



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs P Harrison

**Respondent:** Delta Merseyside Limited

**HELD AT:** Manchester

**ON:**

5 April 2017

**BEFORE:** Employment Judge T Ryan

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr I Steele, Solicitor

## REASONS

1. These are the reasons for the tribunal's judgment on remedy which was previously sent to the parties. They are provided in writing pursuant to a request made under rule 62(3) of the Employment Tribunals Rules of Procedure 2013.
2. The claimant worked for the respondent until 16 May 2016. The circumstances of the dismissal and the reasons leading up to it are set out in the findings of fact which I made at a hearing on 30 January 2017 and are contained in a judgment with written reasons that was sent to the parties on 21 February 2017.
3. The conclusions, beginning at paragraph 60 of my earlier judgment, show that I find that the respondent came to a reasonable conclusion that was open to it that the claimant was guilty of conduct, namely that they had believed she had set up a cake making operation contrary to her contract of employment without the respondent's consent. The claimant's case was that she was doing that as a hobby, but for the reasons that I have set out in that judgment I find that there was factual material upon which an employer could conclude that there were periods when the claimant was absent from work and undertaking cake making and doing it as a business. The factual situation was complicated by the fact that this was a claimant who, for the reasons I have previously described, was off work for significant periods of time leading up to her dismissal.
4. For the purposes of the judgment I have to make on remedy, the principal issues have been the relevant gross weekly pay, the claimant's efforts to mitigate and the effect of the doctrine in **Polkey v A E Dayton Services**, bearing in mind the

findings of fact and the conclusions I drew in relation to the reasons why I found the dismissal was unfair.

5. In summary, in finding unfair dismissal it was the appeal approach of Mr Beesley that I criticised. There was an interplay here between different potential reasons for the dismissal. Clearly there were capability concerns that the respondent had, but there were also conduct issues and the cumulative effect was that there was ultimately a breakdown in trust and confidence.

6. The matter was put over for a remedy hearing. I had given indications in relation to possible findings on contributory conduct and **Polkey**, but I made it clear in my earlier judgment that those comments were to assist the parties and that all matters of remedy remained at large should they not be able to agree.

7. At this hearing Mr Steele confirmed that the respondent was not pursuing allegations of contributory conduct or contributory fault but was confining itself to arguments in respect of **Polkey** and mitigation.

8. I heard evidence from the claimant at the hearing but there were no additional witness statements. I found the facts as follows.

9. The claimant was dismissed on 16 May 2016. She had previously had a history of headaches associated with insomnia. According to a letter written by her GP in September 2016 she had become unwell after the dismissal such that she was not able to seek employment. The claimant received in June 2016 and again in August effectively three month sick notes saying she was not fit to work. I have not seen the second of the fit notes but I am prepared to assume in her favour that that was also a fit note saying she was unfit to work. She was in receipt of Employment Support Allowance.

10. The claimant received a letter from the respondent on 22 November 2016 saying they would need evidence of her attempts to find work, and that apparently prompted her to start the task of finding work. On 23 November she made her first application and on 8 December she began work.

11. She now works for TJ Morris operating as Home Bargains. Her contract was nominally for 16 hours a week at £7.42 per hour gross but it clear that from that time she has worked more than that and she explains to me that she has also sought alternative employment on a full-time basis but without success.

12. The argument before me here was largely focussed on the question of the claimant's attempt to mitigate. However, because of the decision that I have made concerning the application of the doctrine in **Polkey** and the claimant's health that issue in effect falls away.

13. I am satisfied on the basis of the doctor's letter, that certainly for a period of three months after she was dismissed, the claimant was not fit to seek alternative employment. Whether she should have sought alternative employment earlier than she did I think is an open question. I think it is a surprising coincidence that she makes her first application, or at least there is evidence of her first application, so soon after Mr Steele's letter, but nothing turns on that now because of my other conclusions.

14. So far as the claimant's wage was concerned, she had at that stage that she was dismissed a contractual right to three shifts a week, and she had been performing it. There was an informal agreement with her and Mr McHugh that they would go up to four shifts a week, and indeed the last two most recent payslips show that in the two weeks for which she was paid prior to dismissal she had worked longer shifts. However, there were a number of weeks in the 12 week period before she was dismissed in which the claimant did not work and received no remuneration, and accordingly I have discounted those, with the agreement of Mr Steele, for the purpose of calculating the average weekly pay.

15. Going back from 17 May 2016, for the last 12 weeks in which the claimant received remuneration, the relevant sums are as follows: £333.50, £322.50, £185.62, £49.50, £198, £255.57, £198, £198, £195.94, £115.50, £173.85 and £191.81. They make by calculation a total of £2,417.97 and the average is £201.50 per week. This is more than the respondent had calculated and less than the claimant sought, but in my judgment that is the appropriate sum.

16. As far as the basic award is concerned the claimant had worked for four full years and was over 41 years throughout that period. She is entitled to 1½ weeks' pay multiplied by four which is six weeks' pay which comes to £1,209.

17. By reason of unfair dismissal she has lost her employment and will have to work for two further years in order to gain her statutory rights. In my judgment the appropriate sum to award by way of loss of statutory employment rights is £300.

18. I turn to the compensatory award. The claimant on the face of it has significant loss and that continues and is partial loss.

19. However, although I indicated at the completion of the liability hearing that I thought this was a case for making a **Polkey** reduction on a percentage basis rather than awarding compensation for a limited period of time, having reflected upon that and considered the matters set out in paragraphs 60-69 of my original judgment, it seems to me that the proper approach to the **Polkey** issue is as follows.

20. On the material before the respondent, if it had properly considered the questions of capability and had put to the claimant the matters of concern, namely that she was taking uncertificated absence that was not genuine, then I think that the respondent would have been in a position within a period of no more than six weeks of being able fairly to say that the claimant would reasonably have been dismissed. I take the period of 6 weeks, which may be thought to be slightly generous to the claimant, because the matter was complex and the respondent would have needed time to set up and carry out a fair process. I accept this is an exercise in trying to recreate what might have been but that is my best assessment of what might have been necessary to achieve a fair result out of a fair process.

21. In my judgment, therefore, loss should be capped in respect of compensation at a period of six weeks and that is the basis upon which I have made the order for a further sum of £1,209.

22. In those circumstances, then, I awarded the claimant the sums I have indicated.

23. I checked the precise amount of Tribunal fees that the claimant had paid after the hearing, but there was no resistance by Mr Steele to an order that those Tribunal fees should be reimbursed by the respondent.

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Employment Judge Tom Ryan                      7 July 2017

REASONS SENT TO THE PARTIES ON

10 July 2017

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FOR THE TRIBUNAL OFFICE