



EMPLOYMENT TRIBUNALS

Claimant: Mr Andrei Pronin
Respondent: NGE Contracting Limited
Heard at: East London Hearing Centre (via CVP)
On: 8th June and 25th July 2023
Before: Employment Judge J Bromige

Representation

Claimant: In Person
Respondent: Ms. S Dupree (HR Manager)

JUDGMENT having been sent to the parties on 12 June 2023 and 21 August 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

WRITTEN REASONS

1. The above case was heard before me on 8th June 2023 for a liability hearing, with the remedy hearing determined on 25th July 2023. The liability judgment was sent to the parties on 12th June 2023 and no request for written reasons from either party was received. The remedy judgment dated 25th July 2023 but only sent to the parties on 21st August 2023. The Claimant requested written reasons on 29th August 2023. Whilst this only applies to the remedy judgment, given that certain aspects of that judgment are predicated on findings of fact made at the liability stage, I consider it in the interests of justice to provide written reasons for both liability and remedy and I vary the time limit set at rule 62(3) of the Employment Tribunal Rules of Procedure 2013 (“the ET Rules”) as per r.6(a).

Liability Hearing - Preliminary Matters and Identifying the Issues

2. The Claimant issued his claim on 6th January 2023, bringing claims of unfair dismissal, notice pay, holiday pay and unlawful deduction of wages. The Claimant had been given notice of dismissal, purportedly for redundancy, on 21st October 2022 and his employment was due to end on 13th January 2023. The Respondent filed their ET3 on 9th February 2023.
3. Prior to the ET1 being filed, the Claimant was in ACAS Early Conciliation between 23rd November and 8th December 2022. Therefore any act or

omission prior to 24th August 2022 may be out of time.

4. The Claimant was employed firstly by TSO SAS UK from 9th May 2016, and then by the Respondent from 1st February 2021, until the termination of his employment on 13th January 2023. TSO SAS UK and the Respondent are part of the NGE SAS Group, a French owned Civil Engineering and Construction company which works on public sector building contracts in the UK, such as the Crossrail and HST 2 railway projects. The Respondent did not dispute that the Claimant's continuous employment started on 9th May 2016. From 1st February 2021, the Claimant, employed by the Respondent, worked at a site in Liverpool as a Quantity Surveyor. He returned to the London Head Office in 2022 at his own request.
5. Because this was identified as a relatively straight forward unfair dismissal claim, the case had not been case managed via a preliminary hearing, and no issues had been clarified by the Tribunal. Since both parties were unrepresented, the Tribunal took some time at the outset of the hearing to clarify the issues.
6. For the unfair dismissal claim, the Claimant's effective date of termination, his last day of work, was 13th January 2023. The Respondent says that he was dismissed for redundancy, a potentially fair reason. The Claimant does not accept that this was the real reason for his dismissal, or, in any event, that his dismissal was fair. The Respondent says that, because the Claimant requested to move back from Liverpool (where he was working) to London, there was no work available for him, and his position was redundant. The issues are therefore:
 - a. What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.
 - b. If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:
 - i. The Respondent adequately warned and consulted the Claimant;
 - ii. The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
 - iii. The Respondent took reasonable steps to find the Claimant suitable alternative employment;
 - iv. Was dismissal within the range of reasonable responses?
7. The arrears of pay claim are twofold. Firstly, it is agreed that the Respondent made a deduction from the Claimant's wages in or around June 2022 of £399.96. The Respondent says that this was a lawful deduction, as per the clawback provision in the contract of employment, and was because they had in error paid the Claimant £33.33 gross per month extra since June 2021. The Claimant disputes the legality of this deduction. This is the unlawful deduction of wages claim, and the issues as clarified are:
 - a. Was the deduction of £399.96 made in or around June 2022 required or authorised by a written term of the contract?

- b. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
 - c. If the contractual provisions do not apply, did the Claimant agree in writing to the deduction before it was made?
 - d. How much is the Claimant owed?
 - e. If the total unlawful deduction was made prior to 24th August 2022, was it reasonably practicable for the claim to be made within the time limit?
 - f. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?
8. Secondly, the notice pay and holiday pay claims. The Claimant accepts that the period for which he was paid both sums are correct, but says that these were based on his “base salary” of £3700 gross per month, and should have been calculated to include his £1400 (net) mobility allowance. The Respondent says that the mobility allowance was only payable when the Claimant was working in Liverpool, and it was removed when he returned to London. The issues are:
 - a. What is the relevant daily rate of pay (for the holiday pay claim)
 - b. What is the relevant weekly rate of pay (for the notice pay claim)
9. I was provided with two bundle of documents – the Claimant’s ran to 231 pages and included his witness statement. The Respondent’s was 89 pages. I heard evidence from the Claimant and Ms Dupree (HR Manager) for the Respondent. Ms Dupree has not provided a formal witness statement, but rather stood by her account in the ET3, which she affirmed as her evidence. The issue of Ms Dupree’s witness statement was resolved as part of the Claimant’s application to strike out the Respondent’s response, which I deal with below.

Strike Out Application

10. The Claimant applied to strike out the Respondent’s response under rule 37(1)(c) and (d), on the basis that the Respondent has failed to comply with the Tribunal’s order dated 31st January 2023 and/or has not actively pursued or participated in this litigation. The application was made in writing, complying with r.92 on 31st May 2023. As of 31st May 2023, the Claimant said that the Respondent had not complied with the requirements to either disclose evidence, prepare a bundle or exchange witness statements.
11. Standard directions had been included in the notice of hearing which was sent to both parties on 31st January 2023. Relevant for this application were the following deadlines:
 - a. 29th March 2023 – mutual disclosure of documents by copy
 - b. 12th April 2023 – bundle to be agreed, Respondent to prepare bundle
 - c. 26th April 2023 – exchange of witness statements
12. In compliance with these directions, the Claimant had emailed the Respondent on 29th March 2023 with his documents, followed by a request

for documents from the Respondent on 12th April. This was further chased on 26th April 2023. I am told, and I accept, that all these emails went unanswered.

13. In oral submissions, the Claimant expanded upon his application, in particular the disadvantage caused to him by the Respondent not properly disclosing evidence and refusing his request for documents sent on 12th April 2023. He highlighted that the Respondent's ET3 emphasised that there were multiple complaints about the standard of his work and that he would have been dismissed fairly even if the redundancy had not happened. The Claimant had sought disclosure of his appraisals to show that he had received good feedback, and he was prejudiced since he could not challenge the Respondent's position without those appraisals.
14. In response, Ms Dupree told me that she had been HR Manager for about a year prior to the events this claim is concerned with, and had previously been the Office Manager. She was promoted to the HR Manager after taking a CIPD Level 5 qualification. By December 2022 she managed an HR Assistant and an HR Officer.
15. She added that she had been off work from 30th March for a short period. She had a surgical procedure on or around that date, returned to work briefly the following week, but then took a period of holiday. She did not delegate responsibility of the case to her subordinates during this period as she did not think they had the experience. Whilst the Respondent was a subsidiary of a large multi-national group, there were no in-house lawyers to turn to, and she was the most senior HR employee at the Respondent. She was unfamiliar with Tribunal procedure and had attended today thinking that only she needed to come.
16. I noted that the Respondent has not prepared any witness statements. Ms Dupree drafted the Grounds of Resistance attached to the ET3, and indicated that she would adopt this as her statement. However, in exploring the issues with the parties today, it is apparent that for the unfair dismissal claim, the main witness of fact, the decision maker to dismiss the Claimant, was in fact a Mr Bicknell (Managing Director). There is no witness statement from him, although there is some contemporaneous documentation, such as letters, signed by him in the bundle.
17. Further, on an examination of both parties bundles, and the Respondent's ET3, there is scant information or evidence about how the Claimant came to be selected for redundancy, whether anyone else was in the pool of employees, what criteria were used and agreed upon, etc. There are no minutes of the redundancy consultation meeting which occurred on 18th October 2022, nor the appeal meeting. Ms Dupree tells me that these documents do exist, and that she would be able to meet her disclosure obligations, and serve witness statements, if an adjournment was granted.
18. Prior to hearing the application, I directed both parties to the short EAT judgment in *Emuemukoro v Croma Vigilant (Scotland) Limited* EA-2020-

000006-JOJ, which I highlighted may be pertinent to this application, especially the issue of proportionality in the event that I determine that a fair trial is not possible within the trial window (which is one day). Whilst both parties were unrepresented, and therefore did not have access to the usual law reports, I confirmed that the full judgment and a headline summary could be found via gov.uk.

Strike Out – the law

19. The relevant parts of Rule 37 are:
 - (1) *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-*
 - (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
 - (d) *that it has not been actively pursued;*
20. Although specifically dealing with Rule 37(1)(b), the principle set out by the Court of Appeal decision in *Blockbuster Entertainment v James* [2006] IRLR 630 is equally applicable to the whole of Rule 37 – the Tribunal’s discretion to strike out a claim or response is a “*draconic power, not to be readily exercised*”.
21. In *Emuemukoro*, which was a decision to strike out principally under Rule 37(1)(c), Choudhury J (as he then was) indicated that the principles in *Blockbuster* were equally applicable to the other parts of Rule 37, and so (as per *Blockbuster*) in order for strike out to occur, one of two “*cardinal conditions*” must be met. Firstly that there has been a deliberate or persistent disregard of required procedural steps, or secondly, that the defaulting party has made a fair trial impossible.
22. *Emuemukoro* further clarified that the question of a fair trial is not to be determined as an absolute, but in the context of an application made at the outset of a trial, whether a fair trial is possible within the allocated window.

Strike Out - conclusions

23. The first question I must determine is whether there has there been non-compliance with the order of the Tribunal by the Respondent? In my judgment, there has been. The Respondent failed to disclose its documents until (as I find) 1st June 2023, 1 week before the hearing. Of the documents it has disclosed, it failed to deal with the Claimant’s request for disclosure on 12th April, and appears to have failed to disclose documents around the redundancy process. Further, it has failed to prepare witness statements, or indeed, actually call the correct witnesses.
24. I pause here to reflect that some allowance can be made for parties when they are representing themselves, and that Ms Dupree is effectively acting, as the Claimant is, as a litigant in person. However, Ms Dupree is an HR Manager, of a company with 77 employees, and knew that she was responsible for the Tribunal litigation as of 31st January 2023. She failed to

delegate compliance with the Tribunal's directions to anyone – even if she thought that her HR Colleagues were not up to the task, she could have requested support from the Senior Leadership Team. She also made no effort to communicate with either the Claimant or the Tribunal to request a variation to the various deadlines.

25. Whilst the above is some mitigation, it does not alter my judgment that there has been persistent disregard to required procedural steps, although there was some efforts at late compliance, meaning that the main focus for the Tribunal is whether the Respondent has made a fair trial impossible within the allocated trial window.
26. I conclude that a fair trial is still possible for the following reasons. Firstly, I remind myself that the burden of proof as to establishing the reason for dismissal is upon the Respondent, and so any potential gap in the evidence to that regard does not disadvantage the Claimant. The same goes to the Claimant's concerns about the Respondent's case regarding his capability and that he may have been fairly dismissed in any event – if there is no evidence to back up this serious assertion, that does not cause particular prejudice to the Claimant.
27. Secondly, Ms Dupree drafted the ET3, and it is not uncommon for a Tribunal to be confronted with one or both parties that has not prepared a witness statement. Whilst not condoning non-compliance with Tribunal directions, in those circumstances, if there is a narrative account in the ET1 or ET3, the Tribunal can adopt this as a witness statement, taking into account that there is no requirement for a witness statement to be accompanied by a statement of truth, that it is not bound by any rule of law relating to the admissibility of evidence (see Rule 41) and that the Tribunal can vary the requirement of a witness statement per Rule 43.
28. The Claimant is familiar with the contents of the Respondent's ET3, hence his application for disclosure arising out of it. With a short adjournment to allow the Claimant to draft some questions, I am confident that he can challenge the Respondent's witness regarding the issues as I have identified above.
29. Therefore, whilst recognising the Respondent's breach of the Tribunal's directions, and understanding the Claimant's frustration at the Respondent's inactions whilst he has carefully prepared for the hearing, I conclude that a fair trial is still possible, and the application is refused.

Findings of Fact

30. The Respondent was employed by the Respondent, or one of its Group/Parents companies since 9th May 2016. At the time of his dismissal, he was employed as a Senior Quantity Surveyor. I have seen a contract which took effect on 1st April 2020 for the same job role, and a salary of £41,400 per annum gross. The place of work stipulated in the contract was London.

31. A further contract was agreed on 1st February 2021, which varied the Claimant's place of work to Liverpool, and included a mobilisation allowance of £1400 per month NET. I accept the Respondent's evidence that this allowance was linked to HMRC regulations around such an allowance (hence why it was expressed "net" of tax), and that the allowance was given because of the Claimant being required to work in Liverpool, which was away from his home in London. There was a mobilisation policy in force from December 2020.
32. From 24th June 2021, the base salary for the Claimant was increased to £3700 per month (gross), or £44,000 per annum.
33. On 21st April 2022, it was agreed that the Claimant could move back to London from Liverpool and work in London from the end of May or beginning of June 2022. This followed some negotiations on our around 6th July 2022 between the Claimant and Mr Bicknell, the Respondent's Managing Director, about keeping the £1400 per month net allowance, which the Respondent said could not be kept as this was a government benefit scheme, to which the Claimant no longer qualified because of his relocation.
34. Between 31st May – 29th July 2022, the Respondent deducted £122.21 per month. The pay slips recorded this as "overpayment". I accept from the contemporaneous documents that the Claimant was informed of this at the time. Ms Dupree emailed the Claimant on 23rd June 2022, indicating that instead of the pay rise to £3700 per month (gross) since June 2021, the Claimant had been paid £3,733.33 (gross) per month, resulting in a gross overpayment of £399.96.
35. This overpayment is reflected in the payslips that the Claimant has provided, which shows the gross monthly salary paid during this period as £3,733.33. A gross deduction of £122.21 was made on 30th June 2022, 29th July 2022 and 31st August 2022.
36. Although I have not seen any confirmation of the same, I find that, as per the Claimant's payslips, he received a pay rise in July 2022 to £42,200.00 per annum (gross) or £3,850.00 (gross) per month.
37. The Claimant was subjected to a personal performance review on 4th August 2022. I have not heard any evidence if this was part of a capability process, or simply an annual appraisal, but it appeared to be negative towards the Claimant. I find it was more likely than not the former, as at the start of September 2022, the Claimant was invited to a meeting on 15th September 2022 which from the invitation letter was meant to be a capability meeting. The meeting was conducted by Nick Curran, with Ms Dupree providing HR support.
38. As a result of this meeting on 15th September, the Claimant was placed on gardening leave until the end of his employment. He was not dismissed at this point – it was "*gardening leave pending investigation*" as per Ms Dupree's email to the Claimant on the same day. Gardening leave is usually a term to denote paid leave or notice (without an obligation to work) at the end of the employment. The Tribunal finds that in effect, he was suspended

- something which the Respondent refers to in its own minutes of the 15th September meeting. The Claimant was not provided with a copy of these minutes.
39. The Tribunal has heard no explanation from the Respondent as to why the Claimant was suspended. The last line of the minutes reads *“explained to Andrew that this is not a disciplinary hearing and the start of a formal investigation. Explained to Andrew, that while the investigation is taking place, he will be suspended from work”*. Ms Dupree was unable to explain why the Respondent’s ET3 suggested that the suspension was due to there being no work for the Claimant in the London Office, whereas the contemporaneous documentation indicates that he was suspended for a reason linked to his conduct and/or capability. The Tribunal preferred the contemporaneous documentation.
40. The Claimant chased for updates, but whatever investigation there was into his capability, this was not shared with the Claimant (nor did he have to attend further meetings) until 11th October 2022 when he was told that the investigation was not being proceeded with. No minutes of this meeting have been produced, nor was a letter sent afterwards summarising what happened in it. The Claimant’s witness statement is silent on this meeting, as is Ms Dupree’s statement. The Tribunal does not need to make a finding of what happened at this meeting; however, the Tribunal does accept the Claimant’s evidence that he remained suspended from work after it.
41. On 18th October 2022, the Claimant attended a meeting with Ms Dupree and Mr Bicknell where he was told that he was at risk of redundancy. Minutes were taken, but the Respondent has failed to disclose them and never provided them to the Claimant. A consultation period occurred on 21st October 2022, but there is no evidence that the Respondent held another consultation meeting with the Claimant to discuss the proposals and alternatives to redundancy. The Claimant says that there were a series of telephone calls or Microsoft Teams video calls, but none were minuted by Ms Dupree, or if they were, the Respondent failed to disclose them.
42. The Claimant was notified on 11th November 2022 that he would be dismissed due to redundancy. The decision maker was Mr Bicknell. His employment was due to terminate on 6th January 2023. The Claimant was told of his right of appeal, which he availed himself of. The appeal was held on 1st December 2022. The appeal was chaired by Mr Bicknell. At both meetings Ms Dupree was in attendance. She took minutes. She failed to provide these minutes to the Claimant at the material time, and, the Tribunal notes, has failed to provide them in disclosure. The Respondent was unable to explain why Mr Bicknell, as the decision maker for the redundancy, had also chaired the appeal hearing.
43. During the appeal meeting, the Claimant proposed alternatives to redundancy, in that he was willing to take a vacant job in both the procurement and the finance teams of the Respondent. He followed up these proposals with a chasing email to Ms Dupree on 7th December 2022, asking for her availability to discuss the proposed roles in greater detail. A meeting with Ms Dupree did occur on 14th December 2022 (although again,

there are no minutes) where the Claimant was expressing interest in the role of Finance Apprentice. He requested information about *“the salary for this role and the proposed start date for this position”*. Ms Dupree simply ignored this email and the next the Claimant heard from the Respondent was a letter from Mr Bicknell dated 28th December 2022 confirming the date that his employment would terminate and arrangements for payment in lieu of notice.

The Law

44. s.13 Employment Rights Act 1996 (“ERA 1996”) states that:

(1) An employer shall not make a deduction from wages of a worker employed by him unless-

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction*

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised-

- (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
- (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

45. s.98 ERA 1996 states that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

- a. *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) *shall be determined in accordance with equity and the substantial merits of the case.*
46. As per s.98(1), the burden on showing the reason or principle reason for dismissal rests upon the Respondent. As Cairns LJ said in *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213:
- A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason.*
47. It follows that evidence should be led by the decision maker as to what those set of facts known to the employer were – see *Orr v Milton Keynes Council* [2011] EWCA Civ 62.
48. In *Smith v City of Glasgow District Council* [1987] IRLR 326, it was held that the Respondent could not discharge their burden under s.98(1)(a) then the Respondent could not be in a position to rely upon that reason as a sufficient ground for dismissing the Claimant. On a reading of s.98(1) and s.98(4) this must be correct – the determination of the question of fairness under s.98(4) only applies if the Respondent has satisfied s.98(1).

Conclusions – liability

49. I deal firstly with the contractual issues. During oral evidence, the Claimant says that he did not agree the salary increase in June 2021, and in fact, the correct mechanism for base salary was a verbal agreement with Mr Bicknell that his salary would be no less than the market average. I have not heard from Mr Bicknell about this conversation, but even if the Claimant is correct, in my judgment this is incapable of being a contractual term for two reasons. Firstly, it is inconsistent with the June 2021 increase letter, and secondly, it would fail as a contractual term due to uncertainty. There was no agreement or mechanism for assessing average market salary, none for taking into account London weighting for example, and no formal appeal or arbitration in the event of disagreement.
50. The Claimant says the salary increase in June 2021 was imposed unilaterally, and he did not agree to it. With respect, that is an odd position to take – it was a pay increase, which he received for over a year, without seemingly protesting, if the Claimant thought that this salary increase was not enough (and it was £4k more than the April 2020 contract) he could have renegotiated, or indeed, resigned. He did neither. The Tribunal

therefore concludes that the Claimant's base contractual salary was £3700 per month gross, rising to £3850 per month gross in July 2022.

51. As for the mobility allowance, this was expressed NET of tax in the contract. The Tribunal accepts that the Claimant did not see the mobilisation policy at the material time, but it would have been obvious to the Claimant, and indeed, the objective bystander, that this allowance was for the Claimant to be working in Liverpool. It was a formal variation of the contract, but it was certainly implicit that it would only be for when the Claimant was working in Liverpool. The reference to it being "net" firmly ties this clause in with the government scheme, and since it was referenced as "net" it was not capable of forming part of the Claimant's base salary – the contract even references that it is not part of the pensionable salary, and for those reasons, it would not have been part of the salary for calculating holiday pay during the material time. The holiday pay claim therefore fails.
52. As for notice pay, the Tribunal's judgment is that the allowance was removed on or around June/July 2022 when the Claimant returned to London. It did not form part of the Claimant's pay after that, and so should not have been included in the notice pay calculation. Again, the Claimant's breach of contract claim fails.
53. For the unlawful deduction of wages claim, the Tribunal's conclusion is that the correct gross monthly salary at the material time was £3700 gross, the Claimant was overpaid at a rate of £33.33 per month gross for 12 months, totally £399.96 and there was a lawful clawback provision in the contract. s.13 ERA 1996 does not require prior notification to a deduction, but in any event, notice was given when challenged. The unlawful deduction of wages claim is not well founded and is dismissed.
54. Finally, the unfair dismissal claim. The burden is on the Respondent to show the reason or principle reason for dismissal was redundancy. The Respondent has not called Mr Bicknell, who made the decision to dismiss. The Respondent has not adduced any evidence about the redundancy process, such as why there was no work available for the Claimant, why, if that is correct, he was allowed to come back from Liverpool, and it has not disclosed who else was in the pool of employees, how the Claimant was selected for redundancy, or, if employees were not in the pool. Put shortly, there is no evidence before the Tribunal that the Claimant's role was actually redundant within the definitions contained in s.139 ERA 1996, or even that the Respondent believed that there was a genuine redundancy situation.
55. In fact, the Tribunal concludes from the September 2022 disciplinary/capability process, the lengthy suspension of the Claimant, and the fact he remained suspended afterwards, that redundancy was not the real reason for dismissal. It appears that the Respondent had concerns (the Tribunal makes no finding as to whether genuine or not) about the Claimant's performance. This seemingly petered out by 11th October, but the Claimant remained suspended. The redundancy was most likely a convenient excuse to remove the Claimant in a softer way through the guise of redundancy.

56. Therefore, the Respondent has not established the reason for dismissal, and therefore without that reason, the Claimant's claim for unfair dismissal succeeds. Even if I am wrong about that, and the Respondent had been able to show that the dismissal was for redundancy, I would have found the dismissal unfair in any event. There was no evidence before me as to what considerations Mr Bicknell took into account, the consultation did not have a structure and no proper information was given to the Claimant, and his right of appeal was nullified because the Respondent, despite employing 3 HR staff, and having 74 employees, plus group companies, chose to have the decision maker act as the appeal officer. The dismissal was procedurally and substantively unfair. The unfair dismissal claim is therefore well-founded and succeeds.

The Remedy Hearing

57. The Tribunal adjourned the issue of remedy until a separate hearing on 25th July 2023. At the end of the liability hearing I set directions for there to be further disclosure on the issue of remedy, and further witness evidence from both parties, especially since the Claimant was seeking an order for reinstatement and/or reengagement.
58. The Claimant provided an addendum bundle of 193 pages (some of which had been included in the original bundle) which included a further witness statement. Ms Dupree provided a witness statement on behalf of the Respondent, as well as a statement from Mr Bicknell, although he did not attend to give evidence.
59. The following issues were clarified with the parties:
- a. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just
 - b. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.
 - c. What should the terms of the re-engagement order be?
 - d. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - a. What financial losses has the dismissal caused the Claimant?
 - b. Has the Claimant taken reasonable steps to replace their lost earnings, for example looking for another job?
 - c. If not, for what period of loss should the Claimant be compensated?
 - d. If there is a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - e. If so, should the Claimant's compensation be reduced? By how much?
 - f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - g. Did the Respondent unreasonably fail to comply with it by continuing the Claimant's suspension through until the termination of his employment?
 - h. If so is it just and equitable to increase any award payable to the Claimant? By what proportion, up to 25%?
 - i. Does the statutory cap of fifty two weeks' pay apply?
 - j. What basic award is payable to the Claimant, if any?

Findings of Fact

60. I accept that the Claimant was significantly impacted by his dismissal, as he believed (correctly) that his role was not redundant, and could not rationalise the unfair treatment he had been subjected to. That being said, the Claimant had not stood still and had thrown himself into looking for alternative work. He produced a schedule, which I accept is accurate, of all of the attempts he had made to find alternative employment. Between 13th December 2022 and 30th June 2023 he took steps on nearly each day to mitigate his loss.
61. The Claimant had 12 weeks of contractual notice which he was paid for. This notice runs from 28th December 2022, so he has been paid in full until 22nd March 2023. At the point of his dismissal, he earned £46,200.00 (gross) per annum. This includes his employee pension contributions. He also benefited from 3% employer contributions.
62. On 1st February 2023, the Respondent was contacted by Caris International Real Estate Limited who had made a conditional job offer to the Claimant. Caris wanted a reference from the Respondent, as the Claimant's last employer. I interpret the employment reference request, which I have seen, as an evidence based reference request.
63. The request was sent to Ms Dupree. Following on from her conduct in ignoring the Claimant's emails towards the end of her employment, she ignored this request, and further chaser emails were sent on 2nd and 20th February 2023 with no response. On 10th March 2023, the generic HR Department email from the Respondent sent a "*company reference letter*" for the Claimant, which was a factual reference. Caris chased for further details, and highlights the difficulties they had in communicating with Ms Dupree when they wrote on 13th March 2023 "*I have tried calling over 10 times now, to speak with you regarding the reference you sent to is... can you please confirm the answers to the questions raised in our request for the reference?*".
64. No further information was provided by the Respondent and the job offer from Caris was withdrawn. As of the date of the remedy hearing the Claimant remains unemployed.
65. As for the Respondent, whilst there is limited evidence from them as to documentary evidence, and indeed it appears that up until June 2023, the Respondent was recruiting for relatively senior positions, I accept Ms Dupree's evidence that with regards quantity surveyors, there is currently no vacancies available, with the Liverpool project (which the Claimant was previously involved with) ending in November 2023, no projects in London (where the Claimant was based prior to his dismissal) and the closing of the Norwich site.
66. The Respondent has continued to recruit to other departments, and most recently on 7th June 2023, advertised for the roles of Finance Director, Project Finance Controller and Procurement Officer. I have seen the job advertisements for each role, although not the proposed salary. The

Claimant says he could be reengaged by the Respondent into one of these roles.

The Law – Remedy

67. s.114 ERA 1996 states:

Order for reinstatement.

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) 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 reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

68. s.115(1) ERA 1996 states:

(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.

69. s.116 ERA 1996 states:

(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.

70. In *Lincolnshire County Council v Lupton*, the EAT noted that an employer does not necessarily have a duty to create a space for a dismissed employee to be re-engaged. There is no statutory presumption that an employer is required to displace or bump an existing employee.

71. In *Allmakes Ltd v Boorman* [1995] ICR 842, the Court of Appeal held that the set-off provision under s.122(4)(b) ERA 1996 does not apply where a purported redundancy payment was made and the reason for dismissal was not redundancy.

Conclusions – Remedy

72. Dealing first with the issue of reinstatement or reengagement, the conclusion of the Tribunal is to not make an order within the terms of s.114 or s.115 ERA 1996. I accept that the Respondent has a reduced number of projects in Liverpool and London, and is experiencing a downturn in work that the Claimant is qualified to undertake.
73. This is not the same as saying that the Claimant would have been dismissed fairly by summer of 2023 – the Respondent has not led specific evidence of a redundancy exercise in London, nor shown that the Claimant would have been made redundant in such an exercise.
74. Therefore I decline to make an order for re-instatement or re-engagement.
75. I next deal with the basic and compensatory award in turn. For the basic award, The Claimant was 36 years old at the time of dismissal and had 6 years qualifying service. The statutory cap for a week's pay for this calculation was at the time £571.00. $6 \times 571 = £3426.00$.
76. Where the Claimant has been dismissed for redundancy and a redundancy award has already been paid, the basic award shall be reduced to nil to set off the amount already paid – s.122(4)(b) ERA 1996. However, applying *Boorman* and given the Tribunal's finding that the reason for dismissal was not redundancy, the Claimant is entitled to a basic award (in that s.122(4) does not apply) and so is awarded **£3426.00**.
77. For the compensatory award, the judgment of the Tribunal is to award the Claimant his losses from his dismissal until today's date by way of past losses. Breaking this down to reflect tax years as there is a substantial change in tax treatment from 6th April 2023, there will be two periods of past loss. Firstly, from 23rd March – 5th April 2023 (2 weeks) and then from 6th April – 25th July 2023 (16 weeks).
78. In the 2022/23 tax year, the Claimant's gross weekly pay was £888.46, and net weekly income (including employee pension contributions) of £673.00 per week. So for the first period of 2 weeks, the Claimant is awarded **£1346.00**.
79. For the next 16 weeks in the current tax year, the Claimant's net pay is £682.00. $16 \times 682 = £10,912.00$. Therefore the Claimant's total past loss of earnings is **£12,258.00**.
80. For future earnings, I award the Claimant a further 26 weeks of loss of earnings. The Claimant has disclosed multiple job applications, which he has ultimately been unsuccessful in so far, although one job, with Caris, got as far as a conditional offer, which was withdrawn after the Respondent did not provide a full factual reference. Despite Ms Dupree's failure to deal with it promptly, I make no criticism of the Respondent in this, an employer is allowed (and indeed, from the experience of this Tribunal, often does) to provide a simple factual reference. The fact that they did not go further does

not reflect upon either them or the Claimant, however unfortunate the consequences.

81. However, what this means is that the Claimant, in the past 6 months, has been successful at interview, to the extent of an offer being made, and there is no reason why he cannot, with further applications and diligence, find a job of similar remuneration within the next 6 months. Whilst the Claimant has indicated a desire to re-train, the Tribunal's judgment is that the cost of this re-training is not something which the Respondent should be liable for, since there are still plenty of quantity surveyor jobs available to the Claimant, and his experience and hard work will mean that he is likely to find further work over the coming months.
82. 26 weeks at £682.00 per week is **£17,732.00**. I also award the Claimant £500.00 for loss of statutory rights, and do not make any award for health insurance, as I have not heard any evidence about this.
83. I must also deal with employer pension contributions. Whilst part of the compensatory award, I make a separate calculation for this (I do not need to do this for employee contributions, as this is incorporated in the loss of earnings already).
84. The total period of loss is 44 weeks. The employer would have contributed £26.65 per week which equals **£1172.77**.
85. Finally, the issue of an uplift under s.207A TULCRA 1992. The ACAS Code of Practice for disciplinary and grievance matters does not apply redundancy matters, however, the finding of the Tribunal was that this was not a genuine redundancy situation.
86. The Tribunal is focused on the actions of the Respondent in September/October 2022, when the Claimant was told that he was not subject to a disciplinary hearing, but rather an investigation which required him to be suspended. This must be, the Tribunal concludes, a disciplinary process, even if it was a sham one.
87. The Claimant was not kept informed about this process until 11th October when he was told that the investigation would not be proceeded with, however he remained suspended from work. There has therefore been a breach of §8 of the ACAS Code, that where a period of suspension is considered necessary, it should be as brief as possible and kept under review. It was not in this case.
88. Therefore I find that there has been a breach, however, in all the circumstances, and directing myself as to the test at s207A, I apply a 10% uplift to the compensatory award. This is because the breach did not of itself result in dismissal, and I do not take into account the subsequent dismissal as being a separate or cumulative breach. However the Tribunal recognises that the ongoing suspension had a detrimental impact upon the Claimant and was wholly unnecessary. This means that the compensatory award is uplifted by a further **£3166.27**.

89. To summarise the figures:
- a. Basic Award - £,3426.00
 - b. Compensatory Loss (Loss of Earnings) - £29,990.00
 - c. Compensatory Award (Loss of Pension) - £1,172.77
 - d. Compensatory Award (Loss of Stat Rights) - £500.00
 - e. ACAS Uplift @ 10% on (b) (c) and (d) - £3,166.27
90. This makes a total award of £38,225.04. The Claimant has not claimed any benefits since his dismissal and the recoupment provisions do not apply. I also do not gross any of the award up for tax, since s.403 ITEPA will apply to the first £30,000 of the award, and the Claimant tells me (which I accept) that he has not paid any income tax this year, meaning that his personal allowance remains.

Employment Judge J Bromige
Date 23rd November 2023