EMPLOYMENT TRIBUNALS

Claimant: **Mr A Seal**

Respondent: **Network Rail Infrastructure Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton (by video) **On:** 1 March 2024
(With parties further written submissions submitted on 28 March 2024)

Before: Employment Judge Gray **and Members:** Ms Barrett and Mrs Skillin

Appearances

For the Claimant: Mr Toms (Counsel)

For the Respondent: Mr Zovidavi (Counsel)

RESERVED JUDGMENT ON REMEDY

The unanimous judgment of the tribunal is that:

- **For the successful complaint of unfair dismissal, the Claimant is awarded, and the Respondent is ordered to pay to the Claimant, the sum of £19,702.20 made up as follows:**
    - **Basic Award of £5,652.90**
    - **Compensatory Award of £14,049.30**

REASONS

1. This Judgment and reasons relate to the determinations of remedy in respect of the successful complaint of unfair dismissal only.

2. The remedy hearing took place on the 1 March 2024 by video.

3. A separate Judgment was delivered in respect of the successful complaint of wrongful dismissal and sent to the parties on the 8 March 2024.

4. Judgment was reserved in relation to the successful complaint of unfair dismissal as it was necessary for the parties to make further written submissions on the quantification of the compensatory award (in particular, the pension loss calculation and the impact of retrospective pay increases and subsequent regrading on loss calculations).

5. It was confirmed to the parties that this would be a reserved decision delivered after receipt and deliberation of the parties' further submissions. This also accorded with the request by Claimant's Counsel at the remedy hearing for written reasons in respect of this remedy judgment.

6. The parties' further submissions were ordered for the 15 March 2024, but the parties each requested further time, and with the consent of the Tribunal time was extended to the 28 March 2024, on which date the parties provided their submissions.

7. By way of background, it was at a final hearing which took place on the 20 to 24 November 2023 by video that matters of liability were determined. At that hearing it was determined that the complaint of unfair dismissal succeeded. That judgment was delivered orally on the 24 November 2023. Judgment was then sent to the parties on the 14 December 2023. Written reasons have not been requested or provided for that decision.

8. For reference at this remedy hearing the Tribunal was provided with:

    a. An electronic remedy bundle of 73-pages

    b. A witness statement from the Claimant

    c. A witness statement from Ria Lemaitre on behalf of the Respondent

    d. Written submissions on behalf of the Claimant.

9. Then pursuant to the case management order made by consent the parties submitted their further written submissions specific to the compensatory award.

10. At the start of the remedy hearing the relevant remedy issues to be determined were confirmed as those set out in paragraph 7 of the case management order of Employment Judge Bax from the hearing before him on 20 June 2023. These are repeated below:

"7.1 The Claimant wishes to be reinstated to their previous employment or reengaged to comparable employment or other suitable employment. Should the Tribunal order reinstatement? The Tribunal will consider, in particular, whether such an order is practicable and, if the Claimant caused or contributed to the dismissal, whether it would be just to make it and upon what terms it ought to be made.

7.2 What basic award is payable to the Claimant, if any?

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

7.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

7.4.1 What financial losses has the dismissal caused the Claimant?

7.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

7.4.3 If not, for what period of loss should the Claimant be compensated?

7.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

7.4.5 If so, should the Claimant's compensation be reduced? By how much?

7.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it by failing to carry such investigation as was necessary to establish the facts and imposed a sanction which was not appropriate in all the circumstances? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

7.4.7 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensatory award? By what proportion?

7.4.8 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

7.4.9 Does the statutory cap of fifty-two weeks' pay apply?"

11. In respect of these issues, it was confirmed by Claimant's Counsel that the Claimant no longer sought reinstatement or reengagement.

12. Issue 7.4.8 is no longer relevant as the whistleblowing claim failed and was dismissed.

13. The parties agreed that the Claimant's basic award without reduction was £10,278, and we agreed this amount.

14. The Respondent asserted contributory fault on the part of the Claimant that should reduce the basic award and the compensatory award. Respondent's Counsel asserted there should be a 75% contribution. Claimant's Counsel asserted there was no contributory fault, or if there were it should be limited to 20 to 25%.

15. As to the compensatory award the Claimant asserted a claim for immediate loss and then future loss of 2 years. The Respondent asserted 6 to 12 months from the effective date of termination (5 May 2022), limited by a failure to mitigate and/or that a fair dismissal would have happened at that point anyway for some other reason (it asserts a breach of trust).

16. It is not in dispute that the Claimant received £43,429.06 net in the immediate loss period (a period of 83 weeks).

17. As to whether there was a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures, the Claimant asserts in the list of issues (paragraph 7.4.6) that the Respondent unreasonably failed to comply with it by failing to carry such investigation as was necessary to establish the facts and imposed a sanction which was not appropriate in all the circumstances. At the hearing Claimant's Counsel confirmed that the Claimant relies on paragraphs 19 to 23 of the code. Further, that the Claimant seeks an uplift of 15%.

FACTS

18. Matters of fact relevant to matters of remedy.

19. The Claimant was 20 years with the Respondent and worked up through job grades, with them.

20. The Claimant was dismissed on the 5 May 2022.

21. The Claimant obtained alternative employment on the 1 June 2022, but at a lower salary and with lower benefits.

22. From the 27 February 2023 he was also undertaking consultancy work.

23. Within his witness statement the Claimant tells us … "… I wish to stay in my current role and am not seeking reinstatement or reengagement with the Respondent. I cannot risk my mental health deteriorating again by returning to work for the Respondent and facing the same issues and I find my current role

rewarding." (paragraph 10). Further, … "I have supplemented my income as best I can with IST ad-hoc consultancy work from 27 February 2023 [pages 39 - 44]. However it is difficult to find the time for this with my full-time role. I have continued to look for higher paid work. However I have a limited skill set as I have worked for the Respondent my entire adult life and I have not yet identified other roles that are suitable for me that pay an equivalent wage to my previous role. …." (paragraph 11).

24. In cross examination the Claimant confirmed when asked how many jobs he has applied for that it was one other job being IST simulations, which is the company through which he is providing his consultancy services. When asked why he has not applied for any other jobs he confirmed that it is difficult when working full-time and that he didn't think he would be successful in jobs outside of the railway, or in applying for them.

25. The two roles the Claimant has applied for (being his current full-time role that he started on the 1 June 2022 and the consultancy role that he started on the 27 February 2023) he has obtained. He has not applied for anything else. He finds his current role rewarding.

26. It was agreed that the Claimant earns from 1 June 2022 to 27 February 2023 the net amount of £16,067.20 (£415.02 x 38 and 5/7) and as confirmed in his schedule of loss received £154 in benefits.

27. As to matters of contributory fault it was not in dispute factually when considering matters of liability, where we found the reason for the Claimant's dismissal was his conduct, that the Claimant doesn't deny what he did, but he asserts there is mitigation to explain it. We remind ourselves that the focus of the disciplinary action against the Claimant was the call on the 21 October 2021, an email he sent dated 8 November 2021, the four calls on the 25 November 2021 and the call on the 28 November 2021. What the Claimant writes and says in those calls was not in dispute and includes for example in the transcript from the call on the 21 October 2021, the Claimant referring to the line blockage plan as … "a bit dodgepop" and describing the lineblock planning office as … "Monkeys in the office that turn out rubbish.". We find that the Claimant's conduct was blameworthy and did cause or contribute to the dismissal.

28. We have also considered the parties' further written submissions in respect of the compensatory award. Form those submissions it is not in dispute there was a back dated pay rise of 5% to the Claimant's salary (increasing it from £40,635 to £42,667), followed by two re-gradings, one on the 1 September 2022 (increasing the salary from £42,667 to £46,000.23 an increase of 7.8%) and the next on the 1 October 2022 (increasing the salary to £47,864.23, a further increase of 4%).

29. Within those further submissions though, there is a dispute between the parties as to the net pay figure they each use in their calculations as the starting point.

30. At the hearing it was confirmed by the parties that the Claimant received a net weekly pay figure of £918.75 up to the date of dismissal. This figure is relied upon by the Claimant in his submissions and we accept it, as it was the figure confirmed at the hearing.

31. We also accept the Claimant's submitted weekly pension loss figure which is based on the most recent payslip contained in the remedy bundle (page 29) and which gives a weekly amount of £140.56 (£442.23 + £120 / 4 weeks).

LAW

32. For financial remedy matters these are found in the Employment Rights Act 1996, at relevant sections 122(2), s.123(1) and s.123(6):

> **s.122 Basic award: reductions**
> **…**
> **(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**
>
> **S.123 Compensatory award**
> **(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**
> **…**
> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.**

33. The compensatory award may be reduced to reflect the chance that a claimant would have been dismissed in any event and that the employer's procedural errors made no difference to the outcome: ***Polkey v AE Dayton Services Ltd [1987] IRLR 503***.

34. Further, if the Tribunal finds that a claimant has, by any action, caused or contributed to his dismissal, it shall reduce the compensatory award as it considers just and equitable (section 123(6)).

35. As to contributory fault we are reminded by Claimant's Counsel in his written submissions that the correct test is to consider whether any relevant conduct was culpable, blameworthy, foolish or similar which includes conduct that falls

short of gross misconduct and need not necessarily amount to a breach of contract (***Nelson v British Broadcasting Corporation (No. 2) (1980) ICR 110, CA***.).

36. Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> **If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.**

37. The ACAS code of practice on Disciplinary and Grievance Procedures provides as follows (as we were referred to by Claimant's Counsel, paragraphs 18 to 23):

> **"18. After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing.**
>
> **19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.**
>
> **20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.**
>
> **21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.**

> **22. A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.**
>
> **23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct."**

38. About the breach of the ACAS code, by virtue of section 124A of the Employment Rights Act 1996, it is clear that, for the purposes of unfair dismissal compensation, any adjustment made in accordance with section 207A only applies to the compensatory award not the basic award.

39. Considering the case authority of ***Lawless v Print Plus EAT 0333/09*** relevant circumstances to be taken into account by tribunals when considering uplifts should include:

    a. whether the procedures were applied to some extent or were ignored altogether

    b. whether the failure to comply with the procedures was deliberate or inadvertent, and

    c. whether there were circumstances that mitigated the blameworthiness of the failure to comply.

DECISION

40. The Claimant was 20 years with the Respondent and worked up through job grades, with them. He did secure alternative work quickly (by 1 June 2022) and has not evidenced applying for any other roles, save for the consultancy work he also now undertakes. As at the 27 February 2023 he is committed to the role he has, supplementing it with consultancy work.

41. The Respondent submits that there should be a reduction in the compensatory award because the Claimant has not mitigated his loss. It asserts losses should be limited to 6 to 12 months.

42. Secondly, the Respondent says that the Claimant's employment would have ended fairly within 6 to 12 months.

43. We remind ourselves of the statutory provision (section 123(1)) … "…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss

sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”.

44. The Claimant has presented evidence to us that he is no longer mitigating his loss as at the 27 February 2023. It is our view that it is not just and equitable for the Respondent to be required to compensate the Claimant for the losses which he suffers because of that choice.

45. We take the view that the Respondent should compensate the Claimant up to 27 February 2023 but not thereafter.

46. We do not find that the Claimant’s employment would have ended for a fair reason before that date.

47. As to matters of contributory fault it was not in dispute factually when considering matters of liability, where we found the reason for the Claimant’s dismissal was his conduct, that the Claimant doesn’t deny what he did, but he asserts there is mitigation to explain it. Reflecting on those matters as found at the liability hearing and referred to above, we find that the Claimant’s conduct was blameworthy and did cause or contribute to the dismissal. Consequently, we consider both the basic and compensatory award in this claim should be reduced and the extent that it is just and equitable to reduce them is by 45%.

48. Considering paragraphs 18 to 23 of the ACAS code of practice on Disciplinary and Grievance Procedures. There was a failure to issue any warnings to the Claimant before the decision to dismiss. Section 207A of the Trade Union and Labour Relations Consolidation Act 1992 provides that if there has been a breach of the ACAS Code there should be an uplift. We find there was a breach as asserted by the Claimant and award the claimed 15% uplift.

49. The basic award is not challenged in the sum of £10,278. Applying our finding of contributory fault to that (45%) the basic award made to the Claimant is **£5,652.90**.

50. Considering then the compensatory award.

51. The Claimant was entitled to 12 weeks’ notice pay (this has already been awarded pursuant to the Judgment dated 1 March 2024).

52. It is not in dispute that the Claimant earnt in the awarded loss period the net amount of £16,067.20 and received £154 in benefits.

53. At the hearing it was confirmed by the parties that the Claimant received a net weekly pay figure of £918.75 up to the date of dismissal. This figure is relied upon by the Claimant in his further written submissions and we accept it, as it was the figure confirmed at the hearing.

54. Therefore, applying the % increases as detailed in the parties further written submissions to that net figure, we accept the calculations submitted by the Claimant:

a. 5% pay rise to £918.75 = £964.69.

b. First regrading increase of 7.8% to that figure = £1,039.94.

c. Further regrading increase of 4% to that figure = £1,081.54.

55. Then accepting the periods of loss as submitted by the Claimant:

a. 27.7.22 to 1.9.22 (5 weeks)

b. 1.9.22 to 1.10.22 (4 weeks)

c. 1.10.22 to 27.2.23 (20.5 weeks)

56. This produces a loss of earnings figure of **£14,933.58** (5 x £964.69 = £4,823.45, plus 4 x £1,039.94 = £4,159.76, plus 20.5 x £1,081.54 = £22,171.57 = a total of £31,154.78 from which £16,221.20 (which is an amount both parties agree in their further written submissions, consisting of the net earnings received (£16,067.20) and the £154 benefit amount referred to in the Claimant's schedule of loss) needs to be deducted leaving £14,933.58).

57. We also accept the Claimant's pension loss calculation which is based on the most recent payslip contained in the remedy bundle (page 29) and which gives a weekly amount of £140.56, to which the same % increases are then applied (5%, 7.8% and 4%, albeit the first period is 5.5.22 to 1.9.22 (a period of 17 weeks)):

a. 5% pay rise to £140.56 = £147.59.

b. First regrading (7.8%) = £159.10

c. Further regrading (4%) = £165.46

58. This produces the following pension loss calculations:

a. 5.5.22 to 1.9.22 = 17 weeks x £147.59 = £2,509.03

b. 1.9.22 to 1.10.22 = 4 weeks x £159.10 = £636.40

c. 1.10.22 to 27.2.23 = 20.5 weeks x £165.04 = £3,383.32.

59. This produces a total pension loss of **£6,528.75**.

60. As was confirmed at the hearing the Claimant is also awarded the claimed amount of **£750** for loss of statutory employment rights.

61. The compensatory award therefore amounts to **£22,212.33** before the ACAS uplift and the contributory conduct reduction are applied.

62. Applying the 15% ACAS uplift to that figure means an addition of £3,331.85.

63. This gives a total of £25,544.18.

64. Then applying the contributory fault reduction of 45% gives a final compensatory award of **£14,049.30**.

65. Based on the submissions made by the parties and the credit they both make for the £154 benefit against the compensatory award, we have made this Judgment on the basis that the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 do not apply to these "benefits".

_____
Employment Judge Gray
Dated 9 April 2024

Judgment sent to Parties on 25 April 2024

For the Employment Tribunal