EMPLOYMENT TRIBUNALS

Claimant Miss K McGarr

Respondent: Equity Solutions Property Services Ltd

BEFORE: Employment Judge Little
Dr P C Langman
Mrs S Robinson

RECONSIDERATION JUDGMENT

The unanimous decision of the Tribunal is that:-

1. The respondent's application having been considered on its merits is refused.
2. For the avoidance of doubt the only deduction from compensation in due course should be in respect of contribution and not in respect of Polkey/just and equitable grounds.

REASONS

1. The respondent made an application in its solicitor's email of 21 February 2020. That was an application that the Tribunal should consider the Polkey issue and if need be reconsider its Judgment in the light of that consideration.
2. The claimant was invited to comment on that application and did so in her email of 4 March 2020.
3. The respondent invited the Tribunal to consider its application "on the papers" – that is without a further hearing. The claimant did not object to that proposal and the Tribunal considered it apt to proceed in that way.
4. The Tribunal accept that, in terms, they failed to specifically deal with the issue now under consideration when setting out the reasons for our Reserved

Judgment. Further we accept that although Polkey/just and equitable reduction did not feature in the draft list of issues which the Tribunal prepared and circulated to the parties at the beginning of the hearing, it was a matter raised by the respondent's counsel when that list of issues was being discussed. We accept that it was added to our list of issues in that way.

5. On that basis we accept that it is a matter that we now need to give specific consideration to. We might add that we did conclude in paragraph 9.4 of our written reasons that it would have been unlikely for a reasonable employer to have dismissed for a first offence – that is the claimant's conduct on 31 August 2018.

6. We should also add that the Polkey/just and equitable issue is not a matter dealt with in the respondent's written closing submissions and only a passing reference was made in Mr Lewinski's oral submissions. That was to the effect that we should take heed of Ms Sargison's evidence to the effect that after days of evidence in the Tribunal her view – that there were no grounds to uphold the claimant's appeal against dismissal - had not changed.

7. We consider that the emphasis which the respondent now seeks to place on the claimant's failure to accept that she was in the wrong is not the way in which this employer was looking at the matter at the time. As we have found, Mr Dwan's particular concern was what he referred to as 'defamatory' comments made by the claimant, the majority of which we have found to be qualifying protected disclosures.

8. In any event we consider that it is difficult to divorce what could be interpreted as a stubborn failure to acknowledge any fault from what might be described as the zeal of a whistle blower. Whilst in certain circumstances the former could be the basis for a fair dismissal the latter could only be so if the method or manner of blowing the whistle amounted in itself to serious misconduct. We find that that was manifestly not the case here.

9. We also of course need to bear in mind that we have assessed the claimant's contribution to her own dismissal at 30%. We consider that it would be illogical to equate that level of conduct with any likelihood of a dismissal sanction – let alone the 50% to 75% or more which the respondent now suggests. In our view a 30% contribution would equate to a sanction significantly short of dismissal such as a warning – possibly a first written warning. We also bear in mind that, without we hope unfairly paraphrasing Mr Dwan's evidence, his intended sanction would have been docking half a day's pay until the claimant started to "defame" colleagues and the respondent.

10. We note that towards the foot at page 2 of the respondent's written application of 21 February 2020 an exchange between Mr Dwan and the Employment Judge is set out. The Tribunal take the view that the emphasis which Mr Dwan sought to give to the not accepting fault issue is in marked contrast to the views he expressed at some length in the deliberations document and in the dismissal letter. We take the view that we have to make the assessment on the basis of

whether it was possible or probable that a fair employer would have dismissed for non-protected disclosure related reasons. The unanimous judgment of the Tribunal is that there was no reasonable likelihood that an employer would dismiss in the circumstances.

Employment Judge Little
Date 20th March 2020