EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Chowdhury	**v**	**Marsh Farm Futures**

Heard at: Watford by CVP **On**: 24-25 November 2020

Before: Employment Judge R Lewis
Members: Ms S Johnstone
Mr R White

Appearances

For the Claimant: In person
For the Respondent: Ms S Clarke, Counsel

JUDGMENT

1. The claimant's application for recusal by this tribunal is refused.

2. The claimant's application to introduce fresh evidence is refused.

3. If a fair procedure had been followed:

    3.1. Completion of the procedure would have taken two (2) months and the claimant's employment would have been extended by that period;

    3.2. On conclusion of the procedure, the probability of the claimant's fair dismissal is 100%.

4. For the purposes of both basic award and compensatory award, the claimant contributed to his dismissal by a factor of 100%, and both awards are entirely extinguished.

REASONS

Introduction

1. The claimant asked for written reasons at the end of this hearing. Delay in sending them has arisen from administrative error, for which we apologise. We apologise that as a result the timetable in the accompanying case management order is tight.

2. In these reasons we refer to three previous judgments or orders. This tribunal's judgment on liability, sent in May 2018, is referred to as LJ (so LJ21 is paragraph 21 in that judgment). The claimant's appeal was heard at the EAT on 14 January 2020 (UK EAT/0205/19). The EAT substituted a finding of unfair dismissal for fair dismissal and remitted questions of remedy. (Reference to EAT22 is to paragraph 22 of the judgment of the EAT). The present judge conducted a telephone preliminary hearing for case management on 23 June 2020. This listing was given then. The tribunal's order, sent a few days after the hearing, set out a timetable for preparation. (A reference to CMO4 is to paragraph 4 of that order).

3. One member of the original tribunal which heard this case was unwell and therefore unable to participate. The Regional Judge appointed Ms Johnstone under Regulation 9 as his substitute. In preparation for this hearing Ms Johnstone read the tribunal's judgment of 2018, the EAT judgement of 2019, and the case management order of June 2020.

Chronology of this hearing

4. On 23 November the claimant informed the tribunal that he was unwell and unable to attend. He attached medical information which did not in fact confirm that he would be unwell at the date set for this hearing. At very short notice the hearing was converted to be conducted by CVP the following morning. However, the lateness of this development had the practical consequence that the tribunal did not have the paper bundles prepared in accordance with the order of June 2020, and we were told there were practical difficulties in converting them to PDF use.

5. The tribunal convened by CVP on the morning of Tuesday 24 November. The Judge was in the tribunal venue at Watford and each member worked from home. Due to connectivity problems, the hearing started late, a matter for which we record our apologies to the parties.

6. The claimant confirmed that he was well enough to proceed. After introductions and clarification, the tribunal dealt first with the claimant's application that the tribunal recuse. He had written to the Regional Employment Judge to ask that this hearing be conducted by a fresh panel, and been advised to apply to the full tribunal at the start of the hearing. Ms Clarke opposed the application. We gave judgment and declined to recuse.

7. The second step was to decide on the claimant's application to introduce fresh evidence. We asked for the assistance of the parties in how we could deal with this remotely and without access to the paper bundle.

8. Unfortunately, this opened up a satellite disagreement about preparation and composition of the bundle. The disagreement was regrettably reminiscent of the problems set out at LJ36 to 48 inclusive, which the present judge had tried to avert at the June telephone hearing and subsequent order.

9. We hoped to have had in concise and accessible format a submission on fresh evidence, and indeed the evidence itself to consider. Ms Clarke told us that the bundle included many documents which had been in the 2018 bundles, but she was unable to say with certainty if it included any item that was not before us in 2018. The claimant could not clarify this either. That was a disappointing failure, given the apparent importance to him of the point, and the time available since June 2020 for preparation for this hearing.

10. The claimant later asked the tribunal how could the respondent "get away with" failing to provide a bundle for this hearing, and, in his view, failing to provide a fully legible bundle. Ms Clarke replied that the bundle consisted in its entirety, or near entirety, of submissions from the claimant and herself (which we had had); Mr Rafi's evidence on re-employment (which we did not reach); and that the remainder of the bundle consisted of emails at work in the period 2013 to 2016. As this material could not be relevant to the remitted issue, it did not seem to us that any further point turned on it.

11. We were however told that the bundle included four statements from the claimant. While it could not be said that any one of them was confined to the issue of fresh evidence, or even dealt with that issue, we asked to be emailed these documents, and adjourned to read them. Our intention in doing so was that these documents might summarise, include or otherwise identify the fresh evidence which the claimant asked to introduce.

12. The four statements were:

    12.1 A 6-page document called "Gross Misconduct points only",

    12.2 A 14-page document called "Remedy Statement",

    12.3 A 10-page document called "Remedy Statement",

    12.4 A 10-page document called "Remedy Statement for Re-engagement".

13. There was an adjournment which included an extended lunchbreak. We could not in our reading identify any new evidence or reference to any new document. When the hearing resumed therefore, we declined to admit new evidence and invited submissions on contribution and Polkey. We asked each party to speak for no more than 30 minutes, and asked Ms Clarke to speak first, so that the claimant, as litigant in person, could have the last word.

14. Ms Clarke's submission was concise. After she had finished, she emailed the tribunal submissions on contribution and Polkey, which she said had been sent to the claimant some months previously. The tribunal adjourned for some 35 minutes to enable the claimant to finalise his reply. The claimant replied for about some 40 minutes. The tribunal reserved judgment at the end of the day.

15. Before adjourning at the end of the first day, there were three further matters to note. First, the claimant said that he was suffering from covid 19. That was the first that the tribunal was told that the claimant was conducting this

case while unwell with covid 19. The medical certificate which he had submitted on 22 November appeared to indicate that he had had a positive test on 2 November and should self-isolate for another 10 days from start of symptoms (plainly a date on 1 November or earlier). The claimant had not said, and no document had confirmed, that he remained unwell on the date of this hearing.

16. Secondly, the claimant said that he recognised that he may have misunderstood the basis of this hearing: we return to that belated acknowledgment below. Thirdly, and in light of the claimant's submissions, the judge asked Ms Clarke to inform the tribunal at the start of the following day which of four individuals named in submission by the claimant remained in post with the respondent (Mr Davies, Chair; Mr Rafi, CEO; Mr Dubont, Facilities Manager; and Ms Okole, Administration Officer). She confirmed next day that Mr Davies remained a member of the Board, but was not Chair; and that the other three remain in the respondent's employment.

17. The tribunal met remotely at 9:45am on the second day. The public hearing resumed at 11am. The claimant confirmed that he was well enough to proceed. We gave judgment and an outline of the reasons.

18. We then proposed to adjourn the question of re-employment to a hearing in the new year, which we discuss below. We adjourned to enable the parties to consider, and after some further discussion adjourned.

Recusal

19. The claimant applied for the panel to stand down. We recognised the potential embarrassment of a member of the public who asks a tribunal to recuse. The claimant expressed himself entirely courteously, and he is not to be criticised for having made the application. Furthermore, he prefaced his application by stating that he accepted that he could have no objection to Ms Johnstone being a member of the panel in 2020, as she had not heard the 2018 proceedings. While that was generously said, we treated the application as an application that the entire panel stand down, so that it could not be said that two allegedly biased members had "contaminated" the third member.

20. The claimant's point was a brief one. He felt that he would not have justice from the 2018 panel. We understood his point to be two-fold, first his lack of confidence in the panel which had reached the conclusions which we did in 2018; and secondly his concern that the fact that he had made an allegation of bias might prejudice a panel against him. He expressed his concern that this issue (ie of a fresh panel) had not been raised or dealt with by the EAT.

21. The claimant mentioned his experience in audit work, and submitted that parallel principles of integrity and avoidance of bias or any appearance of a conflict of interest would apply to these proceedings.

22. In reply, Ms Clarke submitted that the fair minded informed observer would not form the view that this tribunal was biased. She pointed out, correctly,

that it is commonplace practice for successful appeals to be remitted to the original tribunal, which is of course duty-bound to accept any criticism and correction which may be made by the EAT.

23. The correct approach, as Ms Clarke indicated, is to disregard the subjective feeling of a party, no matter how sincere or profound. The correct approach is to ask whether the reasonable observer, viewing the matter independently and objectively, and with full knowledge of all the facts (including having read in their entirety and understood all previous judgments and orders of this tribunal and the EAT) would consider that a fair trial might not take place.

24. The claimant's difficulty, when the matter was looked at from that perspective, was that at the EAT he had had representation from respected specialist counsel and solicitors. The appeal had succeeded on only the narrow grounds set out at EAT 30-32 and 34. Counsel for the claimant had put other grounds of appeal which included, in summary, that this tribunal had denied the claimant a fair hearing in 2018. The EAT rejected all those grounds. It gave the following conclusion on those submissions (EAT25):

> "We have looked very carefully at the material which has been put before us. We can see no unfairness in the way that the Tribunal conducted this difficult case. We are satisfied that the claimant was given every reasonable assistance by the Tribunal which was clearly frustrated at times by his apparent refusal to act on the guidance given. "

25. At EAT35 the EAT wrote:

> "We remit the case to the same Tribunal to determine remedy and to consider issues of contribution and Polkey."

26. The EAT had power to direct that the remitted hearing should be before a different tribunal. We asked Ms Clarke whether the claimant's counsel had made an application for remission to a fresh tribunal, and she thought not. Certainly, it would be unusual for the EAT not to have written in its judgment that such an application had been made and refused.

27. We attach no weight to the submission that the fact alone that a recusal application has been made should lead the tribunal to recuse. We respectfully adopt the reasoning of the EAT in Enamejewa v British Gas UKEAT/0347/14 at paragraph 28, rejecting an application to remit to a new judge:

> 'As originally drafted the grounds of appeal made extensive allegations of racism, fascism, hooliganistic conduct and, to put it at language of a lower temperature, unjudicial conduct on the part of Judge Lewzey and Judge Pearl but in particular on the part of Judge Lewzey. If it were to be thought that, by making allegations of that kind, which have been dismissed as unfounded, a litigant could influence the choice of Judge who was to determine his claim, then it would be open to unreasonable and unscrupulous litigants in effect to select the Judge that they thought most likely to be favourable to their cause. That is something which, as a matter of principle, must not be allowed.'

28. The claimant's strength of feeling is not the point. He has not put before this tribunal material which we find would lead the fully informed fair-minded observer to doubt the fairness of this hearing. We agree with Ms Clarke as a matter of experience that the tribunal is often called upon to hear or re-hear a case remitted after a successful appeal to the EAT. We accept that there is no reason to believe that the claimant's counsel asked the EAT to remit to a new tribunal. It is the judicial duty of the tribunal to accept the judgment of the EAT and proceed accordingly. We could see no basis for recusal, and declined to do so.

Fresh evidence

29. This part of our judgment takes us to a fundamental difficultly which pervaded this hearing. As the claimant himself acknowledged at the end of the first day of hearing, he approached this hearing on a mistaken footing.

30. We remind ourselves of how this issue has arisen for us now; we refer to LJ8 and 222 and to EAT33-36. The tribunal expressed provisional views about fresh evidence; the EAT did not comment or interfere, save to say that while it was a matter for us, it was 'likely' that fresh evidence would not be required.

31. It appeared to the present judge during the June 2020 hearing that the claimant did not understand just how limited the task of this tribunal was to be. For that reason, at CMO4.2 to 4.5 he wrote:

> 4.2 "The judgment of the EAT has left untouched the whole of this tribunal's judgment except for the conclusions at paragraphs 7 and 221.
>
> 4.3 In particular, the findings at paragraphs 171-221 inclusive remain untouched, and form the basis for consideration of any remedy.
>
> 4.4 Paragraph 35 of the EAT judgment confirms that this tribunal may refuse to hear any further evidence or submission on contribution or Polkey. The EAT comments that it may not be likely to do so.
>
> 4.5 The reference at paragraph 36 is to the situation where the formal victor in dispute is the real loser."

32. Despite this attempt at clarification, the claimant said that he had understood, wrongly, that the effect of the judgment of the EAT was to reopen in full the factual and legal basis of the claim of unfair dismissal.

33. Our approach to the issue of fresh evidence was that it was for the claimant to identify evidence, either in a document, or through a witness, which had not been heard, or available, at the 2018 hearing; and to submit that it was in the interests of justice for that evidence to be addressed now, either by analysis of the document or by hearing the witness. The interests of justice discussion would include consideration of whether the evidence had been in the hands of the claimant at the time of the first hearing, why it had not been given, and some assessment of its possible relevance and impact.

34. In his 40 pages of submissions, we could find nothing which seemed to approach touching on any of this. Instead, as the claimant himself appeared to acknowledge at the end of the day, he attempted to re-state and re-argue the points which had failed at the 2018 hearing. Having read the statements, the tribunal felt confidently able to proceed to reject any application to introduce fresh evidence.

35. The claimant asked later whether the tribunal had considered the material mentioned in his submissions to the tribunal on the first day. Our answer was and is that we have decided the issue remitted to us by the Employment Appeal Tribunal. It follows that if and to the extent that the claimant sought to put before the tribunal information and material about the merits of his behaviour in 2016, it was not necessary for us to consider that material because it was not the remitted matter. Put more bluntly: the claimant's repeated attempts to persuade the tribunal that he had done nothing wrong to justify his dismissal entirely related to the "unappealable" findings of fact which were unchanged by the appeal proceedings.

Contribution and Polkey

36. Ms Clarke's submission (heard before the claimant, so that the claimant could reply) and confirmed in writing, was briefly as follows. The tribunal should approach matters by considering Polkey first. It should ask what this respondent would have done had the procedural shortcomings set out at LJ218-220 not happened, and a fair procedure been in place. She submitted that if a fair procedure had been followed, there was a 75-100% prospect of the same outcome, and that it would have taken no more than 2 to 4 weeks to reach that conclusion. She accepted that the logic of that approach was that the claimant's remedy was limited to 2 to 4 weeks full net pay and thereafter loss at whatever discount the tribunal applied.

37. She submitted that further investigation would have made no difference because the claimant knew the allegations, had replied to them, and had accepted that he had done the things for which he was dismissed. She submitted that dismissal was inevitable, particularly in light of the claimant's deliberate rejection of management authority, on which she drew to our attention in particular our findings at LJ64, 70.7, 177 and 222.

38. On contribution, she accepted that while a finding of 100% is unusual, it was open to the tribunal. The tribunal should consider the precise conduct which led to dismissal and ask was the conduct culpable, did the claimant contribute to dismissal, and would it be just and equitable to reduce compensation accordingly. She submitted that the reduction should be the same for both basic and compensatory awards. Her final point was that the claimant was a knowing and deliberate actor in all of these matters, and that therefore a very high finding of contribution would be justified.

39. When the claimant came to address the tribunal on contribution and Polkey, he reiterated, at speed, and with detailed reference to emails written between 2014 and 2016, the fundamental contentions which we rejected in 2018. We

quote the judge's note of the opening of his submission, which captures the essence of his approach:

> "I have not done any wrong. It was judged in a different way. At the full hearing I was not well, I had very little capacity to give information. I later looked at evidence and found no fault. I never admitted any misconduct."

40. He then went into a detailed exposition of his dealings with HMRC between 2014 and 2016, quoting that he was in constant liaison with Mr Rafi, and repeating that any mistakes were attributable to Mr Rafi.

41. When he came to speak about the computer password issue, he made serious criticisms of Ms Okole (whom he called 'a liar'), and of Mr Rafi and asserted that he had in fact given his password to Mr Davies. He also asserted that his email account had been hacked by a third party who was a relative of Mr Rafi.

42. He referred to instances when he said others employed by the respondent had either disregarded Mr Rafi's instructions, or had communicated their passwords to others. He asserted that Mr Rafi, Mr Davies and others had "teamed up against him." He asserted that he was justified in failing to disclose the information received from Mr Dubont's referee because he was afraid that Mr Dubont might take legal action against him if he did so.

43. In summary, the claimant's submissions were:

    43.1 He had done nothing wrong to justify his dismissal;

    43.2 He wished to reopen the four factual complaints for which he was dismissed so as to demonstrate that he was not at fault but that others were; and

    43.3 That he was the victim of concerted proactive wrongdoing by, among others, Mr Rafi, Mr Davies and Ms Okole.

44. At the very end of his submission and before adjournment, the claimant told the tribunal that he did not realise that his appeal to the EAT had not been 'done properly', and that he had understood that this hearing was a full reopening of the case which had failed. We repeat that the CMO of June 2020 had attempted in terms to correct all those misunderstandings, although it seemed to the judge then that the language of the EAT was clear, and was likely to have been explained to the claimant at the time by his then specialist advisers.

Polkey

45. The tribunal's approach has been one which we consider relatively straightforward. At LJ 217 to 221 inclusive, but in particular at LJ 218 and 219, we set out the procedural points which we found gave us cause for concern. Summarised briefly, they were the absence of a written framework; the extent to which one individual (Mr Davies) was involved at a number of

stages in a number of roles; the extent to which the original charges were fully formulated and documented (LJ187 to 188); and the absence of an effective appeal process. We accept in principle that the availability of a fair appeal process, while an essential element of fairness, would not alone ordinarily give rise to a financial remedy, because it would not ordinarily extend the period of employment after dismissal.

46. We must ask ourselves, what would the outcome of the dismissal process have been if these procedural failings had been absent. In other words, what would have happened, if there had been a more detailed and documented "charge sheet" with attached documentation; a clear written process; if other officers than Mr Davies had been involved; and if there had been an effective appeal procedure.

47. In our judgment, that procedure would inevitably have led to the claimant's dismissal, and we set the likelihood of that outcome at 100%. The procedural failings, if corrected, could not have altered the underlying factual matrix, which was that the claimant was dismissed for four separate acts of misconduct; each of which was a voluntary exercise of his discretion; each of which was contrary to the procedures and norms of the workplace; and each of which had the recurrent theme upon which we have touched repeatedly in our first judgment, namely the claimant's confidence in his own judgment over that of others, and his consequent rejection of others' authority. We add to those factors the aspects summarised at LJ 215 of how the claimant defended himself at the disciplinary hearing.

48. We then consider how long it would have taken to reach that conclusion. That in turn would indicate the period, subject to contribution, for which the claimant might fall to be compensated. If these procedural shortcomings had been identified and addressed in January 2016 then the procedure could have been fairly concluded on the day it in fact did, 14 April 2016. However, it seems to us right in principle that we give the claimant the full benefit of the doubt, and proceed on the basis of asking how long it would have taken to remedy these procedural failings if the decision to do so had been taken on 14 April. We therefore take the hypothetical situation that on that morning, instead of proceeding with the disciplinary hearing, the respondent understood that it needed to start the disciplinary procedure with an almost fresh sheet.

49. The respondent organisation had legal advice, as we noted from the issue about lease of premises. It also had contacts in other organisations upon which it may have been able to draw. It would not have had for example to draw up a disciplinary procedure from a fresh sheet; it could not have been very long for example before it was advised to make use of information available on the ACAS website. Giving the claimant the benefit of reasonable doubt, we set the period which it would have taken to reach a fair disciplinary hearing at two months.

Contribution

50. We turn finally to contribution. As Ms Clarke correctly pointed out, we approach the basic award through ERA s.122(2) which provides:

> "Where the tribunal considers that any conduct of the complainant before the dismissal… was such that it would be just and equitable to reduce… the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

51. That wording contrasts with s.123(6) which in relation to the compensatory award provides as follows:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

52. We accept Ms Clarke's submission that we should ask broadly whether the claimant committed culpable or blameworthy conduct; whether it contributed to his dismissal; whether it would be just to reduce any award. We have the power to apply different reductions to the basic and compensatory awards, but should be cautious before taking that exceptional step, and identify a specific reason or reasons for doing so.

53. We consider the unusual circumstances of this case to be such that we find in relation to both awards that the degree of contributory conduct of the claimant was 100% and therefore that both awards are extinguished.

54. We reach that finding on the basis that the claimant was dismissed for four actions, not a single one; and that each of the matters for which he was dismissed was a voluntary exercise of his discretion, not an action forced upon him. He was fully culpable in each event, and each alone contributed to his dismissal. We find that by his response to the allegations, and the arguments which he advanced at the disciplinary hearing, the claimant confirmed the underlying concern, which was that he was unmanageable, except on his own terms. He showed poor judgment by thinking that it was appropriate to defend himself by trying to justify his own wrongdoing. We find that it is just to reduce the award to the point of extinction.

55. It follows from our findings that no compensation is payable by the respondent to the claimant.

The re employment hearing

56. We delivered judgment at 11am on the second morning, and informed the parties of our proposal to adjourn to hear the application for re-employment. In doing so, the Judge expressed the view that it would be in everyone's interests first to have these reasons in writing; secondly if at all possible, to proceed in person or in any event with paper bundles; and thirdly, the claimant should proceed on the basis of the tribunal's guidance on the effect of ERA s.116(1) and 116(3). Those sub-sections provide that when considering an order for re-instatement or re-engagement the tribunal must take into account three points. The first is the wishes of the claimant. Second is "whether it is

practicable for the employer.. to comply"; and the third is "Where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-instatement (or re-engagement as the case may be)".

57. We explained that we thought it right to make one final effort for the re-employment hearing to take place in person, and certainly with the bundles which were available in principle for this hearing. It also seemed to us right that the parties should have our reasons from this hearing in writing before the final stage. Finally, while the tribunal's position remains of course that it does not offer legal advice to a party, it seemed to the Judge right to offer the claimant further guidance, as he had endeavoured to at the June 2020 case management hearing. He put forward two points of guidance.

58. The first is that when considering the practicability of a re-employment order, the question for the tribunal is whether or not returning the claimant to the workplace may work successfully. The Judge advised the claimant that in light of the live anger and hostility which he seemed to have expressed the day before towards the four named individuals, all of whom remain within the respondent, the claimant would have to address at a re-employment hearing the question of how his return to the workplace could be practicable and could be sustained successfully. That includes the challenges of leaving past events in the past, and accepting the line management authority of Mr Rafi and the Board.

59. The second matter was that in light of the precise wording of s.116, quoted above, the tribunal is required to take into account <u>any</u> extent to which a claimant has contributed to his dismissal, and that this was a case where the extent was 100%.

_____
Employment Judge R Lewis

Date: ……3.2.21……..

Sent to the parties on: .....

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For the Tribunal Office