



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Michael Miller

**Respondent:** Rajeev Atchuthananthan t/a Swallow Filling Station

**Heard at:** North Shields **On:** 23 July 2018

**Before:** Employment Judge Beever sitting alone

***Representation:***

**Claimant:** In person

**Respondent:** Mr P Maratos (Consultant)

## RESERVED REASONS ON RECONSIDERATION AND REMEDY

1. The parties attended the tribunal on 23 July 2018. The Claimant appeared in person as he had done at the earlier liability hearing. Mr Maratos was acting for the Respondent in place of Ms Halsall who had appeared at the liability hearing.
2. The tribunal had sent a decision on liability to the parties on 16 April 2018. In it, the Claimant's application for unfair dismissal succeeded. His compensatory award reduced by 100% on Polkey principles. His wrongful dismissal claim succeeded. His holiday pay claim was dismissed on withdrawal. The tribunal directed the listing of a remedy hearing.
3. The Respondent applied for a reconsideration on 30 April 2018. There were two grounds:
  - 3.1. the finding of an entitlement to 12 weeks' notice pay ought to have been subject to the application of the Polkey principles and reduced accordingly to the extent that a different but fair process would have meant a fair dismissal in any event, and
  - 3.2. the tribunal ought to have, but has not, made a finding to adjust the basic award under s.122/s.123 in respect of the conduct issues. The tribunal had looked at contributory fault in connection with correspondence but

had not done so in respect of the conduct issues and must do so even without submissions.

4. A Notice of Hearing dated 27 June 2018 informed the parties that the reconsideration application would be dealt with at the remedy hearing listed for 23 July 2018.

#### Reconsideration

5. The application is not seeking to revoke the finding of liability. That must stand. The application instead focuses on tribunal's assessment of the remedy in the context of whether the actual or provisional remedy should fall to be discounted.
6. The application to reconsider is made in time. Rule 70 of the 2013 Rules applies and a tribunal may on the application of a party reconsider any judgement where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked.
7. The first ground contends for a reduction in any wrongful dismissal award. It could properly be said that the opportunity to argue that the wrongful dismissal award can further be discounted is an argument that remains available to the Respondent to adopt during the course of the remedy hearing in any event. It should be noted that the tribunal's finding as to the calculation of the claim, in paragraph 86 of its liability decision, took the form of "provisional observations". See paragraph 84 of the liability decision.
8. The second ground relates to the argument for a reduction on the basic award. The tribunal had expressly dealt with the basic and compensatory awards in connection with the "correspondence" issue. That was consistent with how the matter was put forward by Ms Halsall on the previous occasion. The Respondent seeks to argue that the tribunal should also now deal with the basic award in connection with conduct issues. It might be said that the Respondent had its opportunity last time but, equally it would be forcibly argued by the Respondent that on a somewhat unusual 100% Polkey case, the Respondent should be entitled to make further submissions and to explore the extent to which the 100% finding impacts on contribution arguments at a remedy hearing; and that is so regardless of whether or not specifically raised at the liability hearing.
9. The Claimant has raised no objections. The tribunal is satisfied that it is in the interests of justice to deal with these two matters raised by the Respondent which also go directly to remedy in any event.

#### Reconsideration - Ground 1:

10. The Respondent contends that the Claimant's entitlement to 12 weeks' pay based on notice pay should be subject to a discount because the tribunal should determine whether and if so to what extent a different and fair process would have resulted in a fair dismissal. The Respondent contends that this is an application of the Polkey principles.

11. A legal analysis of the contractual claim is required: an employee is entitled to be given notice of his dismissal in accordance with the terms of his contract unless he has committed gross misconduct in which case dismissal can usually be effected summarily. Where a claimant has been dismissed without the appropriate contractual notice, the claimant is entitled to claim the damages which are the equivalent to wages he would have earned between the time of the actual termination and the time at which the contract might lawfully have been terminated.
12. In this case, the tribunal has found (paragraph 82 of its liability decision) that it is not satisfied that the Claimant actually committed a repudiatory breach of contract. It was for that reason that the contract claim was upheld. The application to reconsider does not seek to go behind that finding. The finding of a wrongful dismissal must therefore inevitably still stand.
13. The Respondent now argues that given the finding on Polkey, any wrongful dismissal award should be reduced by reference to the likelihood that a fair dismissal would have taken place. This is perhaps an understandable point to take given the unusual 100% Polkey finding.
14. This ground is rejected by the tribunal. The Polkey finding is an application of the principle that compensation should be just and equitable pursuant to the statutory basis of unfair dismissal. Its place is in dealing with compensatory awards pursuant to s.123 ERA. It has no application to a claim for wrongful dismissal which is a claim based in contract.
15. The Respondent has developed orally further submission that a contract claim can be susceptible to a finding of contributory negligence, a reference perhaps to the – a reference perhaps to the Law Reform (Contributory Negligence) Act 1945 - the negligent relied on being the act of taking the stock without paying for it.
16. The tribunal was willing to consider the expanded version of the application which was put orally by Mr Maratos this morning. The tribunal reviewed the facts as it found them to be in the liability decision and in particular its finding, and Paragraph 79 of the liability decision, that the Claimant did not dispute taking the goods from shelf, and at Paragraph 80 of the liability decision, the Claimant's understanding that damaged stock could be taken. The tribunal made no finding that the Claimant knew he should not be taking damaged stock.
17. What is the act complained of, which might amount to negligence? In the present case, the tribunal has not made a finding that the Claimant was careless in taking damaged goods. There was no written procedure to deal with it; the tribunal saw very little evidence of any alternative process relating to damaged stock. There is insufficient evidence for a finding on a balance of probabilities that the Claimant was in fact negligent to an extent that it would be appropriate to consider the application of contributory negligence. The Respondent's argument fails on the facts.
18. The difficulty for the Respondent is also that the Claimant is entitled to notice pay absent gross misconduct. Even if a fair process were followed, a fair dismissal on the facts of this case would have taken place but on the facts

before the tribunal there is no finding of repudiatory breach. Accordingly, the Claimant would remain entitled to his notice pay.

19. On the first ground of reconsideration of the liability decision, the tribunal refuses the application. To the extent that it needs to, the tribunal confirms the liability decision. The Claimant is entitled to notice pay as compensation for his wrongful dismissal claim.

#### Reconsideration - Ground 2

20. The tribunal made no finding in relation to adjustments to the basic award in respect of conduct issues. By, s.122(2), “where a tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly”.
21. The test is different from that which is applicable for a compensatory award calculation and accordingly different methods of calculation can mean that an adjusted figure relating to contributory conduct can be different for the basic award compared with any compensatory award.
22. Notwithstanding any differences, the essential enquiry is that the conduct must be culpable or blameworthy. In terms of the “basic award” calculations, there is no requirement (as there is in compensatory awards) for such conduct to cause or contribute to the claimant’s dismissal.
23. The tribunal has at the forefront of its mind its finding that a fair dismissal was inevitable, and for that reason any compensatory award would fall to be reduced by 100%. The tribunal is particularly mindful of the attraction of the argument that a 100% Polkey deduction is liable to flow through both to compensatory and basic award calculations.
24. The tribunal is especially mindful of the overall need to ensure that a claimant is properly compensated and is not penalised twice for the same conduct. See *Lenlyn UK v Kumar* UKEAT/0108/16 and *Granchester Construction (Eastern) v Attrill* UKEAT/0327/12, the latter which deals with the interaction of Polkey principles and the Basic award: it provides useful guidance which identifies that the process of calculation of a compensatory award is potentially subject to a reduction to take account of the chance that there would have been no loss at all because a dismissal might have been effected which was fair. But however that such reasoning is likely to be irrelevant where what is in issue is the basic award which is not normally affected by Polkey deduction. But however also paragraph 19 of *Attrill* should be read in full.
25. This is a point of some significance and it is appropriate and in the interests of justice that the tribunal deals with this point head on. Thus, the tribunal is dealing with this point as a ground of the application to reconsider the liability decision and in any event a part of the remedy hearing and decision.

26. The Claimant took stock without paying for it. There was no established process for doing so and the Claimant himself acknowledged (Paragraph 17-18 of the liability decision) that there had been a single occasion only when Mr Atchuthananthan said he could take damaged stock. This was not the same as having a clear or established process. The evidence was that his colleague Mr Tuke believed that what the Claimant did was the wrong thing to do. The Claimant's employer honestly believed the Claimant to be guilty of gross misconduct in so doing. Were it not for the deficiencies in the investigation process, the tribunal has found that it was 100% likely that the Respondent would have terminated the Claimant's employment fairly.
27. Being now faced with a scenario that the Claimant had no loss at all and that no compensatory award for financial loss is due to the Claimant, the Respondent argues that it would be just and equitable to reduce the basic award.
28. The tribunal has considered this carefully. It concludes that the Claimant's conduct in appropriating stock without reference to his employer – albeit not dishonest – was conduct that was blameworthy and which exposed the Claimant to suspicion especially in the light of the evidence of his colleague, Mr Tuke, which tribunal accepted (at Paragraph 16 of its liability decision) that stock should have been placed for Mr Atchuthananthan to decide what to do. The tribunal also notes that the Claimant had not been allowed the proper opportunity to put forward his version of events prior to his dismissal and has asserted that he was left with a sense of grievance. The tribunal reminds itself that the Claimant's dismissal was unfair.
29. The tribunal accepts the Respondent's submissions that the conduct of the Claimant amounts to conduct that is relevant for the purposes of s.122(2) ERA. Additionally, the scenario in which the Claimant has had no loss at all by the statutory measure of just and equitable compensation is a material feature: equally the tribunal reminded itself that as part of the question of whether it is just and equitable to make a reduction, it must have in mind the need to avoid the risk of a Claimant being penalised twice for the same conduct.
30. It is just and equitable to reduce the amount of the Basic Award. In all the circumstances, the tribunal considers that it is just and equitable to reduce the Basic Award by 50% and accordingly does so in the remedy section below.

### Remedy

31. First, as to Wrongful Dismissal, the parties are agreed as to calculation, being based on the Claimant's notice pay, at 12 weeks' net pay. The figure now agreed between the parties as net weekly pay is £250.77 (a figure consistent with the ET1): multiplied by 12, the total amount is £3009.77.
32. As for loss of statutory rights, the tribunal adopts a conventional sum, which this tribunal routinely applies, of £350.
33. As for the basic award:

33.1. The Multiplier: - with 13 complete years of service, all of which being over 41y (dob 8/3/57), the Claimant is entitled to a factor of 1.5 for each year of service:  $13 \times 1.5 = 19.5$

33.2. The relevant amount for the Claimant's gross pay was agreed between the parties (and consistent with the ET1) at £279.14

33.3. The sub-total position is  $19.5 \times £279.14$ , amounting to 5443.23

33.4. The application of a 50% reduction results in a net figure of £2,721.61.

34. The tribunal makes its award accordingly:

34.1. Basic Award - £2,721.61

34.2. Compensatory Award (Loss of Statutory Rights) - £350

34.3. Wrongful Dismissal - £3,009.24.

---

**Employment Judge Beever**

**Date of signature** 21 August 2018

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.