abilities and what an appropriate position would be for him within the FCA structure'. He recalled the email, in which the Claimant suggested that the FCA should change its approach to suit his skills and that the FCA 'needs to make a strategic decision to use such skills and then start to design itself around such key work streams'. He also recalled the Claimant's email to Mr Randell, the Treasury Select Committee and others, seeking reinstatement and asserting that 'they had not offered me an equivalent position or one that was appropriate to my profession [which I was not prepared to change]'.

27. Mr Bolton states that, in his view, the Claimant showed a concerning lack of insight and behaved unreasonably. He states that the flexibility that the Claimant now says he is prepared to consider 'appears very incongruous' in the light of his position during the restructure. He expresses the view that it would be inappropriate to re-employ the Claimant in light of his lack of insight and the fact that his expectations were completely unrealistic. He observed: 'I cannot see how

this could have so significantly changed'. He expresses the concern that, if the Claimant were re-engaged, there is a real risk that he would not be satisfied in any role which did not provide him with the seniority/importance the Claimant previously required.

28. Mr Adams is Head of HR Policy and Delivery. He did not know the Claimant when he worked for the FCA. His view is that the Claimant no longer has the skill set or behaviours to be considered for a Manager or equivalent Technical Specialist role because, since his dismissal, the organisation has 'moved on culturally, operationally and strategically'. At paragraph 10 of his statement, he says this:

> 'Judgment is one of our core skills (alongside Engagement, Delivery, and Self-Management). The Claimant's assessment of the breadth of roles that he would be suitable for, including for example an Executive Director position, three grades above the role from which he was made redundant, or a Head of Department role in the General Counsel's Department despite not holding any legal qualifications, is but one example of a lack of calibration in judgement that is demonstrated in his witness statement.'

29. We found both witnesses to be thoughtful and credible. We were satisfied that the Respondent's belief in the impracticability of re-engagement is genuinely held.

Is there a rational basis for the Respondent's position?

30. We turned to the question of whether there is a rational basis for that belief. In doing so, we had regard to all the information available to us, including our own findings of fact, the Claimant's reconsideration application and grounds of appeal, the *inter partes* correspondence post-judgment, his witness statement on remedy and his oral evidence at the hearing.

31. We began by reminding ourselves of the findings of fact we made in our judgment on liability (the paragraphs in the judgment are referred to as J1 etc.).

    31.1. The Claimant believed throughout his employment and up to the Tribunal hearing (and beyond) that he had a '*de facto'* role which was far senior to his actual role, notwithstanding that he had neither sought, nor been given promotion (J183, J846 onwards).

    31.2. The only two jobs the Claimant applied for during his employment by the Respondent were Governor of the Bank of England in 2012 (J158) and CEO of the Respondent in 2015 (J270). We found that the Claimant's application for the CEO role was probably rejected on the sift because he lacked the degree of seniority and leadership experience to be a credible candidate (J833).

    31.3. During the restructure process in 2017 he stated that he ought automatically to be appointed as a Senior Manager without going through a promotion process, although he regarded even that role as acceptable only if it was expanded to match his qualifications and experience (J336).

    31.4. We found that the Claimant believed that he should be occupying a role at the very top of the organisation as of right and that, to accept anything less, would be to acquiesce in an ongoing failure to recognise his work. We found that the corollary of this was that he required others to share his own exceptionally high estimation of his abilities and the importance of his

work; he regarded a reluctance to do so as an intellectual failure on their part, or an injustice to him, or both (J332 and J846 onwards).

31.5. In an email to Mr Bailey and Ms Frohn in February 2018, the Claimant asserted that he had 'rare skills and experience that should be of great value to the FCA, other regulators, and especially to the financial economy, consumers and taxpayers'. He recorded that he had been told (by Mr Nelson) that he deserved a Nobel Prize and (by Ms Frohn) that he was a genius (J355-7).

31.6. In relation to his appraisals, the Claimant wrote in 2009 that 'on any rational scale of performance' he should be given the highest available rating (J140). In 2014 he asserted that the FCA owed him for 'over six years of accomplishment' (J211).

31.7. He objected to being appraised on the basis of his actual role because it did not reflect what he regarded as his *de facto* role (J175 and J182-3 in 2013, J190 in 2014, J280 in 2015, J 317 and J337 in 2017). We found that he required the Respondent to conduct what he described as a 'rolled-up appraisal', by which he meant a retrospective assessment of his work throughout his time at the FSA and FCA. We concluded that he would only regard such a process as appropriate if, as a result, the FCA accepted the value of his work at his own very high estimation, publicly acknowledged it and promoted him to a very senior level of the organisation without the need for him to apply for promotion (J872).

31.8. There were periods during the Claimant's employment when he moved on from working on the Harm metrics to other areas (2013/14 at J170; 2016/17 at J304). In practice, however, he did not put his preoccupation with the Harm metrics and his own status behind him. He continued to object to being appraised on the basis of his actual role because it did not reflect what he regarded as his *de facto* role (see above).

31.9. The Claimant compared himself to Galileo and Copernicus in terms of his achievements and the way he was treated (J148 in 2010; J162 in his witness statement of 2022). We found that this disclosed 'a concerning lack of perspective' (J163).

31.10. In January 2019, the Claimant sent an email to the Governor of the Bank of England, the Chancellor of the Exchequer, the Shadow Chancellor, the leader of the Liberal Democrats and the leader of the Scottish National Party in Westminster. One of the Claimant's requirements was that, in order to remove what he perceived as twelve years of detrimental treatment, he should be given a 'high-profile role' to enable him to take a leading role in getting the Harm metrics into use internationally. He also suggested that, as he arguably deserved a Nobel prize for his work, he be awarded a retrospective honour (J412).

31.11. At trial, the Claimant asserted that he believed that anyone who ignored the Harm metrics was wrong (J118). We concluded that anything less than total commitment to his model was intolerable to him and described his approach as absolutist (J119).

32. We are satisfied that, in light of these findings, the position was that, up to and including the trial on liability in July 2022, the Claimant consistently held an exceptionally high estimation of his own abilities, unrealistic expectations both as to his entitlement to be employed by the FCA at a very senior level and also as to how promotion should be achieved in his case, and a concomitant and acute sense of grievance that the Respondent would not agree with these positions.

33. We considered whether there was evidence to support the Respondent's belief that the Claimant's mindset was unlikely to have significantly changed by the time of the remedy hearing.

34. We had regard to the Claimant's reconsideration application and appeal against the Tribunal's judgment. The mere fact of the application/appeal is wholly irrelevant to the present exercise: the Claimant was perfectly entitled to exercise those rights. However, their contents, insofar as they are indicative of the Claimant's subjective views in October/November 2022, when the documents were lodged, are relevant.

35. We note the following in the reconsideration application, which was lodged on 14 October 2022.

    35.1. The main focus of the application was that the Respondent (and then the Tribunal) had failed to answer what the Claimant described as 'the first exam question', which was essentially, was he right about the ability of the Harm metrics to reveal harm in the financial system, and 'the second exam question', which was essentially, was he right about the Respondent's failures in management, governance and culture (paragraph 3).

    35.2. The Claimant characterised the final hearing on liability as being a 'preliminary trial' (paragraph 39), the result of which opened the door to his seeking a further trial, including a further round of disclosure and the commissioning of fresh expert evidence (see, for example, paragraph 17) in order to answer the two exam questions.

    35.3. He repeatedly asserted that it remained the Respondent's legal obligation to resolve the failures he had identified (see, for example, paragraphs 11, 12, 2, 44 and 84), including retrospective investigation into the failures of the long-abolished FSA (paragraph 21).

    35.4. At paragraph 32 he writes: 'my persistence about evaluating my work is not so much that my work must be implemented to please me, or further my career, but that something comparable must be implemented to understand and fix the regulatory failure and that I deserved fair credit for attempting and/or doing that. I cannot tell from the Judgment as it stands why that is not my right having delivered the work.' At paragraph 46 he reiterates that it is 'my right to have that work fairly appraised'.

    35.5. At paragraph 69, he states that 'I believe I have a reasonable expectation that my ability to spot such failures makes me a credible candidate for senior positions including but not limited to CEO and Governor as they have failed to prove wrong, let alone spot and correct such serious failures.'

36. Thus, as of October 2022, the Claimant continued to believe in the Respondent's ongoing obligation to validate the Harm metrics and his right to recognition for his work on it by way of a role of the highest seniority.

37. That is also consistent with a letter which the Claimant wrote to the CEO and Chairman of the Respondent on 24 October 2022, expressing his interest in re-engagement. He wrote:

> 'Naturally, I am most interested in positions where I can use my proven skill, knowledge and experience to spot, analyse and report possible regulatory failures in business models and regulatory obligations, as exemplified in the protected disclosures, Risk Boxes I wrote for EXCO and the Board and or draft FPC papers throughout my regulatory career from 2006.
>
> I believe that the FCA is legally obliged and if not should improve its consideration and handling of such possible regulatory failures including those in the past and would like to be able to have frank discussions about that at the highest levels when appropriate. If the FCA is now able to recognise my accomplishments and contributions, I hope you have and will make me aware of, and seriously consider me for, positions where I can do so again.
>
> But such is my dedication that I will also consider a range of other jobs if you do not offer me jobs as described above. For example I designed and delivered (with Fod Barnes at Barbara Frohn's request) the Risk Management module for the Masters in Regulation in 2017 by drawing in experts from every area, so would be interested in training roles.'

38. We note the Claimant's belief that he ought to be able to have frank discussions 'at the highest levels when appropriate'.

39. The Claimant lodged an appeal against the judgment on liability, which was deemed to have been received by the EAT three days out of time, on 14 November 2022. We note the following in the grounds.

    39.1. The Claimant asserts (at paragraph 6) that the Respondent's admissions at trial and the Tribunal's judgment had triggered the legal obligation on the Respondent to investigate its failures.

    39.2. At paragraph 17 he maintains his self-comparison with Galileo and reasserts the Respondent's legal obligation to validate or disprove his work on the Harm metrics which, at paragraph 29 and elsewhere, the Claimant refers to as 'perpetual legal obligations'.

    39.3. At paragraph 29, the Claimant asserts that 'in law, my completed work is still in their inboxes unresolved'.

40. Thus, as of November 2022, the Claimant maintained essentially the same position.

41. We also had regard to the three roles which the Claimant applied for with the FCA in December 2022, presumably by way of mitigation. He accepted that two of them were more senior than his previous role.

    41.1. He applied for the role of 'Executive Director – Enforcement and Market Oversight', a role several grades above the role from which he was made redundant, reporting directly to the Respondent's CEO. He accepted that this role 'would require a fresh assessment of my full CV and corresponding promotion'.

41.2. He applied for the role of 'Head of Department Market Assurance in the Risk and Compliance Oversight', which was also considerably more senior than his previous role.

41.3. The third role was that of 'Technical Specialist in Risk Oversight and Compliance', which appears identical to the one he was offered in the 2017 reorganisation. He stated (paragraph 46) that, having raised the issues he raised at trial, 'this role becomes acceptable if all else fails as a starting point to relaunch my career'.

42. The first of these roles is consistent with the Claimant's belief in his entitlement to promotion to a very senior role. His observations about the third role make explicit the fact that he regarded it as a mere stepping-stone to greater things. This does not suggest that he had adjusted his expectations by December 2022.

43. We also had regard to the *inter partes* correspondence in the period leading up to the remedy hearing.

43.1. On 4 January 2023, the Claimant wrote to the Respondent's legal representatives: 'My position is that although I prefer an ideal role, under the circumstances I am willing to start out in any suitable role and work thereafter to continue mending fences and seeking the most suitable internal or external role longer term.' Again, any initial role into which he is re-engaged is regarded by him as a stepping-stone to a more suitable role.

43.2. On 11 January 2023, the Claimant wrote: 'Meanwhile upon reflection, I hope the FCA will agree with me that the trial left most issues unresolved in a draw, it is time to move on, accept my apology, mend fences, genuinely assess my skill knowledge experience drive and cultural characteristics afresh, propose and undertake all required or desirable training, find the most suitable managerial role for me, and work constructively together. I still have the energy and desire.' Two things emerge from this: firstly, the Claimant continues not to acknowledge that he was largely unsuccessful in his Tribunal claim; secondly, the requirement that the Respondent 'genuinely assess' his capabilities echoes his position when the Respondent tried to appraise him during his employment.

44. We considered the content of the Claimant's witness statement (signed and dated on 2 May 2023) and noted the following.

44.1. In his opening paragraph, the Claimant says that 'I find every role in the bundle suitable to varying degrees but seek employment in those most like my prior roles or that recognise my unique financial-mathematical specialism'.

44.2. There was a disconnect between the submission made by Mr Kemp on the Claimant's behalf - which was confined to roles which, on their face, appeared to be arguably on a level with the role for which the Claimant was dismissed - and the more extensive list of roles identified in the witness statement. Having dealt with the former, at paragraph 35 the Claimant moved on to considering the 'suitability of more senior roles', stating that 'I believe that any available roles of these types requiring an effective promotion after so many years of service would be justified and

suitable'. This, notwithstanding the fact that the authorities are clear that re-engagement which amounts to a promotion is not permissible. We assume that this would have been explained to the Claimant.

44.3. At paragraph 38, the Claimant states: 'For reasons I still do not understand, the FCA had decided not to use me as a manager or recognise my advanced degrees and wholesale financial markets specialism and had instead put me into a nominal 'technical specialist' box with no such requirements or recognition during the 2017 reorganisation.' This is a variation on the '*de facto* role/rolled-up appraisal' themes which we have referred to above.

44.4. At paragraph 47, the Claimant stated that the role of 'Head of Department – Markets and Prudential Department, General Counsel's Division – Job Share' was suitable, even though the job specification required that the candidate must be 'a senior experienced qualified lawyer with recent experience of using their strong legal skills'. The Claimant observed that: 'having spent thousands of hours reading law books in cases the last few years I now very interested in the legal areas where I can add value with my financial expertise'. This is plainly unrealistic.

44.5. At paragraph 52 onwards, the Claimant listed other types of roles, which he described as being 'lateral or downward moves', albeit in his introductory paragraph he observes that 'most make little use of my advanced degrees in industry experience'.

44.6. At paragraph 63, the Claimant maintains his position that the Technical Specialist role was not suitable (notwithstanding the fact that the Tribunal found as a fact that it was at J325 onwards) because it did not address a critical issue, which the Claimant identifies in the previous paragraph, which was his managers' failure 'to appraise and recognise the work I was actually doing close to the first line'. Again, we note that this is a variation on the '*de facto* role/rolled-up appraisal' themes.

44.7. At paragraph 66 of his statement, he wrote: I think it was reasonable of me to expect the FCA to fairly appreciate and value my work close to the front line and the rest of my CV when considering me in any new role. This is the bedrock of trust and confidence between an employee and employer.'

45. By a decision dated 18 May 2023 (sealed date: 20 June 2023), the EAT refused the Claimant's application for an extension of time and his appeal was dismissed. The Claimant told the Tribunal that he had decided to accept that decision.

46. We then had regard to the Claimant's oral evidence before us at the hearing. There was a marked change, at least of tone.

46.1. The Claimant said that it was not correct that he still considered that the Respondent subjected him to detriments as a result of its failure to investigate his public interest disclosures. He said that 'I have to abide by the decision of the Employment Tribunal, I do accept its decision […] I have to draw a line and move on. I do draw a line.'

46.2. As to the self-comparison with Galileo, the Claimant said 'that ship has sailed. I have to drop that point and I do do it' although he went on to

maintain that 'when people do look through the telescope, I think they will agree with me the evidence is pretty overwhelming'.

46.3. Asked when he had changed his view, he confirmed that the refusal of EAT to grant him an extension of time was 'the definitive nail in the coffin […] Whatever lingering feelings I might have had, I have to move on from that […] There have been significant changes all over the place [within the FCA]. I need to figure out how to fit into that organisation.'

46.4. Asked if he thought that there was an ongoing obligation on the Respondent to find out if the Harm metrics showed what he believed it showed, the Claimant replied 'they have an obligation to find out if it is true or not' but he then observed 'I have no *locus* to cause that to happen [...] I have to bite my tongue if I think that is true, I have to keep it out of my work to the extent that it is possible.'

46.5. Asked about the fact that he applied in December 2022 for the role of 'Head of Department Market Assurance in the Risk and Compliance Oversight', he accepted that this was two levels above his previous role but qualified this by observing 'using the box I was in'. He confirmed that, by this, he meant the level at which he was employed by the FCA. When it was put to him that this terminology, connoted that he was not happy with 'the box', he stated that it connoted that 'I would like my entire CV to be taken into account, not just particular role I performed at FCA/FSA'. In response to a question from the Tribunal, the Claimant said: 'I hope you would not see it as a promotion'. Again, this rehearsed the 'rolled-up appraisal/*de facto* role themes.'

Conclusion on practicability

47. We went on to consider whether the Respondent has good grounds to believe that re-engagement would not be capable of being carried into effect with success (*Coleman*) and that it would be impracticable for the Claimant to return to work because the Respondent does not have confidence in him (*per* Underhill in *Kelly*).

48. We weighed in balance the Claimant's stated views from the period before the rejection of his appeal against those from after it and considered whether the Respondent is entitled to regard the former are a more reliable predictor of the Claimant's future approach than the latter. We considered that was an entirely reasonable conclusion. Mr Kemp submits that 'things have moved on since 2018. The Claimant's priorities have changed from seeking recognition for his protected disclosures to saving his career'. We think the Respondent is right to believe that the Claimant's priorities have only changed because of the final rejection of his appeal, when all other avenues are closed to him.

49. Nor were we persuaded by Mr Kemp's submission that, insofar as the judgment on liability recognised that the Claimant had made protected disclosures and been subjected to detriments (albeit the Tribunal lacked jurisdiction in respect of them), this 'lanced the boil that featured in his mindset' when he applied for roles during the restructuring exercise. That is contradicted by the Claimant's statements and actions post-judgment referred to above.

50. We reminded ourselves of the fact that there were periods when the Claimant ostensibly put his preoccupation with/sense of grievance about the Harm metrics

behind him, only for them to resurface when things did not go his way (J316 onwards).

51. Even when it was in the Claimant's interest to moderate his expectations and his sense of grievance, he was unable to resist the temptation in his oral evidence to rehearse old themes, referring to his former substantive role as 'the box they put me in' and confirming that he still believed that the Respondent had an ongoing obligation to investigate the Harm metrics (para 46).

52. To sustain a workable, constructive relationship with the Respondent would require a very substantial change in the Claimant's mindset. The Respondent is not obliged to accept at face value his assurance, given at the eleventh hour, that he has moved on in a way he has never previously been able to do. We accept Ms Shepherd's submission that, to the extent that there was a change of position, it is more consistent with the fact that the Claimant has run out of road, rather than reflectingany newly discovered insight. We have concluded that the Respondent has good reason for concluding that the Claimant continues to lack insight and is highly unlikely to be able to put behind him attitudes so entrenched that he has maintained them for the best part of 15 years.

53. For these reasons, we accept the Respondent has a sound basis for its lack of confidence that, in the Claimant's case, re-engagement is capable of being carried into effect with success. We have concluded that re-engagement is not practicable in the circumstances, and we decline to order it.

54. For the avoidance of doubt, we do not accept Mr Kemp's submission that, because the Tribunal did not hear from the recruiting managers or those who would be working with the Claimant in the roles he had identified as suitable, it was not open to the Tribunal to conclude that re-engagement would not work. Apart from the obvious impracticality of calling the recruiting managers for all the roles the Claimant identified as suitable, it is difficult to see what they could add. The conclusion the Respondent has reached, and which the Tribunal regards as reasonable, is based in large part on the Claimant's own conduct and statements over nearly fifteen years and an assessment of the likelihood of his being able to make a success of any role within an organisation about which he has such fixed views.

55. We were satisfied that the combination of the Tribunal's findings and conclusions on liability, the Claimant's statements post-judgment summarised above, the evidence led by Mr Adams and Mr Bolton, taken together with Ms Shepherd's cross-examination of the Claimant and her submissions, were more than sufficient to enable us to reach our conclusion.

<u>Conclusion on contribution</u>

56. If we are wrong about the practicability issue, we go on to consider the question of contribution.

57. The conduct in question must be culpable or blameworthy, in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish, perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

58. In our judgment on liability, we concluded as follows (at J941-942):

> 'We have concluded that this was a genuine redundancy/restructuring exercise, conducted by Ms Frohn, which she anticipated would lead to the Claimant's retention, not his dismissal. Every reasonable effort was made to encourage him to accept the role offered in the new structure, or to apply for other roles. He declined to do so.
>
> In our judgment, the Respondent was entitled to regard the alternative which the Claimant proposed (appointment into/creation of a role within the organisation far senior to his own, without the need for him to apply) as unreasonable. Unfortunately, his dismissal gradually became an inevitability, not because of any whistleblowing, but because of the Claimant's own intransigence.'

59. We remind ourselves of our other findings, summarised above (para 30).

60. Mr Kemp submitted that the Claimant's approach must be seen against the background of the fact that he had made protected disclosures, which had not been investigated; that there was a genuine dispute as to the nature of his role after the Respondent stopped the Harm metrics; and that the Claimant genuinely believed that the redundancy process had, or may have been, influenced his by his protected disclosures. Mr Kemp submitted that the Claimant's position may have been intransigent, but it was not blameworthy or culpable conduct.

61. We were not persuaded by those submissions. Despite encouragement from several managers, the Claimant never formally invoked the Respondent's whistleblowing procedure, indeed he was clear that he deliberately avoided doing so. There was no dispute as to the nature of the Claimant's role: his role was the same as it had always been, precisely because (with the exception of his application to be CEO of the organisation) the Claimant had never applied for promotion. The fact that he believed that he ought to be automatically moved up into a senior position without the need to apply was an aspect of his intransigence. Even if the Claimant believed that the redundancy process may have been influenced by his protected disclosures, there was nothing to prevent him from accepting the role he was offered, or applying for an alternative role, while reserving his right to pursue his concerns and grievances. Again, that course had been urged on him by several managers, but he had always refused to follow that advice. That was another aspect of his intransigence.

62. Mr Kemp further submitted that it cannot be right to effectively require an employee to accept a role in redeployment that the Respondent characterises as suitable in order for the employee to avoid a finding of contributory fault at the remedy stage. That is to understate the extent of the Claimant's intransigence: the Respondent did not limit the Claimant to accepting the role of Technical Specialist. He was urged by several managers, if the role was unacceptable to him, to apply for a different role. He refused to do so.

63. We reject Mr Kemp's submission that the Claimant's conduct was intransigent but not blameworthy. In our judgment, it was both.

64. We have concluded that the Claimant's approach to the redundancy exercise was wholly unreasonable: he refused to accept a job which we found (J325-327) was essentially his own role under a different title and without the management responsibility (which he no longer performed); and he refused to apply for any

alternative roles, despite encouragement from management and multiple extensions of time; instead, he required the organisation to place him in a far more senior role without the need for him to apply. It is difficult to imagine an approach to an exercise of this sort which was more likely to lead to his dismissal. In our view, his approach was perverse; he was entirely the author of his own misfortune.

65. In his witness statement at paragraph 62, the Claimant wrote: 'I was very engaged and took a proactive role trying to agree a suitable position which was not forthcoming.' For the reasons we have already given, this was such an obvious mischaracterisation of his approach at the time, that the fact that the Claimant maintains it is, in our view, further confirmation of a deep-rooted lack of insight on his part.

66. In all the circumstances, we do not consider it would be just to order re-engagement by reason of the Claimant's contribution to his dismissal; nor do we consider it would be adequate or proportionate (as Mr Kemp urges us to do) to reflect our conclusions on contribution by confining our orders to a reduction to an award of back-pay.

Compensation: *Polkey*

The law

67. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue). The relevant principles relating to a *Polkey* deduction, as set out in *Software v 2000 Limited v Andrews & Others* [2007] IRLR 568 at [54] are, insofar as they are relevant to this case:

> **'(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself.**
>
> **(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.**
>
> **(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.**
>
> **(5) Having considered the evidence, the Tribunal may determine:**

> **(a) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself.**
>
> **(b) That employment would have continued indefinitely.'**

68. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

69. It is clear from sub-paragraph (2) above that it is not just the evidence adduced by the employer that will be used to determine the *Polkey* question.

70. The EAT in *Shittu v South London & Maudsley NHS Foundation Trust* [2022] IRLR 282 held (*per* Stacey J at [95]):

> **'There can therefore be an 'all or nothing' result, but it will be because the tribunal is 100% satisfied that a future chance would or would not have happened. In practice there are a number of possibilities, three of which were identified in *Software 2000* at [54](7): (1) there was a less than 100% chance of indefinite continued employment in which case the tribunal must assess the percentage chance and apply that percentage reduction; (2) the tribunal is satisfied on the evidence there was a 100% chance that the employment would have ended anyway by a certain time or at the same time as the dismissal, in which case compensation is limited to that period and the claimant is awarded 100% of whatever that period is (or receives nothing for loss of earnings if it was the same date as the dismissal occurred); (3) employment would have continued indefinitely in which case there is no percentage reduction applied. There is a fourth possibility identified in *Zebrowski* and *O'Donoghue* where there was a 100% chance that the employment would have continued for a certain period followed by a lesser percentage chance thereafter. There may be other possible categories. But in each category the exercise is the same – the assessment from 0 to 100 of the percentage chance of what might have been or what will be.'**

<u>The submissions</u>

71. In this case, because we have found that the unfairness occurred at the appeal stage, we must consider what the chance was that the Claimant's appeal against dismissal would have been allowed and the Claimant reinstated.

72. Mr Kemp submits that the Respondent 'has not adduced any relevant evidence on which it wishes to rely' and criticises the fact that neither Ms Hoggett nor Ms Frohn was called to give evidence. He submits that 'it is not possible to reconstruct the hypothetical world without evidence adduced as to what Ms Hoggett would have done had she fairly determined the Claimant's central ground of appeal'. Alternatively, he submits that the Claimant's appeal 'was not doomed to fail'.

73. In her written submissions, Ms Shepherd argued that, had Ms Hoggett addressed the central ground of appeal, her conclusion would inevitably have remained the same. The correct approach would have been for her to explore with Ms Frohn the Claimant's allegation that the real reason for dismissal was because he was a whistleblower, rather than redundancy. The Tribunal can be certain that, had such enquiries be made, Ms Hoggett would have been satisfied that this ground of appeal was entirely without merit. The Tribunal has had the benefit of hearing all the evidence relating to the reason for the Claimant's dismissal. In addition, it had the benefit of hearing the evidence of Ms Frohn herself and found that she was a credible witness. The Tribunal concluded that this was a genuine

redundancy/restructuring exercise, which Ms Frohn anticipated would lead to the Claimant's retention not his dismissal. This is not a case where compensation might flow from considering how long a fair process would have taken. The unfairness arose at the appeal stage, by which time the Claimant had already been dismissed and was no longer being paid by the Respondent; there was no financial loss flowing from the unfairness. In her oral submissions, Ms Shepherd submitted that calling Ms Hoggett or Ms Frohn to give evidence would have added nothing, given the evidence the Tribunal heard at the liability stage and the conclusions it had reached.

The facts

74. The starting point is our conclusion in the judgment on liability (J964-966), which was as follows:

> 'However, there is one aspect of the dismissal which concerned us: the decision by Ms Hoggett not to engage with the Claimant's ground of appeal that his dismissal was because he had made protected disclosures. The Respondent's own policy (para 396) provided for an appeal against dismissal for redundancy. The Claimant exercised that right and identified his grounds of appeal. This was his main ground and Ms Hoggett did not investigate it, even to the extent of speaking to Ms Frohn and asking her questions directed at establishing whether the Claimant's disclosures played any part in her decision-making.
>
> We have concluded that, in disregarding the central ground of appeal the Respondent acted unreasonably; to use the language of *Cabaj*, the Claimant was 'denied the opportunity of showing that the real reason for dismissal was not sufficient.' It may well have made no difference to the outcome; but the authorities are clear that that is a matter of remedy (the *Polkey* issue), not liability.
>
> […]
>
> To assist the parties, we express a preliminary view, which is that, had Ms Hoggett investigated the question of whether the Claimant was dismissed for whistleblowing, and had she spoken to Ms Frohn, we think it likely (at the very least) that she would have concluded that the dismissal was unrelated to any whistleblowing by the Claimant. That was our conclusion, reached after a lengthy hearing, in which the Claimant has had every opportunity to challenge the Respondent's reason for his dismissal.'

75. We also reminded ourselves of further findings of fact and conclusions in the liability judgement, none of which are the subject of an appeal.

    75.1. The restructuring exercise was across the whole Division (J322). We found that its purposes included simplifying the Division operations, clarify reporting lines and redefining job roles and responsibilities according to business needs.

    75.2. All eight Managers were placed at risk of redundancy. The Claimant did not have to reapply for his job, unlike some employees (J323). He was offered the role of Technical Specialist, which we found was not a demotion. One of the Claimant's colleagues was in precisely the same position as him and accepted the Technical Specialist role (J325). We concluded that the role was equivalent/a suitable alternative to his Manager role (J884).

    75.3. We accepted Ms Frohn's evidence that she had no intention to make the Claimant redundant: if he had accepted the proposal, he would have

stayed within the Division and transitioned into the Technical Specialist role; his name appeared on the post-restructure organisational chart (J328). The Claimant would automatically be interviewed for any role he wished to apply for within Risk (J330). The Claimant made no application for any other role (J333).

75.4. Instead the Claimant required the Respondent to look back over his employment, accept that he had been right about the Harm metrics all along, promote him to a very senior role, increase his pay accordingly and then recommence the redundancy consultation process, at which point it would be obliged to acknowledge that he was indispensable (J339). We found that the Claimant knew that what he was proposing could not happen in practice and that his approach was tactical (J340).

75.5. The consultation period was extended several times until October 2018. The Claimant was sent details of jobs, which he might apply for, including senior jobs, but he considered them all unsuitable (J341).

75.6. We rejected the Claimant's allegation that, in December 2017, Ms Frohn told him that the CEO and Chairman 'caused her to eliminate his role in an effort to stop him from blowing the whistle'. We found that this was not said (J345-354). We accepted Ms Frohn's evidence that it was she, not they, who took the detailed decisions as to the shape of the proposed structure. There was no evidence that the Claimant's name even came up in the discussions she had with Mr Bailey (J351). The decision as to the Claimant's role was Ms Frohn's, not Mr Bailey's or Mr Griffiths Jones's.

75.7. There was no decision to eliminate the Claimant's role; the decision was to reduce the number of Manager roles overall, which included, but was not limited to, the Claimant's role; although he was affected by the exercise, he was not the focus of it (J354).

75.8. In March 2018, the Claimant wrote to Ms Jarvis, stating again that none of the proposed alternative roles were suitable and that the Respondent should create a bespoke role for him. In the later meeting on 29 August 2018, the Claimant confirmed again to Ms Frohn that 'he accepted that there was not an existing role available for him' (J362). On 25 October 2018, Ms Frohn wrote to the Claimant, informing him that his employment was terminated by reason of redundancy (J392).

75.9. The Claimant did not cooperate with the Internal Audit review into his allegations (J374-379).

75.10. Nor did he cooperate with Ms Hoggett's investigation into his appeal because he regarded her as the wrong person to conduct it and the process as a sham. We disagreed on both counts (J398-399, J908). The reason she did not deal with the Claimant's ground that he was dismissed because he had made public interest disclosures was because his whistleblowing allegations were being investigated by Internal Audit, and she was advised that the two processes were separate (J906).

75.11. Ms Hoggett concluded that this was a genuine restructuring exercise. The Claimant had been offered the role of Technical Specialist. She had Technical Specialists working for her, who included a former MD of

Goldman Sachs and former CROs investment banks; she regarded it as a role on a par with a Manager role, without the line management responsibilities. She concluded that the consultation exercise had been lengthy and exhaustive; and that the FCA had done what it reasonably could to retain the Claimant within the organisation. We accepted her evidence that she genuinely believed that the position was so clear that she did not need to interview Ms Frohn, especially in circumstances where the Claimant himself had completely disengaged from the appeal process (J907).

75.12. The conclusion of the Internal Audit review was that there was no evidence to support the whistleblowing claim that the Harm metrics were not responded to appropriately by the FSA or the FCA (J416). We concluded that, if the Claimant was dissatisfied with the outcome, he only had himself to blame, as he had effectively boycotted the process (J894).

75.13. We concluded that the fact that the Claimant had made protected disclosures played no part in the Respondent's approach to the restructuring exercise (J887).

76. Finally, we concluded as follows (J940 onwards):

> 'We take as our starting point the observations of HHJ Tayler in the *Fairhall* case (immediately above). We have concluded that this was not a case where the Respondent was 'determined to rid [itself] of a whistleblower', nor did we find evidence of a controlling figure, manipulating the process from the shadows.
>
> We have concluded that this was a genuine redundancy/restructuring exercise, conducted by Ms Frohn, which she anticipated would lead to the Claimant's retention, not his dismissal. Every reasonable effort was made to encourage him to accept the role offered in the new structure, or to apply for other roles. He declined to do so.
>
> In our judgment, the Respondent was entitled to regard the alternative which the Claimant proposed (appointment into/creation of a role within the organisation far senior to his own, without the need for him to apply) as unreasonable. Unfortunately, his dismissal gradually became an inevitability, not because of any whistleblowing, but because of the Claimant's own intransigence.
>
> Mr Kemp submits, in relation to *PID 22, PID 23 and PID 24*, all of which were made during the consultation period, that they 'challenged very senior management and it is more likely than not that they were the true reason or the principal reason for the dismissal. The ET is invited to draw that inference.' He did not go on identify any specific evidence of a causal link between these disclosures and the dismissal. We have concluded that *PID 24* was not a protected disclosure; in any event, there is no evidence that its content caused any adverse reaction within the organisation or had any link with the restructuring process, or the treatment of the Claimant within that process.
>
> In relation to *Disclosures 22 and 23*, we decline to draw that inference. We accept Ms Shepherd's submission that there is no credible connection between these disclosures and the Claimant's dismissal: the key decisions in relation to the restructuring had already been taken; the initial position did not change because the Claimant failed to engage with the process in a constructive way.
>
> We agree with Ms Shepherd that, in making these disclosures, the Claimant contrived to position himself as a whistleblower in the belief that this would protect him from redundancy. Until he was notified of the risk of redundancy he had moved on from his work on the Harm metrics and had worked on other matters without incident. The Claimant was not dismissed because he made those protected disclosures; he made those protected disclosures because he was at risk of dismissal.'

77. Having reviewed our notes of Ms Frohn's evidence (on Day 11), we remind ourselves that the case put to her in cross-examination was that the reason for dismissal was not redundancy, it was because of the historic public interest disclosures to Mr Randell or the public interest disclosures relating to peer-to-peer lending. Ms Frohn replied: 'no, I did not want him out'. It was also put to her that the real reason the Claimant was dismissed when he was because 'his whistleblowing had become far too loud'. Ms Frohn disagreed and said that the redundancy took effect because the Claimant did not accept the Technical Specialist role and did not apply for another role.

Conclusion

78. We reminded ourselves that we found the dismissal to be procedurally unfair because the Claimant was denied the opportunity of showing that the real reason for dismissal was not sufficient. All the evidence suggests that the Claimant would not have cooperated with the appeal even if it was broadened to include the question of whistleblowing.

79. We have concluded that Ms Hoggett should have taken two steps: she should have spoken to Ms Frohn to ask whether the Claimant's whistleblowing had had any influence on her decision to dismiss him from redundancy; and she should have awaited the outcome of the Internal Audit review to see whether it contained anything which might suggest that the dismissal might have been a retaliatory measure.

80. We have no doubt whatsoever that, had Ms Hoggett asked Ms Frohn the same questions as she was asked by Mr Kemp, Ms Frohn would have given the same answers. Further, had Ms Hoggett waited for the outcome of the Internal Audit review, she would have found nothing to support the Claimant's ground of appeal.

81. Mr Kemp's submission that a careful and thorough investigation into the ground of appeal by Ms Hoggett 'would have required an investigation into the Claimant's whistleblowing appeal ground using all of her wholesale market knowledge and experience in respect of the disclosures themselves and her internal executive knowledge of the Respondent's policies including its risk management, supervisory, governance and whistleblowing policies, and its legal obligations' omits the central question Ms Hoggett would have had to ask herself: who was the decision-maker; and were they in any way influenced by the fact that the Claimant had made public interest disclosures? The Tribunal has already answered both of those questions: Ms Frohn was the decision-maker; and she was not so influenced. Having reached those conclusions after forensic exploration with experienced counsel at a 20-day hearing, there is no basis on which we could conclude that Ms Hoggett would have reached a different conclusion.

82. Mr Kemp's next submission was that a fair investigation would have required access to the Internal Audit interviews conducted in June 2018, including with Mr Bailey, Ms Frohn and Mr Woolard. He says that those records 'were not available at the liability trial. We do not know what may have been said.' Absent any evidence before the Tribunal to suggest that they would have contained anything to alter the position, for us to find at this stage that they would have done so would amount speculation without any foundation.

83. Mr Kemp's third submission was that 'further interviews conducted at the appeal stage may well have revealed contemporaneous evidence or material from which inferences could be drawn that was not subsequently before the ET because such an investigation was never conducted'. Again, that is sheer speculation, with no basis in any of the evidence we have heard; indeed, it runs counter to all the evidence we did hear.

84. In light of our findings and conclusions set out above, and the absence of any evidence at all to suggest that the Claimant's dismissal was influenced by his whistleblowing, we are satisfied that there is a 100% chance that, had Ms Hoggett considered the Claimant's ground of appeal that he was dismissed because he made public interest disclosures, she would have rejected it and dismissed his appeal.

85. Ms Hoggett's ability to give an outcome would have been delayed by the need to wait for the conclusion of the Internal Audit review but, by that point, the Claimant's employment had ended and he was no longer being paid. Accordingly, he has suffered no loss for which he can be compensated.

Unfair dismissal: loss of statutory rights

86. One of the heads of loss for which a Tribunal may award compensation is the value of accrued statutory rights that have been lost: where an employee begins a new job following the termination of their employment, they will need to accrue two years' continuous service before they will have acquired the right to claim unfair dismissal or a statutory redundancy payment, and may have lost the right to a lengthy statutory notice period if they have been employed for several years.

87. In all the circumstances, and given the length of the Claimant's service to the Respondent, the Tribunal considers it just to make an award of £500. No separate award is made in relation to loss of long notice.

Unfair dismissal: basic award

Basic award

88. The Claimant does not seek a basic award. He received a redundancy payment in the same amount which extinguishes his loss.

Unfair dismissal: contribution

89. Given our conclusion that, apart from an award for loss of statutory rights, the Claimant is not entitled to a compensatory award, together with the fact that, having received a redundancy payment, the amount of any basic award is extinguished, we do not go on to consider separately the question of a reduction by reason of contributory fault under s.123(6) ERA.

Employment Judge Massarella
Date: 27 July 2023