EMPLOYMENT TRIBUNALS

Claimant: Ms N Daoud (maiden name Boukhannouche)

Respondent: Bvlgari (UK) Ltd

JUDGMENT

The Claimants application dated **14 March 2021** (with additional reasons dated 14 May 2021) for reconsideration of the remedy judgment sent to the parties on **22 February 2021** (with reasons sent 4 May 2021) is refused.

REASONS

1. I apologise to the parties for the delay in issuing this judgment. I was unaware of the Claimant's application until the letter of 14 March 2021 was sent to me on 21 August 2021, and the letter of 14 May 2021 was sent to me on 27 August 2021. Those items were both received during a period of annual leave. I asked for a copy of the Respondent's letter of 22 March 2021 (which is mentioned in the Claimant's letter of 14 May) and I received that on 14 September 2021.

2. Reconsideration of Judgments is covered by Rules 70-73 of the Employment Tribunal Rules. The Claimant has submitted a request within the time limit set out in Rule 71. As requested by her letter of 14 May 2021, I have considered that letter alongside the letter of 14 March 2021, and have treated the contents of both letters as being part and parcel of an application relying on all the points mentioned in the two letters. I asked to have sight of the Respondent's letter of 22 March 2021 only because the Claimant referred to it in her application (in the part dated 14 May), and not because I had requested comments from the Respondent on the Claimant's application.

3. At the first stage, under Rule 72(1), the judge considers whether there is no reasonable prospect of the original decision being varied or revoked. If so, the application is dismissed; if not, the judge arranges for a notice to be sent to the parties setting a time limit for the respondent to comment on the application and for both parties to express views on whether the application can be determined without a hearing.

4. A judgment may be reconsidered where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied or revoked and (if it is revoked) it may be taken again.

5. In this case, my decision is that the application fails and that there is no reasonable prospect of the original decision being varied or revoked for the following reasons.

   5.1. The Claimant refers to the fact that estimated figures were used for the future commission that might have otherwise been paid to her had she not been dismissed. As noted at paragraph 36 of the remedy reasons, the parties took very different positions in relation to commission. The Respondent suggested that (apart from other arguments), the Claimant might have received zero commission as it was discretionary, and the Tribunal rejected that over-arching argument. However, it accepted that certain components had ceased for all staff, or should not be taken into account in the Claimant's case. (See paragraphs 37 and 40.) The Claimant, as administrator, was in a different situation to sales staff in relation to commission (as discussed in the liability reasons) and the tribunal decided that her own past figures were a more reliable guide than speculation based on figures for other staff for periods after the Claimant had left.

   5.2. The Claimant refers to the fact that an average over a different period should have been used. In paragraph 40 of its reasons, the tribunal refers to its reasons for using May, June and July 2018 as a more reliable guide to her net income than the periods later than that.

   5.3. Section 124 of the Employment Rights Act 1996 ("ERA") sets a maximum limit on the amount of compensation (for unfair dismissal) that can be awarded under s123 ERA. Section 124(1ZA) states that, in the Claimant's case, the limit is 52 multiplied by a week's pay. The Claimant argues (by implication) that when determining her "week's pay" (and therefore when calculating 52 multiplied by a week's pay), the tribunal should have included all or some of the annual bonus payment.

   5.4. The provisions defining a week's pay in the ERA are set out in sections 220-229. For the purposes of section 124(1ZA)(b), those are the relevant sections for determining a week's pay (and section 227 does not impose a maximum for the purposes of s124). The commission figures were treated by the panel as being a sufficiently regular part of the Claimant's contractual remuneration to be taken into account when calculating the week's pay in accordance with those sections. However, the discretionary annual bonus was not. As per paragraph 40, when deciding on the Claimant's losses, we took the figure that she would have been awarded had the Respondent given her a Grade C in the appraisal scheme, but she had no contractual entitlement to that. On the contrary, the Respondent's position was that she would have been awarded no bonus had she remained in employment in light of the (hypothetical) disciplinary proceedings which would have (hypothetically) taken place had she not been dismissed without following any procedure. The contractual documents expressly refer to the bonus as discretionary.

   5.5. The Claimant refers to the prescribed element for the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996 ("the

Recoupment Regulations"). As specified in paragraph 1 of the schedule, the definition is:

> *Any amount ordered to be paid and calculated under section 123 [of ERA] in respect of compensation for loss of wages for a period before the conclusion of the tribunal proceedings.*

5.6. In other words, even though the maximum award under section 123 is capped by reference to 52 multiplied by a week's pay, the prescribed element for recoupment purposes is not limited to the losses occurring in the first 52 weeks after the termination of employment. The tribunal has no discretion to disregard the Recoupment Regulations, or to use different definitions or calculations.

5.7. The Claimant objects to the 20% reduction to each of the basic award and the compensatory award, which is discussed in paragraph 29 of the remedy reasons, and which refers back to the findings in the liability decision (and paragraph 20 of the remedy decision). As noted in paragraph 29, the tribunal's opinion was that most reasonable employers would have taken some informal action rather than move straight to formal disciplinary action. In paragraphs 95.6 and 178 of the liability decision, we commented on the fact that the Claimant had been told informally (by way of a letter which rejected a grievance which the Claimant had brought) that she should reflect on her own behaviour, and we said that the Claimant had not had long enough to act on that suggestion prior to her dismissal. The history between Mr Tariq and the Claimant was discussed extensively in the liability reasons, and our opinion was that Mr Lennon could not provide corroboration in relation to Mr Tariq's version of events for October (see paragraph 179.4 of the liability decision). However, we were satisfied that the Claimant was not blameless, and we did find that there was enough material, as of 4 October 2018, to commence formal disciplinary proceedings against her (but not enough to dismiss her). The 20% reduction is not excessive and the decision to apply the same reduction to both the basic and compensatory awards was appropriate.

5.8. It was, of course, the Respondent's case on liability that it had NOT dismissed the Claimant for reasons related to conduct. That was an argument which the panel rejected.

5.9. The ACAS uplift was 20% to reflect the almost complete failure to follow procedures. It was not a complete failure, because there was an appeal process (including hearing, investigation and outcome letter) albeit the appeal process was not sufficient to cure the earlier defects. See paragraph 27 of the remedy reasons, referring back to the liability decision.

5.10. The Claimant argues that she might have been transferred to Bond Street rather than being disciplined/dismissed. This argument does nothing to contradict or alter the tribunal's analysis in paragraphs 24 and 25 of the remedy reasons. In paragraph 178 of the liability decision, the tribunal pointed out that the Claimant had not been offered the option to move to another branch. One difficulty with the Claimant's argument that a 20% Polkey reduction is too high (because, in her opinion, the tribunal should have decided that there was a more than 80% chance that she would have stayed with the Respondent) is that her arguments in relation to contributory fault imply that she believed that her own conduct was not to blame, which in turn means that she might have found it difficult to change that behaviour had she been given a formal (or informal) warning in late

2018. As stated in our reasons, we were satisfied that the Claimant would have been highly motivated to try to avoid being dismissed, but she would also have had to successfully persuade the Respondent that she was meeting the required standards. The 20% Polkey figure was appropriate.

5.11. The arithmetical calculations in the judgment and written reasons are the calculation which the tribunal believes to be correct, for the reasons stated. We came to a figure (after taking into account the adjustments for Polkey, the ACAS uplift and contributory fault) which required grossing up, and we grossed that up. We then applied the statutory cap.

Employment Judge Quill

Date: 14 September 2021

JUDGMENT SENT TO THE PARTIES ON

15/09/2021.

FOR THE TRIBUNAL OFFICE