EMPLOYMENT TRIBUNALS

Claimant: **Ms V Wileman**

Respondent: **Lancaster & Duke Limited**

Heard at: **Nottingham** **On:** **19 November 2018 in Chambers.**

Before: **Employment Judge Clark (sitting alone)**

JUDGMENT

1. The claim for unfair dismissal **succeeds.** The respondent shall pay the claimant the sum of £6,340.52 made up of.

    a. A basic award of: £1,077.75
    b. A compensatory award of £5,262.77

2. The Recoupment Provisions apply:-

    a. Monetary Award: £6,340.52
    b. Prescribed Element: £4,279.91
    c. Period to which (b) relates: 20/9/2016 – 25/5/2017
    d. Excess of (a) over (b): £2,060.61

REASONS

1. Introduction

1.1. On 16 June 2017, I gave a reserved judgment with reasons in this case. Those reasons were sent to the parties on 15 July 2017. The respondent successfully appealed against that judgment on two grounds.

1.2. The order disposing of the appeal before the Employment Appeal Tribunal ("E.A.T.") was that the matter be remitted to the same Employment Tribunal for rehearing on two questions. The questions for me are:-

a. Whether the claimant (the respondent before the E.A.T.) had acted in repudiatory breach of contract, as alleged by the respondent (the Appellant before the E.A.T.) such as to afford the respondent the right to terminate the contract of employment without notice?

b. Whether it would be just and equitable to reduce the compensatory award under section 123(1) Employment Rights Act 1996?

1.3. The E.A.T. expressed a view that no further evidence would be needed, but submissions may be of assistance.

1.4. Upon the case being remitted to the Employment Tribunal for further case management, on 12 September 2018 the parties attended a telephone preliminary hearing before REJ Swann. At that hearing, the claimant was represented by Ms Thakerar, Solicitor, and the respondent by Mr Weaver, one of its directors. Both parties agreed there was no need for further evidence and no need for attendance at any further hearing. Both indicated their intention to instruct counsel to draft written submissions. Orders were made listing the matter before me today and requiring those written submissions to be exchanged on 17 October 2018.

1.5. On that date, the claimant's solicitor filed the claimant's written submissions but indicated they had not had any response from the respondent. Mr Weaver emailed later that day to request a postponement due to family ill-health. To the extent that what Mr Weaver was seeking was a postponement of today's unattended hearing, I refused it with reasons. However, I did grant an extension of time for filing written submissions to 2 November 2018.

1.6. No written submissions have been received from the respondent nor any further application.

1.7. In dealing with the questions posed, I have before me my original Judgment with reasons; the respondent's grounds of appeal settled by Mr Caidan of Counsel; the E.A.T. judgment and order following appeal and the claimant's subsequent written submissions settled by Mr Bidnell-Edwards of Counsel.

2. Question 1 – Breach of Contract

2.1. At the original final hearing, a question arose at the outset as to the application of s.86(6) of the Employment Rights Act 1996 ("ERA") and its effect on s.97 of the ERA and therefore whether, in this case, the claimant had sufficient qualifying service to bring a claim of unfair dismissal.

2.2. It was common ground that she had been summarily dismissed by telephone on 20 September 2016. I found that date to be the "unmodified" effective date of termination. At that date, I found her length of service to be 2 days short of the necessary 2 years' qualifying service to engage jurisdiction to determine a claim of unfair dismissal. However, the date modified by section 97(2) ERA added a period equal to the statutory notice due under section 86(1) ERA, in the claimant's case a further 7 days, meaning that her claim was in time. The respondent argued it had dismissed her for gross misconduct such that section 86(6) ERA removed any right to notice otherwise provided by s.86(1). The issue was presented to me as a preliminary point and dealt with accordingly. It is clear, as the judgment of the

E.A.T. spells out, that it cannot be answered without reaching conclusions on the allegation of any underlying breach of contract that is at the heart of the respondent's case that s.86(6) was engaged. That is so even where, as here, the substantive claim is brought as one of unfair dismissal only and not one of breach of contract. The test to be applied to a claim of unfair dismissal is fundamentally different to be applied in a breach of contract claim. As the E.A.T. observed, it is only through the prism of unfair dismissal that I have so far considered the allegations of misconduct. The first question requires me to reconsider it with the objective test for breach of contract in mind.

The Respondent's Submissions

2.3. I do not have written submissions from the respondent. I do, however, have before me some documentation from which to distil the essence of its case that the claimant was guilty of a repudiatory breach of contract. The ET3 sets out the reason for dismissal on 20 September 2016 as "harassing a valued member of staff, namely Jayne Thomas, into resigning". The dismissal was said to arise after issuing a final written warning on 22 August 2016 which is said itself followed 5 occasions on which the respondent alleged it had had to speak with the claimant about her offensive behaviour.

2.4. I also have the ground of appeal which suggests the basis for a dismissal went further than that pleaded to include conduct which, individually or cumulatively, amounted to repudiatory conduct. In particular, it refers to the claimant's interactions with Mr Weaver and others including the confrontational manner she dealt with Mr Weaver, along with her rude, abrupt or abrasive manner, the complaints made by others, issues over dishonestly claiming commission and dishonesty in respect of her discussions with Ms Thomas.

2.5. So far as I am able to in the absence of further submissions, I have considered all the areas in which I can discern the respondent could assert a breach of contract.

The Claimant's Submissions

2.6. Mr Bidnell-Edwards submits that there was no repudiatory breach of contract by the claimant at all but, if there was, any breach was historic and subsequently waived by the respondent and the contract affirmed.

2.7. He relies on an extract from Chitty on contracts 32nd edition. He submits that the facts giving rise to the breach must be fundamental and in general be sufficiently serious or "of a grave and weighty character". He provided the following extracts from Chitty:-

> **Misconduct**
> **40-184**
> Where the employee is guilty of sufficient misconduct in his or her capacity as an employee he or she may be dismissed summarily without notice and before the expiration of a fixed period of employment.[1265] Although the power of dismissal in these circumstances may be by virtue of an implied term in the contract,[1266] it is also possible to view it as a power to rescind the contract upon a repudiatory breach of contract committed by the employee.[1267]

There is no rule of law defining the degree of misconduct which will justify dismissal.[1268] The test to be applied must vary with the nature of the business and the position held by the employee,[1269] and reported cases are therefore only a general guide. The general rule is that if the employee does anything which is incompatible with the due or faithful[1270] discharge of his or her duty to his or her employer, he or she may be dismissed without notice[1271]; the employee's conduct need not be dishonest, since it is sufficient if it is *"conduct of such a grave and weighty character as to amount to a breach of the confidential relationship*"[1272] between employer and employee. So where a manager of a betting shop borrowed money from petty cash to place a bet in another betting shop, knowing that his employer would not have granted permission for this borrowing had he been asked, the employer was justified in dismissing him summarily, even though the manager put an IOU in the till, and was not surreptitious.[1273] On the other hand, even (conceded) gross negligence on the part of a senior social worker was held not to amount to "gross misconduct" meriting summary dismissal within the meaning of her contractual dismissal procedure

Waiver and estoppel
24-007
Affirmation is sometimes regarded as a species of waiver, the innocent party "waiving" his right to treat the contract as repudiated.[47] But the word "waiver" is used in the law in a variety of different senses and so bears "different meanings".[48] Two types of waiver are relevant here. The first type may be called "waiver by election" and waiver is here used to signify the "abandonment of a right which arises by virtue of a party making an election".[49] Thus it arises when a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them.[50] Affirmation is an example of such a waiver, since the innocent party elects or chooses to exercise his right to treat the contract as continuing and thereby abandons his inconsistent right to treat the contract as repudiated.[51]

2.8. He draws from my original reasons the findings that the relationship between the claimant and Mr Weaver became challenging which was caused, in part, by my conclusion that Mr Weaver's own management style at times bordered on feckless. He relies on my finding that the claimant was trying to engage in order to improve the business and that she was successful in the business. He reminds me that I found how the label of "bullying and harassment" was not one applied by the business itself at the time, that no action was taken and whatever the concerns, they did not displace the respondent's otherwise positive view of the claimant's contribution to the business. He reminds me that I concluded how the criticisms arose in hindsight, following the decision to terminate the claimant's employment.

2.9. For those reasons, he argues nothing done by the claimant in this workplace can be said to amount to repudiatory conduct.

2.10. In any event, the respondent was aware of the claimant's conduct and, if it did amount to repudiation, must by its subsequent actions have been prepared to waive it and affirm the continuation of the contract. In particular, he references the finding that as late as 25 August 2016 the respondent was seeking to persuade the claimant not to leave the business.

2.11. Finally, the claimant argues there is nothing arising from my findings concerning the Claimant's discussion with Mrs Thomas which is capable of amounting to a repudiatory breach of contract.

Discussion and Conclusions

2.12. The test in law is summarised in the extract provided by Mr Bidnell-Edwards. I did not have the benefit of the footnotes referred to in the appendix to his submission but I have re-referred myself to Harvey, Section A II, paragraph 520 onwards and the general test applied in **Neary v Dean of Westminster [1999] IRLR 288 SCD** summarised in the statement that:-

> *conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment*

2.13. I also have regard to the common law principal of affirmation in response to an otherwise repudiatory breach as stated in **WE Cox Toner (International) LTD v. Crook [1981] IRLR 443** to the effect that:-

> *The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end.*

2.14. Against those principals of law, I consider certain findings reached at the final hearing to be relevant to my considerations today. They are:-

a. Such difficulty as there was between the parties arose as much from Mr Weaver's inability to manage effectively, as any acts or omissions of the claimant.
b. Those issues did not lead to warnings, whether formal or otherwise.
c. The assertion that a final warning was issued by the employer, was rejected. However, the fact that the respondent advanced a case that those earlier matters were said have warranted a warning is itself, potentially, instructive on whether they amount to gross misconduct. Clearly, the employer did not think so at that time.
d. I found the discussion with Jayne Thomas to be of a different nature and character to that portrayed by the respondent. Ms Thomas had a close social relationship with the claimant and it was in that context that the discussion took place and it was not an attempt to persuade Ms Thomas to resign, merely an expression that as she was not meeting making sales and not particularly enjoying the work, she ought to consider alternatives before a decision is made for her. The claimant was attuned to what was needed in the business and what Mr Weaver's view of the staff were. I do not accept that there was anything in it for the claimant to express a view to Ms Thomas of her prospects that she did not genuinely believe was the case. I am not satisfied that the respondent established any evidence of dishonesty in that respect.
e. The claimant's skills and abilities were such that she was successful in her field. The respondent recognised her success and until shortly before the decision to dismiss, wanted to keep her. The very same elements of her sometimes difficult personal characteristics, were also part of the reason for her success.
f. A matter of weeks prior to the dismissal, one heated exchange was described by Mr Weaver as arising from an attempt by him to persuade the claimant not to leave the business.

2.15. My analysis of the respondent's case proceeds in the absence of further submissions and, therefore, on the basis of how I understand it on what I have before me. Firstly, I do not accept that the respondent established that there was any fraud or dishonesty on the part of the claimant in the way commission or bonus payments were applied to her income as opposed to that of other employees. It is a serious allegation which requires cogent evidence and, frankly, if it was uppermost in the employer's thought process one would have expected it to have featured front and centre in the reasons advanced. There simply wasn't the evidence before me to establish that on any objective basis.

2.16. The circumstances of Mr Paine's short spell in the business do not point to any misconduct on the part of the claimant sufficient to warrant any disciplinary sanction or establish any misconduct, still less conduct sufficient to amount to a repudiatory breach. Mr Paine clearly had an opinion of the claimant which he shared after the event. That opinion is the high point in the evidence but my original findings were that he was not meeting the expected standards, that he had little contact with the claimant and that Mr Weaver himself had realised the error of appointing him within a day of him starting. Mr Weaver did not challenge the claimant on Mr Paine's assertion that "he could not work with the claimant", because he must have not accepted there was anything in that assertion. In fact, my findings were that rather than challenge the claimant, Mr Weaver confided in her about his own view of Mr Paine's failings and they shared a common view. It may be that the limited interactions the claimant had with Mr Paine was influenced by that view and explain why Mr Paine viewed her in the way he did. All I need to be satisfied of is whether there is evidence of conduct on the part of the claimant that could amount to gross misconduct. I am not satisfied there was.

2.17. Of the disagreements that had taken place in the past involving the claimant, none had led to any form of sanction. The employment relationship had continued and had done so in terms that it was clear the claimant was a valuable asset to the business and was viewed as such. The respondent wanted to keep her until the discussion on 20 September. I am satisfied that it must have been the case that the subject of discussion with the staff on the day Mr Weaver decided to terminate the claimant's employment referred to matters that were already in the knowledge of Mr Weaver and not only which had not previously led to any action but which had led to the relationship being confirmed. The only new matter was the discussion with Ms Thomas.

2.18. I have sought to consider all the possible elements of the respondent's case on repudiatory breach. My conclusion is that the evidence does not establish conduct on the part of the claimant which was of sufficient nature or quality to amount to a repudiatory breach. It is possible that the manner in which the claimant had engaged with Mr Weaver could have been sufficient to amount to misconduct short of repudiation. However, I am not satisfied that her conduct could be properly described as more than that but, even if it was, it is clear that the employer elected to continue the employment relationship thereafter. Such breach as there might have been was waived and the contract affirmed. There could be no greater affirmation than attempts to persuade an employee to stay in the business. The subsequent new matter of discovering the conversation with Ms Thomas was not sufficient to amount to a repudiatory breach.

2.19. The effect of my conclusion is, therefore, that the claimant was dismissed summarily in breach of contract. Whilst her contractual period of notice may be

longer, she is entitled to rely on the effect of s.97(2) ERA to add the one week's statutory notice due under s.86 to her period of service. Section 86(6) is not engaged to remove that. At the actual effective date of date of termination she was, therefore, deemed to have the necessary 2 years' qualifying service to engage the tribunal's jurisdiction.

3. Question 2 – Just and Equitable reduction in compensation

3.1. This second question relates to the application of **Polkey v AE Dayton Services Limited [1988] A.C. 344** and how it informs the principle of justice and equity enshrined in the statutory measure of compensation within s.123 ERA. By that, a tribunal setting just and equitable compensation is to take into account any relevant circumstances from which it may properly be said that, but for the unfair dismissal, the employment would have come to an end fairly in any event. One element is in respect of the procedure adopted where it gives rise to the basis of the unfairness. The tribunal and the parties are at one that that does not apply in this case. That, however, is only one basis on which the principle may engage and it may lead to a chance of future termination or a point in time after dismissal when it could be said that the employment would in any event have ended.

The Respondent's Submissions

3.2. By its ground of appeal, the respondent submits that the tribunal should consider whether a system of warnings, a disciplinary hearing or so on could have led to the chance of her dismissal at some later date. In any event, it submits that the tribunal should consider the chance that, absent the dismissal, the claimant would have resigned at some later date to take on other employment.

The Claimant's Submissions

3.3. Mr Bidnell-Edwards accepts this is not a case where the narrow application of Polkey applies in respect of the procedure actually adopted. He accepts it is a question of considering what would have happened but for the dismissal. He submits simply that I should conclude that the employment relationship would have continued and the respondent would have continued to value the claimant's ability to make money for it.

Discussion and Conclusion

3.4. There is clearly a range of situations that may engage Polkey principles, and section 123, in various degrees of what are sometimes called the narrow or wider principle of Polkey. My task is simply to make a broad-brush assessment about what might have happened in a hypothetical situation which, for obvious reasons, never in fact transpired. (see ***Croydon Health Services v Beatt [2017] IRLR 748***).

3.5. My observation in paragraph 7.14 of the original judgment that this narrow principle did not apply was not intended to reflect the entirety of my consideration of the Polkey principle. I rejected there being any basis for a narrow Polkey reduction on procedural grounds. The unfairness was not based on procedure alone but the substance of the reasoning. I did, however, have in mind that there should in any event be a limitation on the claimant's losses irrespective of her attempts to mitigate her loss arising from the wider application of Polkey. In paragraph 7.24 of the original judgment, where I limited future losses, I said how:-

> *I am reinforced in the decision to limit future loss as the evidence does show that the claimant was herself dissatisfied with her relationship with her employer and had begun to make job applications by August 2016, some weeks before her dismissal. Had the dismissal not occurred, I have no reason to think that she would not have continued to look elsewhere for employment and, on balance, would have contemplated alternative employment with this level of pay.*

3.6. I was of the view that the wider Polkey principal applied and had that in mind at the time of setting just and equitable compensation. I had in mind that had the actual events surrounding the dismissal not in fact happened as they did, the relationship would nevertheless have come to an end by the time I set as limiting future loss. Whilst that is what I had in mind, my reasoning does not make clear that had the claimant not obtained the position at Hays, the respondent's liability for her losses would in any event have ceased at a certain point in time. Nor does it state any chance of that event occurring.

3.7. The conclusions of the E.A.T now require me to revisit the question of just and equitable compensation within the principles of Polkey and to consider whether what I had in mind at the time remains an appropriate assessment of justice and equity or a different conclusion reached.

3.8. In the absence of further submissions from the respondent, I approach that question on the two bases that appear in the grounds of appeal. The first is the chances of a fair dismissal occurring at some point after the actual dismissal by use of disciplinary warnings or hearings. The second is whether the claimant's employment would, in any event, have come to an end for some other reason, in particular her voluntary resignation. Both require me to draw from the evidence such facts as there may be which can properly inform those questions.

3.9. In respect of the possibility of a subsequent fair dismissal this is not a hypothetical situation but an assessment of the actual employer dismissing the actual employee. It is therefore heavily informed by the circumstances of the employment and the facts found. I see significant weight in the fact that this was an employer with very basic employment systems, little in the way of documented procedures and no real experience of people management. The past examples of Mr Weaver's people management do not give confidence that any process that could have been adopted would have led to a fair dismissal or be handled in any better manner. It is my conclusion, therefore, that in the circumstances of this case it is not just or equitable to reduce compensation on the basis of there being any chance of a subsequent fair dismissal. One fact that might make a difference to that is the possibility that the employer might have had sufficient insight to recognise its own deficiencies in people management and to seek competent professional advice to assist it in a disciplinary process. Having considered that, I cannot say that has any greater prospect. The employer did not take that step when it contemplated dismissing the claimant when it did and there is nothing to suggest if that step was not taken then, it would have been taken if the same question arose subsequently. Moreover, the underlying issues did not provide a basis for a fair dismissal whatever process was adopted. Any improvement on the process adopted could only serve to provide opportunity for a response which would illustrate to any reasonable employer why it was that dismissal was not within the range of reasonable responses. Any warnings issued were likely to be heeded and only reinforce the decision to leave voluntarily. They would not, however, have any effect to accelerate a decision which was already set. Overall,

there is no realistic basis for saying matters could or would be handled any differently than they were in September 2017 and I am not persuaded that there is a basis for a finding of a chance of a subsequent fair dismissal so as to make it just and equitable to reduce compensation.

3.10. However, there is force in the respondent's alternative position set out in the grounds of appeal, that the claimant was in any event looking for alternative employment and was likely to have voluntarily resigned at some point in the future. That was my conclusion at the time. The question is, whether there is any basis for arriving at a conclusion that it would have happened sooner than the back end of July 2017. In assessing that chance I regard the following factors as important:-

> a. That if she had remained in employment, the claimant was likely to be more selective in which jobs she applied for, than she was forced to be when unemployed. In other words, after being dismissed she has applied for all potential posts which necessarily includes posts in less suitable arears of work, less suitable geographic areas and at lower salary levels than she would have, had she remained in employment.
> b. Conversely, it follows she will have applied for all potential vacancies that would otherwise have applied for had she remained in employment.
> c. I therefore infer that since her dismissal there have not been any posts advertised or available that she would have applied for had she remained in employment, but which she has not in fact applied for.

3.11. The actual posts that have become available and which have been applied for give a useful measure to what might have happened in the alternative scenario. I am not persuaded that if the claimant had remained in employment, there was any realistic chance she would have voluntarily applied for the post at TNT. I made findings that there were differences in the role that did not fit the claimant's particular skill set and I conclude, on balance, this post would not have led her to resign in favour of it. Similarly, whilst the post at Interactive Recruitment was a more appropriate fit for her skills and experience it was for a specific purpose and therefore temporary. I am not satisfied that the dissatisfaction with her role at the respondent was such that she would have resigned from it in order to take up a temporary role.

3.12. The role with Hays was both a suitable fit for the claimant and at a suitable salary level. Indeed, I was satisfied in my original judgment that the slight reduction in income, earning not less than about 80% of her old salary, was enough to outweigh the dissatisfaction with working for the respondent. However, whilst the findings were that this post was subsequently likely to become permanent, I am not satisfied that the claimant would have resigned to take up what was initially only a temporary position. Having said that, this post does not seem to have had the clearly fixed purpose that the temporary post at Interactive Recruitment had.

3.13. The factors I have considered so far present little reason to deviate from my original conclusion. There is, however, a further significant factor which I cannot ignore and which does cause me to reflect on how just and equitable compensation is set. It is the simple fact that in the alternative scenario the claimant would be applying for posts from a position of employment, rather than unemployment, which has to improve one's opportunity in the market place, particularly in terms of posts being on a permanent basis. That state of affairs manifests in networking opportunities, head hunting and in a greater negotiating position and in a real

possibility of permanent opportunities arising that may not be made available to the public at large.

3.14. I have come to the conclusion that this is a chance that should be reflected in the compensatory award although I cannot say it presents as a significant chance against the background of what did in fact happen. It is also true to say it is a chance that was taken away by the unfair dismissal. I see no basis to say with confidence that a resignation *would* have happened sooner arising only from the applications and opportunities that did in fact present themselves and cannot therefore identify a date by which the employment would in any event have ended. I do, however, see a *chance* that it *could* have happened sooner and it is therefore just and equitable to reflect that chance in a percentage reduction to the compensatory award. It is a small chance but one which needs reflecting. I reduce the compensatory award by 20% to reflect that chance.

4. The Resulting Revised Compensation Calculation

4.1. The total compensation awarded in the original judgment has to be redrawn as follows.

4.2. My conclusions in respect of the uplift under s.207A and the reduction in respect of contributory conduct remain as before. I note, however, that the notional award for loss of statutory awards in the sum of £450 was not made subject to those adjustments. That must be remedied in the interests of justice and I take this opportunity to reconsider that element of the award of my own motion.

4.3. The basic award therefore remains at £1,077.75.

4.4. The compensatory award for immediate financial losses originally set at £5,349.89 must now be reduced by a further 20% to reflect the chance that the employment would have ended sooner. The figure then becomes £4,279.91.

4.5. The notional award for loss of statutory rights in the sum of £450 must now be adjusted in all respects. The effect of all three adjustments made, in order, results in a figure of £337.50 (£450 + 25% - 25% - 20%).

4.6. Future financial loss of £806.70 must now be reduced by 20% to reflect the chance that the employment would have ended sooner. The figure then becomes £645.36.

4.7. The total figure of basic and compensatory award to be paid to the claimant now results in a figure of £6,340.52.

5. Costs

5.1. At the time of the original decision, an order was made for the respondent to pay costs in respect of fees paid by the claimant. Since then, the fees regime has been held ultra vires and no longer applies. An administrative scheme has been established to provide for the repayment of fees either by the party who originally paid them, or the party who was subsequently ordered to, and did, pay them. I do not know whether that order was complied with or whether either party has subsequently obtained a refund and it is my intention to ensure that neither party is either left out of pocket in respect of fees or double recovers. For that reason, I

make no further order in that respect and the original order made at the time it was in force remains.

_____

Employment Judge R J Clark

Date 15 January 2019

REASONS SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNAL OFFICE