EMPLOYMENT TRIBUNALS

Claimant: **Mr P Birrell**

Respondents: **Bank of England**

At: **London Central Employment Tribunal (by CVP)**

On: **1 – 2 July 2024**

Before: **Employment Judge Brown**

Members: **Ms N Sandler**
Ms H Craik

Appearances

For the claimant: In Person accompanied by his wife, Ms D Levy
For the respondent: Mr G Graham, Counsel

REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The Claimant's losses flowing from his constructive dismissal ended on 22 August 2022, when he started a new contracting role**

2. **Pension loss is not to be calculated on a complex loss basis. A second remedy hearing is not required.**

3. **The Respondent shall pay the Claimant a total of £9,542 in compensation for unfair dismissal, comprising a basic award of £1,713 and a compensatory award of £7,829.**

REASONS

1. This was a Remedy Hearing in the Claimant's successful complaint of constructive unfair dismissal against the Respondent. Judgment for the Claimant in his constructive unfair dismissal complaint had been sent to the parties on 2 March 2024.

2. The Claimant had started a new consulting job at HSBC shortly after he left the Respondent. The Respondent contended that the Claimant mitigated his loss completely by that new engagement.

3. At a remedy case management hearing on 20 May 2024, it was noted that there were significant disputes between the parties about the appropriate figures to be used for calculation of pension loss.

4. The Claimant had been a member of the Respondent's Defined Benefit Pension Scheme. The Respondent contended that the value of the Claimant's pension losses should be calculated on a simple, contributions basis, which the Respondent said would show that the Claimant had fully mitigated his pension loss at HSBC.

5. The Claimant's pension scheme at HSBC was a Defined Contributions Scheme.

6. The Claimant contended that he should not be taken to have mitigated his loss by his HSBC consulting role, in any event, and that he had, in fact, suffered ongoing salary and pension loss.

7. The parties agreed that the best approach to the Remedy Hearing would be as in a complex pension loss case, so that the Remedy Hearing would be in two stages: 1) The first stage would identify the non-pension losses and make findings of fact relevant to pension losses. There would then be a period for the parties to try to agree the pensions figure between themselves. 2) The second stage would identify the pension loss, either by using Ogden tables or expert actuarial evidence.

8. The Tribunal needed to resolve the significant dispute about mitigation and remoteness of loss arising from the HSBC consulting role before the pension loss could be addressed.

9. The issues for the remedy hearing were agreed.

10. The Respondent had confirmed that it would not rely on any Polkey or contributory fault arguments at the remedies hearing.

Remedy Issues

Basic award

1 What is the appropriate level of basic award for the Claimant?

Compensatory award

2 What level of compensation would be just and equitable taking into account all the circumstances (including the below)?

3 What are the correct gross and net figures to be used for the purposes of loss calculations?

4 Did the Claimant completely mitigate his salary loss by accepting a consulting role at HSBC, so that there is no future salary loss? If not:

a) for how long will the Claimant be unemployed, if at all and / or
b) in which role is the Claimant likely to be employed; and
c) when, at what salary / income and in which pension scheme is he likely to be employed?

5 Will the claimant have any periods of unemployment? If so, when and what length are those periods of unemployment likely to be?

6 Would the Claimant have remained serving in the Respondent's employment for the whole of his working life? If not, when is it likely he would have left? (This not a Polkey argument but a likely future loss argument).

7 When will the Claimant retire – at age 65 or 67?

8 What calculation should be used to calculate any pension loss (the Respondent contends this should be the "simple" contributions method)?

9 If it is a complex method, does that require actuarial expert evidence or should the tribunal calculate using the Ogden tables?

10 Should the Claimant be awarded any payment for "backdated" salary (the Respondent contends he should not and that there is no basis for any such claim/award)?

11 To what extent has the Claimant mitigated any losses by income received from new employment/engagements since his dismissal?

12 Is the Claimant complying with the duty to mitigate his losses?

13 Should the statutory cap of 52 weeks' gross pay or £93,878 be applied?

11. The Tribunal heard evidence from the Claimant. It heard evidence from Paul Rooney, the Claimant's former manager at the Respondent and from Steve Blackman, the Respondent's Pension Manager. There were 2 Bundles of documents. Both parties made written and oral submissions.

12. It had been intended that the Tribunal would hear evidence and submissions on the first day of this Remedy Hearing and give its first stage judgment orally on the second day. In the event, because of the volume of written material to read and the length of time taken for cross examination of all witnesses, the first stage hearing was not concluded until half way through the second day and the Tribunal reserved its judgment.

The Facts

13. The following facts were agreed:

13.1 The Basic Award was agreed at £1,713.

13.2 The Claimant was employed by the Respondent ("the Bank) from 16 September 2019 until 18 July 2022. As at 18 July 2022, his effective date of termination ("EDT"), his basic salary was £61,887. His gross weekly basic pay was £1,190.13 and his net weekly basic pay was £807.61.

13.3 Employees of the Bank have access to a non-pensionable flexible benefits package offering a choice of benefits or cash allowance. When the Claimant was employed by the Bank, the cash allowance was 7% of pensionable salary. This was increased to 8% on a temporary basis from April 2023, made permanent as 8% from April 2024. Of the £361.01 monthly benefits allowance he received from 1 April 2022, the Claimant spent £71.55 a month on additional benefits.

13.4 The Claimant opted for cash and his basic salary and benefits allowance, combined, totalled £66,219.09 per year as at his EDT, p211.

13.5 Employees of the Bank are entitled to private medical insurance ("PMI") cover, p643- 701. It is a group scheme and the annual cost to the Bank per employee in 2021/2022 was £868 per year. If employees wish to enhance cover to include spouses/dependants they can use part of their flexible benefits allowance to do so.

13.6 Employees of the Bank also benefit from Group Income Protection ("GIP"), p720-722 of the bundle. It is a group scheme, and the annual cost to the Bank per employee in 2021/2022 was £67.37 per year. Employees can choose to enhance cover using their flexible benefits allowance if they wish to.

13.7 Employees of the Bank are also entitled to life assurance cover to the value of 4 times salary, p723-725. Life assurance is self-insured by the Bank via the Bank's pension scheme. The notional cost to the Bank of this benefit is £222.79 per year.

Findings of Fact on Disputed Matters

14. The Bank operates a 'performance award' discretionary bonus scheme. Performance awards are usually awarded in February each year and are based on salaries as at the end of November the previous year. Once performance ratings (either 'Developing', 'Succeeding' or 'Excelling') have been agreed as part of the local annual salary review process, employees are allocated a performance award based on their performance and rating. Each year, performance award guidance is published for managers.

15. The performance award guidance for the 2022 performance award would have been applicable had the Claimant been employed in February 2023 when the 2022 performance award was paid, p637-642. The 2022 performance award range for a performance rating of "succeeding", which is the most common performance rating, was 8%-12%of basic salary.

16. The Bank did not have performance ratings during 2020 or 2021 due to Covid-19. The Claimant was therefore awarded a "standard" award of 9.5% in 2021 for the 2020 performance year and 10% in 2022 for the 2021 performance year. This amounted to £5,963 for 2020 (paid in February 2021), p179, and £6,097 for 2021 (paid in February 2022), p208.

17. The Bank's auto-enrolment pension scheme is a Defined Benefit Career Average Revalued Earnings pension scheme (CARE pension), p 702-719.

18. The CARE pension provides a standard non-contributory accrual rate of 1/95. If employees select this rate, there is no adjustment to their salary. The Bank provides a further 5 accrual rates from which employees can choose, with lower accrual rates of 1/110 and 1/120 providing lower pension, but additional pay, and higher accrual rates of 1/80, 1/65 and 1/50 providing more pension, but a lower salary, via salary sacrifice.

19. Under the CARE pension, pension accrued in a scheme year is then revalued for inflation in each subsequent year. While members are employed by the Bank that revaluation is by the January RPI, applied from 1 April. Once a member leaves employment, their "blocks" of accrued pension are added together to become a deferred pension, and the deferred pension is revalued on 1 April each year by January CPI, until it becomes due for payment. Pension in payment continues to be revalued by CPI. The CARE pension scheme does not automatically provide for a lump sum payment, in addition to pension payments. Members can choose to take a lump sum payment but, if they do, their normal pension payments are correspondingly reduced.

20. The Claimant chose the lowest accrual rate of 1/120, which entitled him to additional pay of £304.94 per month, or 7% salary.

21. In July 2021, Stephen Blackman, the Bank's Pension Manager, wrote to the Claimant, p181-182, saying that that the Bank had mistakenly overpaid his pension flex since March 2020. He said that there had been an input error shortly after the Claimant had joined, which had amended the pension category in the HR database from the standard 1/95 accrual to a standard accrual rate of 1/65.

22. (Employees on a standard 1/65 rate accrue more pension at their standard rate, so by dialling down to 1/120 they give up more pension and therefore receive more additional pay – 22.5% of salary.)

23. In his letter, Mr Blackman said that, in the period from March 2020 to July 2021, the Claimant had received an overpayment of £13,113.42 gross of pension flex. He proposed to adjust the pension flex for that current benefit year, which meant that the Claimant would repay £304.84 over seven months, but that the Bank

would not reclaim any of the overpayment made in previous years. Mr Blackman's letter said:

> *"Our proposal is that we correct the pension flex down for the current benefit year and relevant adjustments will be made to your pay accordingly. This means for the … period 1 April 2021 to 31 March 2022 you should receive £4,268.04 (£355.67 x 12) of which you have already received £4,572.88. Therefore, you have received £304.84 more than you should have so we propose to reclaim this via payroll deductions over the next seven months at £43.55 per month.*
>
> *To be clear, as an exception, we do not propose to reclaim the overpayment for the previous benefit years. …"*

24. At the end of the letter, there was a section for the Claimant to complete,

"I agree to the following proposal:

x The overpayment of pension flex from 1 April 2021 to 31 July 2021 of £304.84 to be reclaimed in equal instalments of £43.55 from August to March 2021 salary payment

In full and final payment of the overpayment of pension flex down.

Signature……. Date……

Name……...."

25. The Claimant indicated his agreement by email. He continued to work for the Bank, having received the letter. The deductions were made as Mr Blackman proposed. The previous overpayments meant that the Claimant received an additional £9,963.22 in pension flex, above his entitlement, during his employment at the Bank.

26. After he left the Bank, the Claimant commenced a new role as Delivery Lead, working at HSBC on an agency basis, pp249, 250 and 264. His first day of work was 22 August 2022, p265.

27. Claimant's assignment at HSBC was stated to be for a term from 25 July 2022 to 25 January 2023, p250. The type of work was stated to be "IT Services", p255. There was a 4 week notice period. The daily PAYE rate was £493.27, plus £59.54 holiday, totalling £552.81 per day.

28. The terms of his agency contract provided that, during an assignment, the Claimant would be engaged on a contract for services by the agency and would be a worker and not an employee of the agency, cl 2.2, p255. .

29. The contract also provided that the agency would endeavour to provide suitable assignments for the Claimant, who would not be obliged to accept any assignment, cl 3.1, p256. Under the contract, the Claimant acknowledged that there might be periods when no suitable work was available and that the agency would not be liable if it did not offer the Claimant assignments, cl 3.2, p256.

30. The Claimant told the Tribunal, and the Tribunal accepted, that the work on the first assignment had been terminated in about November 2022, but the Claimant moved onto another area of work at HSBC for the remainder of the assignment term.

31. The Claimant was given a further assignment at HSBC immediately after the term of the first assignment ended, from 26 January 2023 to 30 November 2023, p270.

32. On 8 November 2023, the agency wrote to the Claimant saying that it had received confirmation of an extension from HSBC until 31 March 2024, p353.

33. The Claimant replied to the agency on 14 November 2023, saying that he would not be around for 5 weeks in January – February 2024 which was a crucial time for the programme, p355-6. On 26 November 2023 the Claimant told the agency that HSBC had withdrawn the extension offer because the Claimant would be unavailable for 5 weeks in January – February 2024, p354.

34. The Claimant told the Tribunal that January – February 2024 was the "go live" period for the project he was working on at HSBC. He was not available because he was due to attend the Tribunal Final Hearing in this case.

35. The Claimant's total gross pay from August 2022 to November 2023 in the HSBC role was £163,302.54, with employer pension contributions of £4,103.09 during that period. His net pay in this period was £112,539.

36. The Claimant appeared to work about 19 days each month at the HSBC assignment , p312,313, 310. Based on 19 working days per month, his gross monthly salary, including holiday, would be £10,503.39, or £126,040.68 gross per year.

37. In the HSBC role, his employer pension contributions were £318.36 per month, or £3,820.32 per year. The value of his remuneration in the HSBC role, based on salary and employer pension contributions, was about £129,861. per year.

38. In the Bank's CARE pension scheme, the deemed employer cost of the 1/120 accrual choice was 33% salary for April 2022-March 2023 and 19% of salary for April 2023 to March 2024, and will be 16% for the 2023- 2024 tax year.

39. Assuming a value of 33% of pensionable salary (£20,422.71 per year) and including the additional 7% pensions flex (£4,332.09 per year) and 7% benefits allowance (£4,332.09), the value of the Claimant's remuneration in his role with the Respondent was in the region of £90,973.89 per year to March 2023.

40. If the Claimant had been employed in February 2023, he would have received a performance bonus of 8 – 12% of basic pay, assuming a "succeeding" rating, p637. The pay range "help to account for differences in pay when allocating awards", p639. Mr Blackman explained, in cross examination, that lower paid employees would be likely to be paid at the higher end, so that their bonus was not lower simply because their basic pay was lower.

41. Applying 12% of basic pay 0.12 x £61,887, paid in February 2023, would mean that the Claimant would have received an additional £7,426.44, had he still been employed with the Respondent. His total salary remuneration in the 2022/2023 year would have been £98,400.33. Adding the value of his PMi and PHI benefits (£868 and £67.37) would have meant that his total package at the Bank in 2022 – 2023 was £99,335.70.

42. On all those figures, the Claimant's gross agency package in 2022 – 2023 was still £30,000 a year more than at the Respondent, including pension, bonus and benefits.

Applications for Other Work

43. In October 2023 the Claimant started to apply for numerous other jobs, primarily through LinkedIn, p331 – 348. Also in October 2023 he applied for a job through "workable", an agency, p570.

44. Later, he contacted 4 agencies, in April 2024, p410.

45. From March 2024, the Claimant applied for many more jobs through LinkedIn, p 372.

46. In total, the Claimant applied for over 600 jobs, in the following disciplines: project manager / delivery lead, ERP, cyber specific delivery, cyber management.

47. The Tribunal observed that the LinkedIn applications did not appear to be focussed. The Claimant appeared to make little contact with work agencies, despite his HSBC role having been obtained through an agency.

48. He has not obtained further work since the end of his agency assignment in November 2023.

Law

49. By *s123 ERA 1996*: "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."

50. A distinction should be drawn between loss flowing from antecedent breaches of the trust and confidence term, and loss flowing from an employee's dismissal -

which is the acceptance of the earlier breaches as a repudiation of the contract., *GAB Robins (UK) Ltd v Triggs* [2008] IRLR 317 CA , at [34] , per Rimer LJ,

"34**.** In my judgment, Mr Clarke's submission is a correct one, which I regard as in line both with general principle and with the guidance provided by Lord Nicholls in *Eastwood's* case [2004] ICR 1064. To the question whether Mrs Triggs's reduced earning capacity by reason of her illness was a loss suffered by her "in consequence of the dismissal" (section 123), the answer is no. It is correct that the dismissal was a constructive one, that is that it was the result of, and followed upon, her acceptance of the employer's antecedent breaches of the implied term of trust and confidence that had caused her illness and, in turn, her reduced earning capacity. But it is fallacious to regard those antecedent breaches as constituting the dismissal. The dismissal was effected purely and simply by her decision in February 2005 that she wished to discontinue her employment. On a claim for unfair dismissal, that entitled her to compensation for whatever loss flowed from that dismissal. But that loss did not include loss (including future loss) flowing from wrongs *already* inflicted upon her by the employer's prior conduct: those losses (including any future lost income) were not caused by the dismissal. They were caused by the antecedent breaches of the implied term as to trust and confidence and Mrs Triggs had an already accrued right to sue for damages in respect of them before the dismissal. The employment tribunal's error in concluding that it was suffered in consequence of the dismissal was to treat the unfair dismissal claim as, in effect, a claim for damages for the employer's fundamental breach and repudiation of the employment contract that Mrs Triggs had accepted by her decision to leave. But her claim was not such a claim. It was simply a statutory claim for unfair dismissal." Applied in Countrywide Estate Agents v Turner UKEAT/0208/13 (20 August 2014, unreported), at para [21]. Eastwood v Magnox Electric plc [2004] IRLR 733

51. In *Whelan v Richardson* [1998] IRLR 114, [1998] ICR 318, the EAT (Judge Peter Clarke presiding) summarised guiding propositions on the calculation of loss where an employee has obtained new work after dismissal - whilst emphasising that tribunals had discretion to do what was appropriate in individual cases:

"(1) The assessment of loss must be judged on the basis of the facts as they appear at the date of the assessment hearing ("the assessment date").

(2) Where the [claimant] has been unemployed between dismissal and the assessment date then, subject to his duty to mitigate and the operation of the recoupment rules, he will recover his net loss of earnings based on the pre-dismissal rate. Further, the [employment] tribunal will consider for how long the loss is likely to continue so as to assess future loss.

(3) The same principle applies where the [claimant] has secured permanent alternative employment at a lower level of earnings than he received before his unfair dismissal. He will be compensated on the basis of full loss until the date on which he obtained the new employment, and thereafter for partial loss, being the difference between the pre-dismissal earnings and those in the new employment. All figures will be based on net earnings.

(4) Where the [claimant] takes alternative employment on the basis that it will be for a limited duration, he will not then be precluded from claiming a loss down to the assessment date, or the date on which he secures further permanent employment, whichever is the sooner, giving credit for earnings received from the temporary employment.

(5) As soon as the [claimant] obtains permanent alternative employment paying the same or more than his pre-dismissal earnings his loss attributable to the action taken by the respondent employer ceases. It cannot be revived if he then loses that employment either through his own action or that of his new employer. Neither can the respondent employer rely on the employee's increased earnings to reduce the loss sustained prior to his taking the new employment. The chain of causation has been broken'.'

52. In *Whelan*, the Claimant had obtained a temporary job post-dismissal paying less than her role with the employer who had unfairly dismissed her. She then obtained a job paying more than she earned with the employer, which she had held for 15 months at the date of the tribunal hearing. She was awarded past loss of earnings on the basis of full loss for the periods before the temporary position, partial loss for the period of that post and then losses were deemed to end upon her taking up the permanent position. The date upon which she took up the permanent position was held to be the cut-off point for the calculation of her losses.

53. The propositions in *Whelan* were described as 'helpful' by the Court of Appeal in *Dench v Flynn & Partners* [1998] IRLR 653, although the Court considered that the obtaining of permanent employment at the same or a greater salary would not always break the chain of causation. In *Dench*, the Claimant had been taken on by the new employer on a 3 month probationary period, which had been terminated after 2 months.

54. In *Dench* Sir Christopher Staughton said, at [26] – [28]:

"… the employee's loss is to be assessed as at the date of the remedies hearing. But it is also true, as was said by the Employment Appeal Tribunal in Whelan v Richardson [1998] IRLR 114 at p.117, that that date is necessarily arbitrary. One must avoid, if one can, it giving rise to arbitrary results.

[27] Other rules adopted by the Employment Appeal Tribunal, if such they be, are at most guidance. What has to be assessed in terms of s.123(1) of the Employment Rights Act 1996 is 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. That includes a test of causation, or perhaps the same test twice over, once by reason of the words 'in consequence of' and a second time in the words 'attributable to'.

[28] That is the ordinary commonsense test of the common law. Was the loss in question caused by the unfair dismissal or by some other cause? The tribunal must ask itself and answer that question, and then ask what amount it is just and

equitable for the employee to recover. Rules will no doubt help as guidance in the process, but that is the task which ultimately has to be undertaken."

55. In *Cowen v Rentokil Initial Facility Services (UK) Ltd* UKEAT/0473/07, [2008] All ER (D) 70 (Apr) (Elias P presiding) the EAT, applying *Dench*, held that the tribunal had erred in concluding that the obtaining of permanent employment at a greater salary necessarily broke the chain of causation. The EAT held that, on the facts, the tribunal should have treated the loss suffered after the Claimant's second dismissal as still causally linked to the first dismissal. The Claimant had been taken on upon a probationary basis and not retained.

56. In the *Cowen* case, Mr Justice Elias said that the EAT's decision should not be interpreted as suggesting that, where a new job is of relatively short duration, that will inevitably mean that causation is not broken. It all depends on the circumstances of the case. The reason why an employee loses the second job may have a bearing on the question. So, for example, if the reason for the employee's dismissal from the alternative job was culpable misconduct on his or her part, that might well break the chain of causation. Elias J cautioned tribunals, however, not to become embroiled in satellite litigation as to the precise circumstances in which the second dismissal took place.

57. In *Aegon UK Corp Services Ltd v Roberts* [2009] EWCA Civ 932, [2009] IRLR 1042, [2010] ICR 596, the Court of Appeal held that the *Dench* principles of causation applied to all aspects of the remuneration package, including pension loss.

58. In *Islam Channel Ltd v Ridley* UKEAT/0083/09 (8 May 2009, unreported) (HHJ McMullen QC presiding), the Claimant obtained new freelance work for which she initially received more income than in her previous employment. However, prior to the tribunal hearing, the freelance work reduced, and her income was less than her previous employment. Applying *Dench*, the EAT held that the tribunal did not err in refusing to set off the excess past earnings (received in the new employment) against her future loss, in view of the inherently insecure nature of the claimant's freelance employment.

59. An employee who was dismissed 18 months after starting new employment was not, according to the EAT in *Courtaulds Northern Spinning Ltd v Moosa* [1984] ICR 218, EAT, entitled to claim ongoing loss against the first employer following the termination of his second job. By contrast, in *Commercial Motors (Wales) Ltd v Howley* EAT 0636/11 the EAT upheld a tribunal's decision that the claimant's short-term two-month consultancy work for another company did not affect his ongoing losses arising from the unfair dismissal.

Mitigation

60. When calculating the compensatory award in an unfair dismissal case, the calculation should be based on the assumption that the employee has taken all reasonable steps to reduce his or her loss. If the employer establishes that the employee has failed to take such steps, then the compensatory award should be

reduced so as to cover only those losses which would have been incurred even if the employee had taken appropriate steps.

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

62. In *Savage v Saxena* [1998] ICR, the EAT commented that a three-stage approach should be taken to determining whether an employee has failed to mitigate his or her loss. The Tribunal should identify what steps should have been taken by the Claimant to mitigate his or her loss. It should find the date upon which such steps would have produced an alternative income and, thereafter, the Tribunal should reduce the amount of compensation by the amount of income which would have been earned.

ACAS Uplift

63. Employers considering an employee's grievance are required to have regard to the Acas Code of Practice on Disciplinary and Grievance Procedures ('Acas Code'). Where the employer has failed to follow the Acas Code and the tribunal considers that the failure was unreasonable, it may increase the amount of compensation that would otherwise have been payable to the employee by no more than 25% if it considers it just and equitable to do so (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)).

Employment Tribunals Principles for Compensating Pension Loss (Fourth Edition (3rd Revision) 2021)

64. Chapter 5 of the ET Pensions Principles Guidance provides guidance for cases involving defined benefit pension schemes. It includes the following guidance:

"5.34 Another scenario involving loss of both earnings and pension rights on a short-term basis is where a claimant mitigates their loss fully by obtaining alternative employment in a role with equivalent DB benefits (replacing like with like) or a role where the total remuneration, even with a less generous pension, exceeds the salary and pensions package of the old job …. . Again, if a tribunal is persuaded that the pension loss is truly short-lived, the contributions method is appropriate. Such scenarios may be rare: even where the claimant finds employment with DB scheme benefits, the tribunal should be alert to a change in their value (for example, if the claimant had DB benefits in the old job that were linked to final salary at retirement, whereas in the new job they accrue on a CARE basis).

5.35 The application of the statutory cap on the compensatory award for unfair dismissal may sometimes mean that it is disproportionate to engage in a complex analysis of pension loss. For example, a high award for pension loss will be greatly reduced upon application of the statutory cap of 52 weeks' pay . It will be open to the tribunal to treat the application of the statutory cap as a reason to adopt the contributions method in respect of DB pension loss. For example, if the cap is

nearly exceeded by loss of earnings alone, carrying out complex pension loss calculations will waste the tribunal's time and the parties' costs."

Discussion and Decision

65. The Tribunal took into account its findings of fact and the relevant law. It addressed the agreed list of issues. Some issues fell away as a result of the Tribunal's findings.

Basic award
What is the appropriate level of basic award for the Claimant?

66. This was agreed at £1,713. The Claimant was aged over 41 at all times during his employment and the maximum amount of a week's pay at the effective date of termination in July 2022 was £571.

Compensatory award

2 What level of compensation would be just and equitable taking into account all the circumstances (including the below)?

3 What are the correct gross and net figures to be used for the purposes of loss calculations?

67. The correct figures for the purposes of calculation were the actual figures for gross and net pay which the Claimant was receiving at the termination of his employment.

68. The Claimant argued that the Tribunal should assess compensation on the basis of the pay he ought to have received at the Bank, had he been appointed at scale E at the outset of his employment, or paid equitably on promotion, or as a result of his grievance. He pointed out that the Tribunal had decided, in its liability judgment, that the Respondent had breached the term of trust and confidence by irrationally allocating his F scale and salary on appointment and by failing to address the fact that the Claimant had been appointed at the wrong grade when he was "promoted" to grade E in February 2020, see, for example paragraphs [498] – [410] and [423] – [430].

69. The Claimant contended that to assess compensation on any other basis would allow the Respondent to profit from its wrongdoing.

70. However, the Tribunal is bound to follow the law in this regard, and the law is very clear: *GAB Robins (UK) Ltd v Triggs* [2008] IRLR 317 CA, at [34], per Rimer LJ: a distinction must be drawn between loss flowing from antecedent breaches of the trust and confidence term, and loss flowing from an employee's dismissal (which is the acceptance of the earlier breaches as a repudiation of the contract). Under *s123 ERA 1996*, on a claim for unfair dismissal, the employee is entitled to compensation for loss which has flowed from the dismissal, but that loss does not include loss flowing from wrongs already inflicted by the employer's prior conduct: those losses were not caused by the dismissal, but by the earlier conduct.

71. The correct figures for calculation are therefore the agreed figures for the Claimant's gross and net salary on termination: his basic salary was £61,887. His gross weekly basic pay was £1,190.13 and his net weekly basic pay was £807.61.

72. The Tribunal also used the up to date figures for other benefits and health insurance set out in the Respondent's counterschedule, p790 & 792, as it accepted that the Respondent, rather than the Claimant, had adopted the correct approach to calculation.

4 Did the Claimant completely mitigate his salary loss by accepting a consulting role at HSBC, so that there is no future salary loss?

73. The Tribunal found that the Claimant did mitigate all his salary, benefits and pension losses when he commenced his consulting role at HSBC. The chain of causation of loss was broken when he started that work.

74. The Tribunal noted that the caselaw in this area suggests, generally, that the obtaining of *permanent* employment at a greater salary may well break the chain of causation, but that undertaking temporary work, or work subject to a probationary clause, is unlikely to do so. The Tribunal also noted that the authorities have indicated that the facts of each case need to be taken into account. The calculation is to be done at the date of the remedy hearing.

75. The Tribunal took into account that the Claimant's consulting role at HSBC was not permanent employment, but an "assignment" for a term from 25 July 2022 to 25 January 2023, p250. The work was not said to be "employment" at all, but a contract for services by the agency, under which the Claimant agreed to be a worker and not an employee of the agency, cl 2.2, p255. Under the contract, the Claimant would not be obliged to accept any assignment, cl 3.1, p256 and the agency would not be liable if it did not offer the Claimant assignments, cl 3.2, p256.

76. That HSBC role was, on its face, temporary.

77. However, the Tribunal noted, from its findings in the liability hearing, that the use of contractors in IT services and IT project management work, such as the Claimant was undertaking at the Bank and at HSBC, was widespread. Further, those contractors typically were paid at a higher rate than employees; see, for example, paragraphs [216], [210] and the Claimant's alleged protected disclosures. It accepted the Respondent's contention that employees in IT and IT project management routinely work on a well-paid contractor basis. Working on such a basis is therefore not necessarily as insecure as other types of temporary work, such as, in the Tribunal's industrial experience, "freelancing" in the media / publishing; or work in the hospitality industry.

78. The Tribunal also noted that the term of the initial assignment was 6 months, which was a reasonably substantial period, and longer than many probationary periods.

79. The Tribunal had little evidence about what was discussed or agreed at the outset of the HSBC role. The express terms of the contract were clear. However, the Tribunal considered that the subsequent conduct of the parties could be an

indication of what they understood and intended, at the outset of the Claimant's HSBC assignment.

80. The subsequent conduct of the Claimant and the agency / HSBC was striking. The Claimant moved to another role at HSBC seamlessly, with the same job title, even when the work he had originally been undertaking came to an end, during the initial assignment. The Claimant was offered 2 further extensions, without any break in work, in January 2023 and November 2023. Those extensions would have provided the Claimant with uninterrupted work until March 2024, at least.

81. Furthermore, the Claimant did not look for any other work until October 2023, more than a year after he started in his role at HSBC. In doing so, he acted as if he was in stable, long term employment. He only searched for other work when it became apparent to him that HSBC might not look favourably on him taking 5 weeks away from work in January / February 2024.

82. While subsequent conduct is not evidence of what was contractually agreed, the Tribunal considered that, in this case, it was a strong indication that, from the outset of the Claimant's HSBC role, he understood and intended that his work at HSBC would be stable, continuing work. If the Claimant had thought that it would be temporary work, the Tribunal considered that he would have been looking for other work regularly throughout his time at HSBC. In particular, if he had thought that the role would end at the end of the first assignment in January 2023, he would have been looking for alternative work well before then, to ensure a continuing income stream.

83. Importantly also, as the Tribunal has found on the facts, the terms of the Claimant's HSBC assignments equated to income of about £129,000 gross per annum, including pension. That was £30,000 more than the total value of the Claimant's annual gross salary, benefits and pension package at the Bank – or £2,500, per month, more.

84. Despite being, on the face of it, temporary contracting work, the Claimant's work at HSBC had, from the outset, the hallmarks of longevity and stability. It also attracted a much higher rate of pay.

85. The Tribunal decided that this was stable and valuable new work, to which the Claimant wholly committed himself. It marked the end of the losses flowing from his constructive dismissal by the Bank. The chain of causation was broken when he started work for HSBC.

86. On the facts, the Claimant started work for HSBC on 22 August 2022, p265, 267, so that was the date when he losses from dismissal ended.

87. *The rest of issue 4, and issues 5 – 7 did not, therefore, arise for consideration.*

8 What calculation should be used to calculate any pension loss (the Respondent contends this should be the "simple" contributions method)?

88. Given that the Claimant's losses from dismissal are of very short duration – 5 weeks – the complex calculation method is not appropriate. The tribunal takes into account the ET Pensions Guidance and the fact that a complex calculation would be disproportionate to the amounts in question.

89. On Mr Blackman's evidence, the deemed employer cost of the Claimant's 1/120 accrual choice was 33% salary for April 2022-March 2023; and 33% of pensionable salary was £20,422.71 per year. That is the yearly value of the pension loss.

90. *Issue 9 does not arise for consideration*

10 Should the Claimant be awarded any payment for "backdated" salary (the Respondent contends he should not and that there is no basis for any such claim/award)?

91. The Claimant's sole successful claim was for unfair dismissal. There was no basis for an award of backdated pay.

11 To what extent has the Claimant mitigated any losses by income received from new employment/engagements since his dismissal?
12 Is the Claimant complying with the duty to mitigate his losses?

92. The Claimant's losses ceased on 22 August 2022. No questions of mitigation arise thereafter.

13 Should the statutory cap of 52 weeks' gross pay or £93,878 be applied?

93. The statutory cap applies but is not likely to be relevant, given the short period of loss.

Other Issues: Overpayment of Pension Flex

94. The Respondent contended that the overpayment of pension flex should be set off against the Claimant's compensation for unfair dismissal, on a just and equitable basis under s123 ERA 1996.

95. The Tribunal disagreed.

96. By letter of July 2021, the Respondent had offered, p181 – 182, and the Claimant had then agreed by email, that the Respondent would not recover the pension flex overpayments in previous years from him. The Claimant continued to work for the Respondent on that basis, giving valuable service. Given that the Respondent and the Claimant had agreed this, and it would amount to a contractual agreement in law, the Tribunal decided that there was no just or equitable basis for going behind that agreement. The overpayment is not to be set off against the Claimant's compensatory award for unfair dismissal.

ACAS Uplift

97. The Claimant contended that the Tribunal should apply an ACAS uplift to his award on account of the Respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, in relation to his grievance. He did not specify which provisions of the Code had been breached.

98. The Tribunal had *not* concluded, in its liability judgment, that there had been a breach of the Code. There was no issue about the right to be accompanied, paragraphs [35] – [39] of the Code. On the facts, the Respondent had held a grievance meeting, paragraphs [33] and [34] of the Code and had communicated its decision in writing, paragraph [40] of the Code. It had given the Claimant an appeal hearing, with a manager not previously involved, and had given him a written outcome to the appeal, Code paragraphs [41] – [45].

99. The Tribunal had found that the grievance had not addressed some of the matters the Claimant had raised in the grievance and had not given a satisfactory outcome to them. The most relevant paragraph of the Code might therefore be [40]: "Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken."

100. However, the Tribunal decided that the Respondent was not in breach of the Code. It had made a decision and had communicated it in writing. As it had decided that the grievance was not upheld, logically, it did not take action to resolve the grievance. The Respondent did comply with the requirements of the Code. The fact that the grievance decision itself amounted to a breach of the duty of trust and confidence, on the Tribunal's findings, did not bear on the Respondent's compliance with the formal requirements of the Code.

Loss of Statutory Rights

101. The Tribunal decided that the appropriate award for loss of statutory rights was 2 weeks' pay at £571, the maximum amount of a week's pay in July 2022. The 2 weeks' pay award is made because it takes an employee 2 years to acquire their employment rights in new employment. The appropriate sum for loss of statutory rights is therefore £1,142.

Outcome

102. As a result, there was no need to hold a second stage hearing because all issues for the calculation of compensation had been finally determined at this first remedy hearing. It would not be in accordance with the overriding objective to hold another hearing. The Tribunal therefore calculated the award for unfair dismissal due to the Claimant.

103. The Basic award was agreed at £1,713

104. Calculation of Compensatory Award

105. The Claimant sustained losses for 5 weeks between 18 July and 22 August 2022.

106. His net loss of pay was £807.61 per week.

107. Accepting Mr Blackman's evidence, the value of the Claimant's pension was £ 20,422 per annum, or £392.73 per week. The Tribunal considered that that was the just and equitable value of the pension loss. It should be calculated gross, because of the tax treatment of pensions.

108. Using the most up to date figures in the Respondent's counterschedule of loss, the Claimant also lost £56.53 pension flex and £56.53 benefit allowance, net, a week £ 56.23 x 2 = £113.06 net per week.

109. The Claimant did not lose any performance bonus entitlement because he was not entitled to be paid any bonus in July/August. He was not in employment when the bonus for that year was payable.

110. Using the figures in the Respondent's counterschedule, the Claimant lost the value of other benefits – permanent health and medical insurance worth about £1400 a year, or just under £120 per month.

111. His total weekly loss was £807.61 + 392.73 + 113.06 = £1313.40. Multiplied x 5 = £6,567.

112. To that needed to be added about a month's permanent medical and health insurance - £120.

113. The Claimant's loss of earnings and benefits in the 5 weeks was £6,687.

114. Add loss of statutory rights at £1,142 = £7,829. That is the compensatory award.

115. Add Basic Award of £1,713 = £9,542.

116. The total award for unfair dismissal, including both the basic and compensatory awards is £9,542

Employment Judge Brown

3 July 2024

Sent to the parties on:

9 July 2024
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For the Tribunal Office:

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