EMPLOYMENT TRIBUNALS

Claimant: **Mr A Phillips**

Respondent: **Young & Co.'s Brewery, P.L.C.**

Heard at: **In Chambers** **On: Friday 23 April 2021**

Before: **Employment Judge Matthews**

Representation:
Claimant: **Mr J Gifford Head of Counsel**

Respondent: **Mr R Hignett of Counsel**

JUDGMENT

1. Acting in accordance with rule 72 of the Employment Tribunals Rules of Procedure 2013 the Tribunal refuses Mr Phillips' application (set out in his letter of 22 March 2021) for a reconsideration of the Judgment sent to the parties on 9 March 2021. The Tribunal considers that there is no reasonable prospect of the original decision being varied or revoked.

2. Acting in accordance with rules 70 and 72 of the Employment Tribunals Rules of Procedure 2013 the Tribunal has reconsidered the Judgment sent to the parties on 9 March 2021 on the application of the Respondent (set out in its letter of 11 March 2021). The original decision is varied as set out in the Reasons below.

3. No order for re-instatement or re-engagement is made.

4. The Respondent is ordered to pay to Mr Phillips unfair dismissal compensation totalling £24,033.03, comprising a basic award of £1,050 and a compensatory award of £22,983.03.

5. The Recoupment Regulations apply and the particulars required by regulation 4(3) of those regulations are:

- total (unfair dismissal) monetary award: £24,033.03

- the Prescribed Element: £22,733.03

- period to which the Prescribed Element is attributable: 21 December 2018 to 21 February 2020

- amount by which monetary award exceeds the Prescribed Element: £1,300.00

REASONS

INTRODUCTION

1. On 9 March 2021 the Tribunal's Judgment as to liability was sent to the parties (the "First Judgment"). The Tribunal found Mr Phillips to have been unfairly dismissed by the Respondent Company. The Tribunal also found that it would be just and equitable to reduce any basic and compensatory awards made to Mr Phillips by 50% in respect of *"contribution"* but declined to reduce any compensatory award to reflect the chance that Mr Phillips would have been dismissed fairly in any event (commonly referred to as a *"Polkey"* deduction).

2. This hearing was set down to decide remedy. In the meantime, both Mr Phillips and the Respondent Company made applications for reconsideration of aspects of the First Judgment. The Tribunal directed that these applications be dealt with at this hearing.

3. The Tribunal heard evidence from Mr Mark Loughborough (Operations Director with the Company) and Mr Phillips. Both produced a written statement. (References in this Judgment to their statements are to those statements as opposed to the statements produced for the liability hearing). There was an "electronic" bundle of documentation. References to pages are to pages in that bundle unless otherwise specified.

4. Mr Hignett produced written argument.

5. The hearing was a remote hearing using the Common Video Platform consented to by the parties. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.

FACTS

6. Until his dismissal by the Company on 21 December 2018, Mr Phillips had always worked in the hospitality sector.

7. As noted in paragraph 7 of the First Judgment, Mr Philips worked for the Company and its predecessor from 5 January 2015. For the four years or so leading up to his dismissal, Mr Phillips had been the General Manager of The Northcote. From all accounts Mr Phillips ran The Northcote successfully and well until the 20 August 2018, when it started a refurbishment programme (see paragraph 20 of the First Judgment). Thereafter the train of events described in the First Judgment led to Mr Phillips' dismissal some four months later.

8. Mr Phillips' evidence is that his dismissal, leading to the first period of unemployment he had experienced since 1997, *"had a huge effect on my confidence and anxiety"* (WS 10). The Tribunal has little doubt that it did.

9. At the time of his dismissal Mr Phillips and his wife were living in accommodation provided for them by the Company at The Northcote. Whilst the Phillips owned a property in Hampton, that was let to a third party. As a result, they had to look elsewhere for accommodation and settled on a let in St Albans.

10. Mr Phillips started his search for alternative employment quickly. In fact, there is evidence this started on or before the day Mr Phillips was dismissed (45). Presumably Mr Phillips had seen the writing on the wall.

11. Initially, Mr Phillips applied for jobs with a similar salary in the same sector of the hospitality industry as the Company. Whether rightly or wrongly, Mr Phillips felt that his prospects of success were limited because knowledge of his summary dismissal would either get around the industry or he would have to declare it to any prospective employer (see WS 12, 13 and 15 for example). In any event, although called to second interviews, Mr Phillips was unsuccessful.

12. By the end of February 2019, Mr Phillips had been advised by JobCentre to widen the scope of his search. Examples were applications for a job with Hertfordshire County Council as an Admin Support Officer and for a post with Deutsche Bank (55-57).

13. What is clear is that, from the end of February 2019, Mr Phillips seems to have pretty well given up applying for jobs of the sort he had with the Company. The Company criticises Mr Phillips for

this. The Company's view is that Mr Phillips should have persevered and, if he had done so, it would not have been long before he secured something in the sector, albeit below General Manager level. The Company suggests that Mr Phillips made a deliberate decision to change his lifestyle. Mr Phillips says that he simply responded to the difficulty he faced in finding a job in the same sector as the Company because he had been dismissed for misconduct.

14. Mr Loughborough's evidence was that, given the size of the sector the Company operated in, the fact that Mr Phillips had been dismissed for misconduct should have presented no great barrier to his employment prospects within it. Further, there was no informal information network operating between employers in the Company's sector. Even if there is no such informal network, it seems clear from Mr Falarczyk's evidence (WS 50 and 55, for example) that personal knowledge and connection play a part in recruitment in the sector. It would be surprising if they did not, subject, of course, to due process. Further, it seems highly unlikely that a prospective employer in the sector would lightly dismiss the fact that Mr Phillips had been dismissed for what was, in essence, a failure to control stock. As noted in paragraph 9 of the First Judgment, pub businesses have a preoccupation with stock controls.

15. In the Tribunal's view it was reasonable for Mr Phillips to act as he did, at least for a period of time. No doubt greatly disheartened by his dismissal and, with some justification, suspecting negative feedback, Mr Phillips gave up on the sector, rather than making a life style choice.

16. Having secured some festival work, but with little else in the offing, Mr Phillips took a post with Royal Mail in July 2019. This post was at a much lower rate of pay than Mr Phillips had enjoyed with the Company, albeit more than bar work would have offered. Again, this was a reasonable step to mitigate loss, at least as a short term measure.

17. Mr Phillips says that, until Christmas 2019, the work for Royal Mail left him too tired to give much consideration to other jobs. At that point, Mr Phillips's job was reduced to his contractual 25 hours a week.

18. In February 2020, Mr Philips and his wife had the opportunity to move back to their Hampton property, giving up the St Alban's lease. In making the move, however, Mr Phillips had to resign

from his job with Royal Mail as a timely transfer was not available. Mr Phillips resigned with effect from 21 February 2020.

19. Thereafter, despite lockdown because of the Covid-19 pandemic, Mr Phillips was increasingly successful in earning through work in the technology sector.

20. Referring to paragraph 106 of the First Judgment. Mr Loughborough gave evidence as to his view of what would have happened had Mr Phillips been given a warning instead of being dismissed on 21 December 2018. In Mr Loughborough's view, the stock losses would have continued, there would have been further disciplinary hearings and Mr Phillips would have been dismissed in the middle of March or April 2019.

21. The difficulty with that view is that Mr Loughborough was starting from the premise that Mr Phillips was not willing to change, not that he could not change. To be fair to Mr Loughborough, his position on this has been consistent. As the Tribunal pointed out in paragraph 108 of the First Judgment, Mr Loughborough's view was that *"Mr Phillips had understood the importance of line checks but had chosen not to conduct them."* However, as the Tribunal continued *"Mr Loughborough was, essentially, finding a way of avoiding the inconvenient fact that Mr Phillips was carrying out stock and line checks".* That remained the case at the remedy hearing. The evidence in Mr Loughborough's statement does not alter the position. Mr Loughborough's mind was closed on the subject, notwithstanding that Mr Phillips demonstrated his willingness to change his behaviour before he was dismissed.

22. If, as seems to be the case on the evidence, Mr Philips had changed his behaviour but stock losses had continued, the matter may well have moved on to the question of whether or not Mr Phillips had the capability to use stock checks to control losses. Given Mr Phillips long experience in the trade, one might have thought so. If not, the matter would have become one of capability and training, rather than conduct.

APPLICABLE LAW

23. Section 123 of the Employment Rights Act 1996 (the "ERA"), so far as it is applicable, provides as follows:

> ***"123 Compensatory award***
>
> *(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable*

in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include –

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal." ….

"(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rules concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."

24. The Tribunal must consider the applications for reconsideration by reference to rules 70, 71 and 72 of the Employment Tribunals Rules of Procedure 2013 (the "Rules"). So far as they are applicable, they read as follows:

*"**70 Principles***

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.

71 Application

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.

> ***72 Process***
>
> *(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.*
>
> *(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the 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."*

25. The Tribunal was referred to *Knapton v ECC Card Clothing Ltd* [2006] IRLR 756 and *Cooper Contracting Ltd v Mr L Lindsey* UKEAT/0184/15/JOJ.

CONCLUSIONS

26. Mr Phillips' application for reconsideration

27. Mr Phillips made an application for reconsideration of the First Judgment in a letter to the Tribunals dated 22 March 2021 (236). The essence of the application was this:

> *"I request the Tribunal to reconsider the decision and to substitute a finding of "capability" as the true reason for the dismissal, and in doing so to remove the reduction for contributory fault."*

28. The application was in time.

29. The Tribunal refuses this application because there is no reasonable prospect of the original decision being varied or revoked in this regard. On the facts found in the First Judgment, the reason for the dismissal was conduct.

30. The Company's application for reconsideration

31. The Company's application can be seen at 33. In paragraph 112 of the First Judgment the Tribunal concluded:

> *"112 This is not a case in which "Polkey issues arise. The imposition of a sanction outside the reasonable band of responses is a substantive matter and not one that could have been cured by a procedural change."*

32. The Company's application included this:

> *"At trial the Respondent argued that if the Tribunal found the Claimant should have been warned as opposed to dismissed, it ought to go on to assess the chance that the Claimant would have been dismissed at a later date as a result of continuing to incur stock losses and his failings in terms of stock management. The Respondent contended that there was at least 50% chance that the Claimant would have been dismissed following a warning.*
>
> *The Tribunal rejected this argument out of hand by concluding that because the issue was one of substantive fairness as opposed to procedural fairness, Polkey did not arise (see paragraph 112 of the liability judgment).*
>
> *This was a clear error of law which is capable of being corrected easily by reconsideration of the point."*

33. The application was in time.

34. Leaving aside the precise nature of the original submission made on the Respondent's behalf (the Tribunal's notes do not record the argument said to have been advanced at the liability hearing), the application is well founded.

35. The Tribunal did not, prior to the hearing, send a notice to the parties as is required by rule 72(1) of the Rules. However, neither party took the point and the hearing afforded an opportunity for both sides to argue their respective cases on the issue. Further, the Tribunal's view is that dealing with the application at the hearing, notwithstanding the lack of the rule 72(1) notice, was in accordance with the overriding objective (rule 2) and just (rule 6).

36. The Tribunal has reconsidered this aspect of the First Judgment and varies it in the following ways.

37. Paragraph 112 of the First Judgement is revoked. The following shall be substituted for it:

> *"112 As far as "Polkey" considerations are concerned, the imposition of a sanction outside the reasonable band of responses is a substantive matter and not one that could have been cured by a procedural change. However, there remains the argument that, had Mr Phillips been issued with a warning, he would have been dismissed in any event within a few months of his dismissal on 21 December 2018. In essence, the Company's case is that Mr Phillips would have continued to be responsible for stock losses, would have been further disciplined and eventually dismissed.*
>
> *112A As the Tribunal's findings of fact record, Mr Phillips was dismissed because the Company believed that he was unwilling to change his behaviour. Again, as the Tribunal's findings demonstrate, that contradicted the evidence the Company had in front of it that Mr Phillips was willing (and indeed, had), changed his behaviour.*
>
> *112B In those circumstances the scenario that would have played out would have been something like this. Mr Phillips would have received a warning that he had to change his behaviour. As Mr Phillips had already demonstrated, his behaviour would have changed. If unacceptable stock losses had continued, the matter would have become one of capability, not conduct. In short, Mr Phillips would have been doing what he had been instructed to do and any continuing failure would have been attributable to Mr Phillips' inability to use the information he obtained correctly.*
>
> *112C Given that this was the first time Mr Phillips had ever had any issues with stock in his time with the Company, it seems to the Tribunal highly improbable that dismissal would have resulted if he been given the time to put matters right. If necessary, additional training would have been given.*
>
> *112D Accordingly, the Tribunal sees no basis on which it would be just and equitable to apply a "Polkey" deduction to any compensatory award made to Mr Phillips".*

38. Remedy for unfair dismissal

39. As noted in the First Judgment, Mr Phillips does not ask that a re-instatement or reengagement order be made.

40. Mr Phillips is entitled to a basic award calculated as follows:

1 week's gross pay for each year of employment in which Mr Phillips was below the age of 41 but not below the age of 22

1½ week's gross pay for each year of employment in which Mr Phillips was not below the age of 41

Mr Phillips commenced employment on 5 January 2015 and was summarily dismissed on 21 December 2019. Mr Phillips had 3 complete years of service.

Mr Phillips' date of birth was 29 November 1975. Mr Phillips was, therefore, over 41 for two of the qualifying years and under 41 for the third.

4 x £525 (capped gross weeks' pay) = **£2,100**

41. Mr Phillips is entitled to a compensatory award.

42. **£500** is awarded for loss of statutory rights.

43. The Tribunal finds that Mr Phillips made reasonable efforts to mitigate his loss for the period up to and including his resignation from Royal Mail on 21 February 2020. Thereafter, it was Mr Phillips's choice to move back to Hampton entailing him resigning from his job. In addition, doing the best it can, the Tribunal finds that, by that date, Mr Phillips could have re-applied himself to finding a job in the hospitality sector. If he had done so, the Tribunal's view is that the passage of time from his dismissal, coupled with a determined effort to pursue opportunities, would have resulted in Mr Phillips finding a job in that sector at a rate of pay equal to that he had enjoyed with the Company. Compensation for loss of earnings is awarded for the 61 weeks between 21 December 2018 and 21 February 2020.

44. Weekly net pay is agreed between the parties at £630. A weekly pension contribution of £42 is agreed as is the weekly benefit of free meals at £25 and utilities at £33.69. These total £730.69. However, there are some heads of loss that are in dispute.

45. First, is the value of accommodation at The Northcote. The Tribunal has not been given any comparable rental valuations for London property. Mr Phillips claims a sum equal to the rental paid on his St Alban's lease. The Respondent argues that no allowance should be made for the value of the accommodation. Applying section 123 of the ERA the Tribunal sees no reason why compensation should not be awarded in this respect. Indeed, this is customary. Mr Phillips mitigated his loss by taking

accommodation out of London and the rental of £265.38 a week is an appropriate measure of loss.

46. Second, is travel costs. Rather than working on the premises at The Northcote, Mr Phillips had to travel to work incurring bus fares of £26 a week for 32 weeks. Averaged over 61 weeks this amounts to £13.64 a week. Again, applying section 123 of the ERA, the Tribunal considers it just and equitable that this be awarded.

47. Third, is bonus. Mr Phillips makes no claim for 2018-2019 but does claim for 2019-2020. The Tribunal has insufficient information to make a sensible calculation of any bonus that might have been payable. In addition, the Tribunal understands that bonuses are calculated in April each year and are forfeited if the employee is not then in employment. The Tribunal's finding is that Mr Philips should have fully mitigated his loss by February 2020. That puts the bonus calculation outside the period of loss awarded and it is not just and equitable to take it into account.

48. Fourth, is the cost of health insurance. Since Mr Phillips did not incur any cost in replacing the health insurance he had enjoyed in the Company's employment, nor did the insured risk occur, there is no financial loss to compensate for.

49. Fifth is "moving costs". The Tribunal has seen no evidence to support this claim and makes no award in respect of it.

50. Accordingly, the figure of weekly net loss of £730.69 mentioned above needs to be adjusted for accommodation costs of £265.38 and travel of £13.64 totalling £1,009.71.

51. The calculation is:

    61 x £1,009.71 = £61,592.31

    From this must be deducted pay in lieu of notice of £2,298 and earnings of £13,828.25 totalling £16,126.25 giving a figure of **£45,466.06**.

52. The total of the basic and compensatory awards (including the £500 for loss of statutory rights) before applying the adjustment for contribution is **£48,066.06**.

53. Applying the 50% reduction for contribution results in an adjusted total award of **£24,033.03**.

54. Mr Phillips was in receipt of Job Seekers' Allowance and the recoupment provisions apply.

Employment Judge Matthews
Dated: 4 May 2021