EMPLOYMENT TRIBUNALS

Claimant:	Mr B Kielkowski
Respondent:	Royal Mail Group Ltd
Heard at:	Exeter Employment Tribunal
On:	16th, 17th and 18th June 2025
Before:	Employment Judge Lambert

Appearances:

For the Claimant: in person

For the Respondent: Mr S Peacock, Solicitor

JUDGMENT

1. The Claimant's complaints of wrongful dismissal and for holiday pay succeed.

2. The parties agreed that the amounts due to be paid by the Respondent to the Claimant for wrongful dismissal was **£238.87** net and for unpaid holiday pay was **£2,416.05** gross.

3. The Claimant's complaints of unfair dismissal and breach of contract are not well-founded and are dismissed.

REASONS

REJECTION OF RECONSIDERATION REQUEST

1. This Judgment was given to the parties ex tempore at the hearing on 18th June 2025.

2. On 23rd June 2025, the Claimant applied for written reasons and made a request for reconsideration of this Judgment. Upon consideration of the reconsideration application, it was apparent that the Claimant was seeking to reconsideration of a decision to dismiss an earlier claim relating to public interest disclosure that had been dismissed on 7th January 2025. The Claimant's reconsideration request was rejected because it had no reasonable prospects of succeeding, it being raised over 5 months after that decision was sent to parties. A separate Judgment has been issued.

INTRODUCTION

3. On 21st February 2024, the Claimant, Mr Kielkowski, presented a Claim Form raising claims of:-

   3.1 unfair dismissal,

   3.2 failure to pay redundancy payment,

   3.3 detriments linked to a public interest disclosure, and

   3.4 for breach of contract.

4. The breach of contract claim arose out of an alleged failure by the Respondent to pay him what he was contractually due under an enhanced severance scheme.

5. The Respondent entered its Response denying all of the claims. It requested further information to be able to understand and respond to the Claimant's case.

6. The claims were initially considered by EJ Housego at a Preliminary Hearing heard on 29th August 2024. At this point in time, the Claimant had not been dismissed by the Respondent. EJ Housego listed the matter for a further Preliminary Hearing to determine whether to strike out the Claimant's case on the basis that because the Claimant had not been dismissed, the Tribunal lacked jurisdiction to hear the claims of unfair dismissal, redundancy payment and breach of contract. In relation to the public interest disclosure EJ Housego could not identify any information that might amount to a public interest disclosure despite questioning the Claimant and he also list this claim to be subject to a consideration for strike out.

7. The matter came before EJ Roper on 7th January 2025. In the intervening period, on 25th September 2024 the Claimant had been dismissed by the Respondent, so the Claimant's claims for:-

7.1 unfair dismissal,

7.2 wrongful dismissal and

7.3 breach of contract

could continue because the Tribunal was seized with jurisdiction. EJ Roper also identified a further claim of failure to pay holiday pay. The public interest disclosure case was dismissed by EJ Roper on the basis that there was no information contained within the pleadings or could otherwise be identified that was capable of amounting to a protected disclosure. That Judgment, dated 7th January 2025, was sent to the parties that day and it was this Judgment that the Claimant made an application to have reconsidered on 23rd June 2025 (which I have described in paragraph 2 above).

THE HEARING

8. When the claim was presented before me, I was asked to determine claims of:-

8.1 unfair dismissal,

8.2 wrongful dismissal and

8.3 breach of contract arising from a failure by the Respondent to pay the Claimant a severance payment in accordance with a contractual obligation.

9. Soon after commencement of the hearing, the parties were able to agree several elements of the claim, namely the failure to pay holiday pay and wrongful dismissal claims.

10. They agreed there were outstanding amounts for Wrongful Dismissal (Notice Pay) of **£238.87** net and **£2,416.05** gross for accrued but untaken annual leave. I have entered Judgment for those claims with these agreed sums. This disposed of the wrongful dismissal and failure to pay holiday pay claims, leaving claims for unfair dismissal and breach of contract.

11. The breach of contract was identified in EJ Roper's Order as:

> *"The Claimant asserts that he was entitled under his contract of employment to a more generous voluntary redundancy package than the one which he was offered. He relies on his contract of employment, and a collective agreement between the Respondent and CWU which he says provides this right, and which he asserts was incorporated into his contract of employment.*

The Respondent accepts that it did not offer the claimant the more generous voluntary redundancy package which he sought to rely on. Was that a breach of contract?"

AGREED ISSUES

12. At the outset of the hearing, I discussed the agreed list of issues with the parties and both agreed that these were the issues I had to determine. The agreed list of issues were:

Unfair dismissal

13. The Respondent accepts that it dismissed the Claimant, and it asserts that it was a reason related to capability, or alternatively for some other substantial reason (SOSR), which are potentially fair reasons for dismissal under s. 98(2)(a) and s98(1)(b) of the Employment Rights Act 1996.

14. Did the Respondent act reasonably in all the circumstances in treating the claimant's lack of capability (or SOSR) as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

    14.1 the Respondent genuinely believed that the Claimant was no longer capable of performing the relevant duties; and

    14.2 the Respondent adequately consulted the Claimant; and

    14.3 the Respondent carried out a reasonable investigation, including ascertaining the up-to-date medical position; and

    14.4 The Respondent could reasonably be expected to wait any longer before dismissing the Claimant; and

    14.5 dismissal was within the range of reasonable responses.

15. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

16. Did the Respondent adopt a fair procedure?

17. The burden of proof is neutral, but it helps to know the Claimant's challenges to the fairness of the dismissal in advance, and he asserts that the Respondent remained in breach of contract by way of its

continuing failure to honour his contractual right to a more generous voluntary redundancy package, and that he was unable to return to work until this dispute was resolved. In the circumstances the claimant asserts that the decision to dismiss him was not within the band of responses reasonably open to the respondent when faced with these facts.

18. There is no apparent claim that the respondent was in breach of any relevant procedure, but if it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

Breach of Contract (Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994)

19. Did this claim arise or was it outstanding when the Claimant's employment ended?

20. The Claimant asserts that he was entitled under his contract of employment to a more generous voluntary redundancy package than the one which he was offered. He relies on his contract of employment, and a collective agreement between the Respondent and the CWU which he says provides this right, and which he asserts was incorporated into his contract of employment.

21. The Respondent accepts that it did not offer of the Claimant the more generous voluntary redundancy package which he sought to rely on. Was that a breach of contract?

22. If there was a breach of contract, how much should the claimant be awarded as damages?

Relevant Facts

23. I make these findings of facts on the balance of probabilities. Any references to page numbers are the page numbers of documents within the agreed trial bundle unless otherwise stated. I have not made findings on all of the issues before me, only findings that are relevant to the issues in dispute.

24. I have read and taken into account the witness statements of the Claimant and Mr Thompson, Redeployment Manager Team Leader South, for the Respondent and the documents they referred to in their statements and through cross examination.

25. Mr Kielkowski was employed by the Respondent from 30th April 2018 as a parcel sorter. He worked in the processing section at Exeter Mail Centre on a morning shift.

26. He was provided with a detailed contract of employment (p.164). Clause 10 of that contract provides:

> *"There are current collective agreements, which may relate to the terms and conditions of employment contained in this statement. These may be seen on request from HR Services or your line manager. You will be subject to the rules, notices, instructions and other directions issued from time to time with regard to your employment."*

27. The Respondent is a very large and well known employer, employing over 130,000 employees across the UK and, as one would expect, it has a policy for managing change. This is referred to as its Managing The Surplus Framework – Administrative and Operational Grades, with the iteration before the Tribunal dated October 2010 ("the **MTSF**"). The MTSF runs to 56 pages and is supplemented by a MTSF Guide for Managers. The version of the Guide before me was dated 11 May 2015.

28. The MTSF confirms in its introduction that:

> *"This Framework, which applies with effect from 18 March 2002, consists of a series of documents containing all the information relevant to the Royal Mail Group Ltd and CWU joint approach to the management of Surplus Employees and proposed redundancies in respect of all permanent Administrative and Operational Grades… This Framework will always be deployed consistently with Royal Mail Group values and the principles set out in the Guide to Deployment of Managing the Surplus Framework.*
>
> *The MTSF will apply in all cases where a surplus situation is expected to occur with the potential for redundancies which will warrant the application of statutory consultation and notifications…. No employee will be disadvantaged or fail to be protected by the provisions of MTSF policies because they have cooperated in early moves…."*

29. Page 6 of the MTSF says:

> *"The aim of this policy is to provide clear direction on the way in which Surplus Employees will be managed throughout RMG. It applies to all management grades."*

30. Under the heading Key Principles it states:

> *"c) The emphasis of this policy is that suitable alternative employment will be offered wherever possible to Surplus Employees with the priority being to maximise placement of employees into vacancies within RMG."*
>
> *"d) Bumping will also be used to facilitate the placement of surplus employees…"*

31. Appendix 5 of the MTSF (p.76) provides the criteria for offering voluntary redundancy which must be met in order for an employee to be eligible for a payment under MTSF:

> *"1.(c) All reasonable efforts have been made to place the employee into suitable alternative employment and no such employment has been unreasonably refused by the employee.*
>
> *1.(e) That the employee would not in any event have resigned or retired or been dismissed by any application of Personnel processes such as… Conduct or Attendance procedures."*

32. I refer to these as the "**Key Criteria**". It is an element of the Respondent's case that the Key Criteria was not satisfied in this case and, irrespective of whether the MTSF was contractual in nature or not, the Claimant was not entitled to payment under it.

33. Under the heading "Selection" it states:

> "*…Providing the criteria set out above are met, where there is an oversubscription of volunteers for redundancy, volunteers will be selected in seniority order."*

34. Appendix 6 of the MTSF provides:

> "*The minimum compensation payment for employees with two or more years Aggregate Service will be 6 months (26 weeks in the case of weekly paid employees) pay."*

35. Throughout the hearing, this was referred to as the "**6 Month Minimum**" calculation and I will use that shorthand in this judgment.

36. On 17th November 2022, the Respondent's then Chief People Officer, Zareena Brown, sent a communication to the Respondent's employees providing details of a preference exercise which the Respondent was about to commence. Importantly, this document stated that the financial position of the Respondent was such that the MTSF 6 Month Minimum formula was no longer affordable and it would not be offered going forward. It confirmed that this position would not change.

37. The document confirmed that a new formula would be used which was based on age and length of service but would capped at a maximum of 9 months' pay. In addition, for this particular exercise, an additional £6,000 would be paid to employees who applied for voluntary redundancy ("**VR**") by 27th November 2022. This was subject to those applications being selected by the Respondent and those employees executing a settlement agreement with the Respondent by a specified date. That communication reiterated the Respondent's position that after 27th November 2022, any further applications or preferences for VR would be based on the new formula with a maximum cap of up to 9 months' pay. There would be no additional £6,000 payment.

38. Regrettably, this document did not state that the 6 Month Minimum guarantee was also being removed.

39. The CWU issued its own communication on 17th November 2022 stating that the Respondent has:

> *"…unilaterally commenced a preference exercise amongst our operational members… this activity contravenes the MTSF and Pathway to Change National Agreements and in particular the agreed Voluntary Redundancy Terms.*
>
> *Royal Mail are claiming our agreed terms are no longer affordable because of the financial position within the company, which they have created.*
>
> *The CEO's response to CWU's position was that he was fine with this, apart from the fact that the company would only be able to afford a 9 months maximum and 8 weeks minimum compensation. The union rejected this offer and have been pushing the company to increase this amount. Late last night the company confirmed that they would increase the amount with a £6,000 enhancement.*
>
> *The union cannot support an unagreed VR process on compensation terms that are significantly inferior to our agreements.*
>
> *It will always be the case that individual members are entitled to make their choice based on their own personal circumstances as to whether or not they are prepared to accept RMG's redundancy terms."*

40. From this document, it is clear that the CWU has noted that the 6 Month Minimum guarantee is being replaced with an 8 week minimum guarantee element ("**8 Week Minimum**").

41. The Claimant applied for VR, completing his form on 17th November 2022 (p.191). This document confirmed that any application for VR was subject to the conditions of business approval from the Respondent and for execution of a settlement agreement by a specified date.

42. During the hearing it appeared that the Claimant was asserting that his action, in completing this form, satisfied the conditions for VR and he was entitled to payment from this action alone. I explained to him that the wording suggested otherwise and this was, in effect, an indication from the Claimant that he would like to be considered for VR. The Respondent was not under an obligation, at this point, to accept that invitation.

43. On 30th November 2022, Zareena Brown sent a further communication stating that the VR exercise had now closed as it was oversubscribed. She acknowledged that there were people who had applied for VR but the Respondent had not selected them. Unfortunately for the Claimant, his

application was not selected. He continued to work at the Exeter Mail Centre.

44. Pausing there: it is clear that the Claimant was prepared to accept the offer calculated under the 8 Week Minimum formula with the additional £6,000 incentive. He was not selected so no binding commitment arose at this point.

45. On 10th February 2023, the Claimant, along with many members of the morning shift which he worked, attended a meeting with Mr Stephen Davies, Manager of Exeter Mail Centre. They were informed that a further VR preference exercise would be opened and based on the 8 Week Minimum formula. However, consistent with the previous correspondence, the payment would not include the additional £6,000 payment.

Collective Grievance

46. Following this meeting, the Claimant along with 10 other employees raised a grievance complaining about a number of matters flowing from this notification. It also included a complaint about the Respondent's intention to move the work completed by the morning shift in Exeter Mail Centre to the Bristol Mail Centre at some point between January 2023 and August 2023. The Claimant complained that this collective grievance was never responded to.

47. Mr Thompson, who gave evidence on behalf of the Respondent, accepted that this collective grievance was not directly responded to. His evidence was that this was a local complaint about a national issue that was being dealt with at senior levels within the CWU and the Respondent. The Respondent had received similar complaints from many other locations within its network and these were addressed generally with a Chairman's response, which was sent to all of the Respondent's locations.

48. Whilst no document was placed before me to this effect, it was not contested and I accept Mr Thompson's evidence on this point. However, I consider it unfortunate that a large employer of the size and with the administrative resources of the Respondent did not send a specific response to individuals, including the Claimant, who had raised a collective grievance, even if simply to make them aware of the Chairman's response.

Second VR process

49. The Claimant attended a meeting on 17th February 2023 with his manager, Mr Mike Keefe. The Claimant, quite understandably, requested information about the earlier VR process and in particular, why he was not provided with certain information.

50. The Claimant was informed at this meeting that there would be no further work for him on the morning shift so he had the option of making another application for VR; or to be considered for redeployment. In the meantime, the Claimant would be required to complete work in the Exeter Mail Centre of a supernumerary nature. This meant the Claimant would be assigned, for a temporary period, to complete short-term project work.

51. The Claimant was made aware of the VR terms that would be available to him. In accordance with the previous communications from Ms Brown, these terms were now based on the 8 Week Minimum formula, not the 6 Month Minimum formula and nor would the Claimant be entitled to receive the £6,000 additional payment. This meant that the Claimant was being offered severance terms that were less favourable than the MTSF terms and the terms offered by the Respondent in November 2022 VR exercise.

52. These facts form the basis of the Claimant's breach of contract claim. He asserts that it was a breach of contract for the Respondent to offer him anything less than the 6 Month Minimum term provided under the MTSF.

53. On 29th February 2023, the Claimant received a settlement agreement. This confirmed that he would be entitled to receive a VR payment of £4,400.50 (p.198).

54. For completeness, the agreed evidence was that the Claimant would have received around £9,979 under the MTSF 6 Month Minimum formula and £10,515 under the 8 Week Minimum formula with the additional £6,000. Clearly, either of these sums were more favourable to him than the offer he received in February 2023.

55. The Claimant did not accept the settlement agreement offered to him in late February, early March 2023. His case is that the amount offered to him was not consistent with his contractual right under MTSF to receive the 6 Month Minimum. On 29th March 2023, the Claimant was informed that this offer was now withdrawn and no longer available for acceptance (p.195).

Second Grievance

56. On 16th March 2023, the Claimant raised a grievance about this issue and sought clarification of why he was not accepted for VR in November 2022. This complaint was addressed to Mr Stephen Davis. The Claimant complained that this complaint was also not responded to by the Respondent.

57. Mr Thompson gave evidence that similar questions were raised by the Claimant in emails with a Mr Peter Williamson, the Respondent's Pipeline Redeployment Manager, on 27th November 2023. Therefore, the

Respondent's position was that these issues were addressed, albeit not in a formal grievance outcome. However, I found that this answer neglected to include the fact that the answers referred to were provided in response to another email from the Claimant on 14th November 2023 and Mr Williamson's response is clearly in response to that email. This was not intended to be a response to the Claimant's grievance complaint to Mr Davis. In addition, the Claimant raised 7 questions and Mr Williamson only provide a response to 5 of the questions posed by the Claimant. Interestingly, one of the questions not responded to by Mr Williamson was the Claimant's question for the reason why his grievance of 16th March 2023 was not responded to by Mr Stephen Davis.

58. Whilst it may be the case that most of the issues were belatedly addressed by Mr Williamson due to further prompting from the Claimant, it is noteworthy that an organisation with the administrative resources of the Respondent did not deal with this matter in a more formal and timely manner, with a meeting, the right to be accompanied, an outcome letter and a right to appeal.

59. I consider the failure to acknowledge and deal with the Claimant's grievance of 16th March 2023, in a manner consistent with the relevant ACAS Code of Practice on disciplinary and grievance procedures, to be unreasonable. However, for the reasons set out below, nothing turns on this finding.

60. The Claimant worked for a further period of around 6 months in a supernumerary role until October 2023, when he was moved into redeployment.

Redeployment

61. In October 2023, the Claimant attended a meeting with Mr Peter Williamson. On 25th October 2023, the Claimant commenced sickness absence and never, in fact, returned to work for the Respondent. He was eventually dismissed for capability on 25th September 2024. I find as a fact that the process leading to his dismissal commenced on the date of his sickness absence, 25th October 2023.

62. The Claimant's sickness absence was managed by the Respondent, seeking occupational health reports, which confirmed that the Claimant was not fit to return to work.

63. The Claimant's position at this time and which was maintained throughout this hearing, was clearly articulated in an email sent to Mr Williamson on 16th January 2024 (p.227) where he stated:

> *"…Please allow me to leave on [Pre-November 2022] terms."*

64. Similarly, in an email to Mr Williamson on 6th February 2024 he stated:

> "*…please allow me to leave my job on the terms set out in the MTSF. I think the best solution for both sides will be to end our dispute. I don't see any other option."*

65. The Claimant confirmed this sentiment several times after this date in emails but also before me in evidence. He wanted to leave the Respondent's employment on the 6 Month Minimum terms. There was a slight change in the Claimant's position because initially in March 2023 he expressed the wish to leave on 8 Week Minimum terms with the additional £6,000 payment. Subsequently he had carried out research and considered that the MTSF terms (6 Month Minimum) were contractual and had never been lawfully changed. This explained his slight change of position. From the facts I have already found, the Claimant was never made an offer of VR from the November 2022 exercise, so no claim arises from that exercise.

66. The Claimant accepted in evidence that he had been offered the opportunity to be bumped into another role in Exeter. This was because the role holder was prepared to accept VR and the vacancy this would create was offered to the Claimant. By 19th February 2024, the Claimant had rejected this offer (p.232) because he did not consider it fair for someone to be moved out of employment to accommodate him. The Respondent says that this was an unreasonable refusal of suitable alternative employment by the Claimant because this role was available on the same shift; on the same terms and it was available. This was referred to as the "**Bumping Role**" in evidence and the Respondent contended that from these facts, the Claimant was not entitled to payment under the MTSF because he did not meet the Key Criteria, namely that this was an unreasonable refusal of suitable alternative employment.

67. On 26th April 2024, the Claimant's sick pay was exhausted.

68. On 24th May 2024, Mr Williamson sent an email to the Claimant providing details of a meeting he held with the Claimant on 16th May 2024. This stated that:

> "*During the meeting we explored the reasons for your absence, which you have stated are work related. We explored possible resolutions to enable you to return to work. However, you still feel the issues are unresolved and as such remain absent from work with no estimated return date. You indicated during our meeting that you wanted to leave the business and did not want to return."*

69. In evidence, the Claimant confirmed that he agreed with this statement.

70. No doubt feeling that this matter had become entrenched, with the Claimant refusing to return to work unless he received the VR terms in accordance with the MTSF, and with the Respondent refusing to offer that amount, Mr Williamson referred the matter to Mr Thompson, Redeployment Manager Team Leader South.

71. Mr Thompson wrote to the Claimant by letter dated 29th May 2024 (p.251) setting out the history of this matter as he understood it (and which effectively forms the basis of the Respondent's defence to this claim). Mr Thompson recapped that the Claimant had been offered the Bumping Role and other alternative work, including a role on the early shift, at the same location and on the same terms. He had also been offered the applicable VR terms (8 Week Minimum) but not the MTSF terms (6 Month Minimum). Both had been rejected.

72. The letter continues:

> "*Reasonable efforts by management to resolve the work factors which you say are driving your absence have not been successful and the business has no reasonable prospect of knowing if or when you will return to work, and in what capacity. The medical evidence received confirms that you will not feel able to return to work until these 'work related' factors are resolved to your satisfaction, but there is no clear advice on what can be done to successfully achieve this, beyond meeting your request for a higher exit payment.*
>
> *This position is not sustainable indefinitely, and is having a significant impact on the business, in terms of ongoing cost, uncertainty, management time and the effect it is having on the team. As a result, we must now consider the position regarding your capability for continued employment."*

73. From the evidence before me, including that of the Claimant, I accept that this is an accurate summary of the situation before Mr Thompson.

74. Mr Thompson arranged to meet with the Claimant on 6th June 2024 to discuss a way forward. Notes were taken and provided to the Claimant. He emailed Mr Thompson afterwards to state these notes were not agreed because they did not record his statements word for word. In evidence he accepted that he said words to the effect:

> "*I am stressed and will never work in this place any more or the whole of Royal Mail. They make me sad and break my rights. None of this is any help, I want to leave the business. The company is supposed to give me 2 years pay I believe."*

75. Throughout the hearing and in response to Mr Thompson's email, the Claimant complained that he wanted to see any legal document that confirmed that there had been a lawful variation to the MTSF. This was based on his understanding that the MTSF terms could not be changed

without agreement of the CWU. It was common ground that such a document was never supplied to the Claimant.

76. However, a draft of an agreement that CWU balloted its members on was in the bundle. This was entitled "RMG/CWU Business Recovery, Transformation and Growth Agreement" (p.119) ("the **Growth Agreement**"). The Growth Agreement sets out in its introduction that:

> *"This agreement provides a resolution to all of the issues arising from the long running dispute between Royal Mail Group Limited and CWU. The agreement sets out how Royal Mail and CWU will jointly rebuild and transform the business to protect and grow good quality jobs and make the company successful again."*

77. It goes on to state:

> "*… RMG will abide by the following key principles covering employees on job security and reassurances over the company's future direction and plans:*
>
> *3.1.3 With the exception of VR compensation terms, the full terms of the existing MTSF process for Voluntary Redundancy will apply, including surpluses and redeployments are managed. (p.122)*
>
> ***6. Terms and Conditions***
>
> *The changes to terms and conditions and working practices are set out in paragraphs 6.1 to 6.4 and in the Appendices to this Agreement.*
>
> *The provisions below and in the Appendices apply only to those Postal grade employees who started before 1 December 2022 on terms and conditions that were collectively bargained with the CWU.*

78. Mr Thompson confirmed that this draft formed the basis of the agreement between the Respondent and CWU which was ratified in July 2023.

79. This raises two points:

    79.1 Under clause 6 of the Growth Agreement (as set out above), there is no reference to the VR terms. This was dealt with earlier in the Growth Agreement at clause 3.1.3. No evidence was put before me as to the background to the Growth Agreement and I am therefore requested to make findings of fact on the evidence before me. It seems to me from the wording of the Growth Agreement set out above that the parties had accepted that any changes to individual terms and conditions would be listed in paragraphs 6.1 to 6.4. The VR terms were not listed here. This confirms in my view that the parties were of the view that the VR terms, having been dealt with in clause 3.1.3 of the Growth Agreement, separately outside of the

"contractual section", were not intended to be contractual in nature and not to be incorporated into individual terms.

79.2 Secondly, from some point in July 2023, it was agreed by the Respondent and CWU that the MTSF terms were no longer in play, in any event.

80. Going back to the meeting on 6th June 2024, Mr Thompson gave unchallenged evidence that he was concerned that the Claimant had misunderstood the position and wanted to provide the Claimant with a further opportunity to either accept a role with the Respondent that was similar to his previous role, or to accept VR on the current terms available.

81. Mr Thompson did this in a letter to the Claimant on 5th July 2024 (p.271) and requested the Claimant respond by 12th July 2024. It included the amount that the Claimant would be entitled to at this point: £4,513.63 and set out the calculation for this sum.

82. That letter makes clear that in the absence of a response, or if the Claimant refused the offers, then Mr Thompson would arrange a further meeting to decide how to take matters forward and this would involve consideration of terminating the Claimant's employment by reason of capability.

83. The Claimant did not respond to this letter.

84. Mr Thompson wrote to the Claimant by letter dated 15th July 2024 requesting that he attend a meeting on 18th July 2024 (p.274). He also emailed this correspondence to the Claimant. In addition, Mr Williamson hand delivered this letter to the Claimant on 16th July 2024.

85. This letter confirmed that if the Claimant did not attend the meeting, then the meeting would proceed in the Claimant's absence based on the facts available to Mr Thompson and an outcome may include dismissal.

86. The Claimant emailed Mr Thompson on 18th July 2024 confirming he had set out his position many times and would not attend the meeting.

Decision To Dismiss

87. Mr Thompson considered the matter and completed a decision report setting out the facts as he understood them before setting out his deliberations. He then decided that the outcome of the meeting would be to dismiss the Claimant.

88. His reasons, which were set out in p. 284 – 286 can be simply stated:

88.1 the Claimant had been absent for over 300 days and had exhausted sick pay;

88.2 OH advice confirmed that the Claimant was not fit to return to work and would not be until his workplace issues were resolved;

88.3 the Claimant had confirmed on many occasions that he would not return to work for the Respondent, despite being offered alternative jobs; and

88.4 he wanted to receive VR terms in accordance with the MTSF.

89. In the light of the Claimant's position and the Respondent's refusal to make that offer, Mr Thompson concluded that the only option available to him to resolve this matter was to terminate the Claimant's employment on the grounds of capability.

90. It was clear to me that the respective positions had become entrenched.

91. In response to my questions the Claimant confirmed to me that this was still his position and it occurred to me that this situation may have still been ongoing at the time of this Tribunal, unless the Respondent either took the decision to dismiss the Claimant in the light of this entrenchment or offered him the 6 Month Minimum terms which it had decided not to.

92. Mr Thompson sent a letter to the Claimant on 14th August 2024, attaching the decision report, and confirming that he had taken the decision to terminate the Claimant's employment on notice by reason of capability. Mr Thompson explained that he interpreted this situation as the Claimant not being capable of returning to work as the position had become entrenched. The Claimant's last day with the Respondent would be 25th September 2024. Mr Thompson made the Claimant aware of his right to appeal, which the Claimant did not exercise.

93. Those are the facts that I have found.

Relevant Law

Unfair Dismissal

94. The Respondent has the burden of establishing that the reason for dismissal was a potentially fair one in accordance with Section 98(2) of the Employment Rights Act 1996 ("the **ERA**").

95. The Respondent has contended that its reason for dismissal was capability or that it is for some other substantial reason capable of justifying a fair dismissal ("**SOSR**"). Both are potentially fair reasons under the ERA.

96. Mr Thompson's letters to the Claimant when considering and then notifying the Claimant of his dismissal relied upon capability. From the evidence I have heard, I am satisfied that this was the reason for dismissal. On these particular facts, it could also be asserted with some justification that dismissal was for conduct (the Claimant's refusal to attend work) or SOSR, because of the entrenched position with no obvious solution. However, the Respondent relied upon capability and I consider it was open to the Respondent to do so. I consider that capability was the reason for dismissal.

97. The next issue I have to determine is whether the Respondent acted reasonably in all the circumstances in treating capability as a sufficient reason to dismiss the Claimant. From the agreed list of issues:

98. Did the Respondent:

    a. genuinely believe that the Claimant was no longer capable of performing the relevant duties?

       I consider that it did. The Claimant agreed that the position was entrenched. In these circumstances, the Respondent was faced with two options: pay the 6 Month Minimum payment to the Claimant or dismiss him because he was not prepared to return to work.

    b. adequately consult the Claimant?

       Meetings were held from October 2023 when the Claimant was managed by Mr Williamson and then from 29th May 2024 when the matter was passed to Mr Thompson. There was ample consultation with both parties understanding the other's position and with the Respondent making clear to the Claimant that it would consider terminating his employment unless he returned to work or accepted the offer it had made. The Claimant's position was equally clear that he would accept nothing less than the 6 Month Minimum payment.

    c. carried out reasonable investigation, including ascertaining up to date medical information?

       The Respondent obtained OH advice and this was consistent that the Claimant was not fit to return to work until the work place issues

were resolved. This gave rise to the circularity that the Respondent was faced with. The Claimant would not return to work unless the Respondent resolved his work place issues by offering him the 6 Month Minimum payment, where he would execute the settlement agreement terminating his employment. No other option was acceptable to the Claimant.

d. could not reasonably wait any longer?

I consider it was not. Both parties agreed that the position had become entrenched. The Claimant had been absent since 25th October 2023, had exhausted sick pay and was clearly of the view that he would not return unless the Respondent agreed to pay him the 6 Month Minimum payment, which would then terminate his employment. I do not consider waiting would have altered this entrenched position.

e. Dismissal was within the band of reasonable responses.

This is the test from the well-known authority of **BHS v Burchell**. I remind myself that this requires that I assess the Respondent's actions against that of a hypothetical employer and it is not for me to substitute my views as to what I would have done in this situation.

I consider that the Respondent's actions were within the band of responses that a reasonable employer would take, taking into account the entrenched position, the length of time taken to resolve matters and that there was no resolution in sight.

99. The last issue to determine is whether the Respondent adopted a fair procedure? The Claimant asserts that it was the Respondent's failure to honour his contractual right to payment under the MTSF (6 Month Minimum payment) that led to this situation. If it had adopted a fair process and offered him this payment. It did not and therefore the process was unfair. I consider that in order to address this issue, it is also necessary to consider whether the Respondent acted in breach of contract by failing to offer him the 6 Month Minimum payment.

100. This issue was also pursued as a separate breach of contract claim and I will address both.

101. From the list of issues, the Breach of Contract claim requires that I determine:

f. Whether this claim was outstanding or arose when the Claimant's employment ended?

There was no dispute that this issue was outstanding from November 2022 throughout and was outstanding at the time his employment ended.

g. Was the MTSF terms incorporated into his contract of employment?

No case law, or general propositions of how the law should be applied were made to me by either party in their closing submissions. The Claimant's position was that the MTSF was contractual, principally based upon the CWU communication of 17th November 2022 and the fact that the Respondent had failed to provide him with any evidence that the terms had been lawfully varied despite being invited to do so.

The Respondent's position was that it was a policy and from the document's title it provided an agreed framework for managing change within its business. It was not contractual in nature. Whilst the Respondent consulted with CWU, it did not need agreement to vary the MTSF because it did not reach the level of a contractual obligation.

Having reviewed the MTSF, I am satisfied that the MTSF does not contain any wording to confirm that it was intended to be incorporated into the Claimant's contract of employment expressly.

Whilst the Claimant's contract of employment at clause 10 suggests that there are collective agreements, which *may* relate to the terms and conditions of employment, I consider this to be too vague in and of itself, to provide for express incorporation of the MTSF.

The Claimant bears the burden of proof in a breach of contract complaint. He did not provide any evidence that would satisfy me that the MTSF was impliedly incorporated into his contract of employment. I do not consider he has discharged that burden.

In any event, and for the reasons I have described in paragraph 79 above, I consider it relevant that the Growth Agreement contains a reference to changes to terms and conditions in clause 6 but this did not include a reference to VR terms, which were dealt with earlier in that Agreement. Whilst there was no evidence from the CWU or the Respondent about the intentions of the parties before me, I consider that this evidences the point that the VR terms were not meant to be contractual in nature.

h. Were the MTSF terms broken by the Respondent when it offered him a sum less than the 6 Month Minimum?

For completeness, even if I had concluded from the evidence before me that the MTSF was contractual, I would not consider that the terms were broken. This is because as set out in the facts above, the Key Criteria for payment under MTSF is conditional upon the employee not unreasonably refusing suitable alternative employment. The Claimant refused to accept several roles, including the Bumping Role, and I consider this refusal to be unreasonable.

Further, at the time of dismissal, the Claimant was subject to a Personnel process, for capability and he was not dismissed by reason of redundancy, meaning that Key Criteria 1(e) was not met.

Therefore, the reason for the Claimant's dismissal did not meet the Key Criteria set out in the MTSF in any event.

102. From these findings I conclude that the Claimant's breach of contract claim is not well founded and fails. This claim is dismissed.

103. Turning back to the point about fair process for unfair dismissal, I do not consider that the Respondent broke the terms of the Claimant's contract in offering a different VR payment to the 6 Month Minimum payment.

104. Overall I am satisfied that the Respondent adopted a fair procedure when consulting with the Claimant about his absence from 25th October 2023, its offers of alternative employment and its subsequent offer of VR terms which were lesser than the 6 Month Minimum payment under MTSF. I do not consider the Respondent's failure to deal appropriately with the Claimant's grievance to have any impact upon the fairness to dismiss because the Claimant was well aware of the Respondent's position through the subsequent meetings it held with him.

105. These findings mean that the Claimant's complaint of unfair dismissal is not well founded and fails. It is therefore dismissed.

Employment Judge Lambert
Date: 7th August 2025

REASONS SENT TO THE PARTIES ON
02 September 2025
FOR THE TRIBUNAL OFFICE