EMPLOYMENT TRIBUNALS

Claimant: **Mr J Butcher**

Respondent: **The Yarmouth (Isle of Wight) Harbour Commissioners**

Heard at: **in Chambers** **On: 24 July 2019**

Before: Employment Judge Maxwell

JUDGMENT

1. The Respondent's application for a reconsideration is granted.

2. Paragraph 2 of the Reserved Judgment dated 15 May 2019 (sent to the parties on 21 May 2019) is varied as set out below:

    2.1. the Claimant's compensatory award will be reduced by 80% to reflect the prospect he would have been fairly dismissed in any event;

    2.2. the Claimant's compensatory award will be further reduced by 25% to reflect his contributory conduct;

    2.3. The Claimant's basic award will be reduced by 85% to reflect his contributory conduct.

REASONS

3. Reserved judgment in this matter was sent to the parties on 21 May 2019.

Respondent's Application

4. By a letter of 31 May 2019, attached to an email of the same date, the Respondent applied for a reconsideration:

> **The respondent believes that it is necessary for the judgement to be reconsidered because there has been in error relation to paragraph 38 of that judgement in that Employment Judge Maxwell has proceeded on the basis that the respondent did not content for Polkey reduction, in addition to a reduction for contributory fault, when Polkey was specifically raised in both the respondent's oral and written submissions to the tribunal (as attached). In accordance with rule 70 of the ET rules, it would therefore be in the interests of justice to vary/reconsider the judgement so that it addresses the Polkey point raised and by giving appropriate consideration to a reduction in compensation to reflect the likelihood of a fair dismissal in any event.**
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> **We further consider that making the order requested will be in accordance with the overriding objective because it is clear, from Employment Judge Maxwell's findings, that a Polkey reduction is likely to have been applied had the submissions in this regard been properly considered, and there is likely to be a significant saving of expense in terms of the need for the parties to attend the remedy hearing that has been listed for 1 August 2019 if the issue is resolved. It is averred that there would be no prejudice to the claimant's position insofar as the claimant has already had the opportunity to deal with any necessary submissions in respect of this issue at the original hearing. This matter could, therefore, be dealt with without the need for hearing.**

5. The Respondent's application attached written submissions (as provided at the hearing), paragraph 11 of which sought a **Polkey** reduction. The application also included the Respondent's notes of closing submissions, the relevant part of which is:

> **"Polkey - 100% contribution. Entirely of his own doing."**

Claimant's Response

6. Further to the Tribunal indicating it did not consider the Respondent's application to have no reasonable prospect of success, by an email of 15 July 2019 the Claimant provided detailed written submissions. The Claimant accepts the Respondent did seek a **Polkey** reduction and, therefore, the judgment falls to be reconsidered. The Claimant maintains, however, the cumulative effect of any **Polkey** adjustment and finding of contributory fault should not exceed 85%.

Law

Reconsideration

7. With respect to reconsideration applications, schedule to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides:

> **70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.**
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> **Application**
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> **71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.**
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> **Process**
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> **72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.**
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> **(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.**
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> **(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct**

that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

8. Rule 70 allows for the reconsideration of a judgment where it is in the interests of justice to do so. There is, however, no automatic right for a party to re-argue a claim which has failed. Almost every disappointed litigant would say they believed their case ought to be reconsidered, but it does not follow that such a course of action will be in the interests of justice.

9. The extent of the discretion in this regard was considered by the EAT in **Newcastle upon Tyne City Council v Marsden [2010] ICR 743**, per Underhill P:

> **16 Williams v Ferrosan Ltd and Sodexho Ltd v Gibbons clearly show that the extensive case law in relation to rule 34(3)(e) and its predecessors should not be regarded as requiring tribunals when considering applications under that head to apply particular, and restrictive, formulae—such as the "exceptionality" and "procedural mishap" tests which were understood to be prescribed by DG Moncrieff (Farmers) Ltd and Trimble. I would not in any way question that approach or the general message of both decisions. There is in this field as in others a tendency—often denounced but seemingly ineradicable—for broad statutory discretions to become gradually so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires in the particular case. Thus a periodic scraping of the keel is desirable. (The exercise would indeed have been justifiable even apart from the introduction of the overriding objective. It is not as if the principles of the overriding objective were unknown prior to their explicit incorporation in the Rules in 2001: rule 34(3)(e) itself is based squarely on the interests of justice. But I can see why its introduction has commended itself to judges of this tribunal as a useful hook on which to hang an apparent departure from a long stream of previous authority.)**
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> **17 But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in Jurkowska v Hlmad Ltd [2008] ICR 841, para 19 it is "basic"**
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> > **"that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."**
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> **The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation—or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that**

> **it is unjust to give the losing party a second bite of the cherry—seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal). Likewise, I respectfully endorse, for the reasons which he gives, the strong note of caution expressed by Mummery J in Lindsay about entertaining a review on the basis of alleged errors on the part of a representative. Lindsay was referred to in both Williams v Ferrosan Ltd and Sodexho Ltd v Gibbons , but Mummery J's observations on this aspect were not disapproved: at para 17 of his judgment in Williams (set out at para 14 above) Hooper J said only that the dangers to which Mummery J referred were of less concern on the facts of that particular case.**

Polkey

10. On well-established principles, a Tribunal may reduce the compensation payable to an unfairly dismissed claimant where there is a prospect they would have been fairly dismissed in any event; see **Polkey v AE Dayton Services Limited [1988] ICR 142 HL**.

11. The correct approach to determining whether a Polkey reduction is appropriate and the amount of the same was considered in **Software 2000 Limited v Andrews [2007] ICR 825 EAT**; per Elias P:

> **54. The following principles emerge from these cases. (1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too**

> **speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role. (6) The section 98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely. (7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it-the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2) ; (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615 ; (d) that employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.**

12. Whilst references to the (now repealed) statutory dismissal procedures can be ignored, **Software 2000** otherwise remains good law and the guidance within it is relevant to how a Tribunal should approach considering whether to make a reduction to reflect the prospect that a fair dismissal would have taken place in any event and if so in what amount.

Contributory Fault

13. Where a Tribunal is considering both **Polkey** and a reduction for contributory fault arising from the same or overlapping facts, care must be taken to ensure the claimant is not doubly punished; see **Lenlyn UK Limited v Kular [2016] UKEAT/0108/16/DM**, per Laing J:

> **81. The second issue arises because there is a significant overlap between the factors the ET took into account when making the Polkey deduction and when making the deduction for contributory fault. In my judgment the ET should have considered expressly, and did not, whether, in the light of that overlap, it was just and equitable to make a finding of contributory fault, and if so, what its amount should be. That overlap means that there is a real risk, which, I consider again, the ET did not take into account, that the Claimant was being penalised twice for the same conduct. I allow the cross-appeal on this point and remit this case for the ET to consider again, after it has reconsidered the Polkey issue, what deduction, if any, for contributory fault is just and equitable, in the light of that overlap.**

Analysis

Reconsideration

14. The Respondent's argument is that the Tribunal misunderstood its position and failed to consider whether a **Polkey** reduction should be made.

15. Mr Sheppard's written argument is clear and to the effect a **Polkey** reduction was sought. The Claimant has now confirmed it is agreed the Respondent did pursue such a reduction at the hearing. On this basis, it appears there was a misunderstanding by the Tribunal as to the Respondent's position. In the circumstances, it is in the interests of justice, within rule 70, that the original decision be reconsidered.

16. Both parties agree the application should be dealt with on paper and have made written representations. I am satisfied it is appropriate to proceed in that way.

Polkey

17. The finding of unfair dismissal rests upon a misunderstanding as between the dismissing and appeal officers as to the reason for dismissal. Put simply, the Claimant was not dismissed for dishonesty, but the appeal was decided as though he had been. The question which then arises is whether, in the event Ms Crampton-Thomas had correctly understood the (non-dishonest basis) upon which the Claimant was dismissed, she would still have upheld that decision and done so fairly.

18. Firstly, I must consider whether the assessment is so speculative that it is not a proper exercise to embark upon at all. Mr Blitz takes the point that Ms Crampton-Thomas did not address the true basis for dismissal in her evidence. Given, however, the clarification of Mr Stables' reasons and what he meant by 'discounting omission' was not obtained until he was cross-examined in these proceedings, it is unsurprising that Ms Crampton-Thomas did not comment upon it in her witness statement. Notwithstanding the absence of direct evidence from the witness as to what her decision would have been, given my findings about the seriousness of the Claimant's misconduct as set-out at paragraphs 30 to 34 of the reasons, there must have been a real prospect of her upholding the dismissal in such circumstances and it is appropriate that I assess the likelihood of the same.

19. Whilst the absence of direct evidence from Ms Crampton-Thomas on whether she would have dismissed if she had dealt with the Claimant on the basis he had not acted dishonestly does not prevent a proper assessment of the likelihood of a fair dismissal, it does not make it easy. As set out at paragraph 34 of the reasons, this is a case where some reasonable employers may have decided not to dismiss, because the Claimant was not acting dishonestly, he had no prior disciplinary history and tragic personal circumstances. On the other hand, some reasonable employers might

dismiss in these circumstances, deciding that even without a dishonest intent the Claimant had fallen very far short of what could properly be expected of him and the mitigation did not explain his actions.

20. Given this was a difficult case in which a proper argument can be made either way, for dismissing or not, I cannot say there was no chance of Ms Crampton-Thomas allowing the appeal. She put herself forward as acting independently, rather than toeing the line of her employer, and I accept that was her approach. On the other hand, she would not have intervened merely because her own view differed from that of Mr Stables, but rather only if she felt he had gone too far (in effect in a band of reasonable responses approach). In those circumstances, it is much more likely than not she would have rejected the appeal. Doing my best, I assess the likelihood of dismissal being fairly upheld at 80% and any compensation due to the Claimant should be reduced accordingly.

Contributory Fault

21. I repeat the observations at paragraphs 39 to 43.9 of the reasons and in the paragraph immediately thereafter (incorrectly numbered 24). The contributory fault was very substantial in this case.

ERA Section 123(6)

22. Before deciding whether it is just and equitable to make a further reduction under ERA section 122(6) and if so in what amount, I must take into account the factual overlap between the matters relevant in this regard and those already taken into account for **Polkey**.

23. The factual overlap in this regard is very nearly, if not entirely, complete. The risk of penalising the Claimant twice for the same conduct is obvious. Whilst his conduct was seriously blameworthy and this should, properly, be reflected in a further reduction, the amount of such a reduction must be substantially moderated in order to avoid a double punishment. In these circumstances I assess the appropriate reduction for contributory fault at 25%.

24. The sequence in which these reductions must be applied to any compensatory award is first **Polkey** and then contributory fault. The cumulative effect of these reductions, an 80% reduction followed by a 25% reduction, is an 85% reduction overall.

ERA Section 122

25. The **Polkey** reduction does not apply to the Claimant's basic award. I can, therefore, approach that matter without any risk of penalising the Claimant twice for the same misconduct.

26. In such circumstances, I remain of the view that an 85% reduction is appropriate.

Variation

27. Paragraph 2 of the Reserved Judgment will be varied as set out below:

    27.1. the Claimant's compensatory award will be reduced by 80% to reflect the prospect he would have been fairly dismissed in any event;

    27.2. the Claimant's compensatory award will be further reduced by 25% to reflect his contributory conduct;

    27.3. The Claimant's basic award will be reduced by 85% to reflect his contributory conduct.

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Employment Judge Maxwell

Date: 24 July 2019

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