Case No: 2200331/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms A Lyons-Shaw

Respondent: Royal Danish Embassy London

Heard at: **London Central (by CVP)** **On: 23 September and 4 October 2021**

Before: **Employment Judge N Walker**

Representation
Claimant: Ms N Mallik of Counsel
Respondent: Ms R Kennedy of Counsel

RESERVED JUDGMENT ON REMEDY

There is no Polkey deduction.
The remainder of the issues relating to remedy will be heard at a future date.

REASONS

Background

1 By a judgement concluded on 4 October 2021, I found that the Claimant's claim for unfair dismissal succeeds. The question of remedy was adjourned to a future date. The parties have, however, asked that I consider the question of what, if any, should be the reduction applied to take account of Polkey based on the submissions they have already made.

Liability Judgment

2 It was my judgement having considered all of the facts carefully that the reason that the Claimant was dismissed was for poor performance.

3 As I noted in the judgement, there was no procedure at all applicable to the Claimant as you would expect for a poor performing employee with over two years' service.

4 I did consider in the judgement the possibility that these circumstances could have mounted to a reorganisation and thus to some other substantial reason for dismissal. I also noted the case of Beard v The Governors of Saint Joseph School in which an employee on a fixed term contract was not given the opportunity of applying for a new appointment when she had drawn attention to the employer the intention of the employer to the fact that she had the qualifications being sought but was not interviewed. In that case, the EAT went on to say that it did not follow that if interviewed she would have got the post but the failure to interview her and adequately consider her application was unfair.

5 In this case the Claimant was not interviewed for the role despite being apparent on the face of her application that she had the skills being sought.

6 In these circumstances I am being asked to consider to what extent Polkey is applicable.

Submissions

The Respondent's submissions

7 The Respondent submitted that even if the Tribunal were to have held that a fair procedure was not followed, the Claimant would have been dismissed in any event. The Respondent referred to Mr Ranieri-Svendsen's witness evidence in which he indicated that the Claimant's role had not led to successful results for the Respondent. Accordingly, the Respondent submitted that had the Claimant been interviewed for the new role, she would not have been successful, and it was not feasible that the Respondent would have retained her for a further period. Before the Tribunal it was suggested that the Claimant had questions about the new approach and so did not understand it.

The Claimant's Submissions

8 The Claimant submits that she was not given an opportunity to be interviewed for the new role and no independent assessment was made of her skills or experience, but had it been, there is 100% chance she would have been selected for the role.

The Law

9 Section 123 of the Employment Rights Act 1996 sets out how the compensatory award should be calculated and states:

> "*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."*

10 Section 98A(2) of the Employment Rights Act provides:

> *"Subject to subsection (1) failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of subsection 98(4) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."*

11 The case of Polkey v AE Dayton Services Limited [1987] IRLR 50 HL has given its named to the phrase a Polkey deduction. I reminded myself that the expression describes the reduction in any award for future loss to reflect the chance that the individual would have been dismissed fairly in any event. This is generally carried out in the form of a percentage reduction although it may take the form of the tribunal making a finding that the individual would have been dismissed fairly after a further period of employment.

12 The case of Software 2000 Limited v Andrews [2007] IRLR 568 provided a summary of principles from cases addressing the approach to be taken. It suggests the following:

> *"(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....*
>
> *(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 judgement 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."

13 In the case of the V v Hertfordshire County Council and another UKEAT/0427 /14 /LA, Mr Justice Langstaff emphasised that Polkey was not about probability but about chance. Therefore, the question I have to consider is whether there is a chance that this particular employer would have dismissed the Claimant in any event had the unfairness not occurred. There are two aspects to this. In some cases, the consideration amounts to an assessment of whether, if a fair process had occurred, it would have affected when the Claimant would have been dismissed. In other cases, the consideration is what percentage chance is there that a fair process would still have resulted in the Claimant's dismissal.

Conclusions

14 I bear in minds the words from the Software case: "*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".* The assessment must relate to a fair procedure.

15 My finding was that the Claimant was dismissed because of the Respondent's doubts about her results as she had onboarded 9 companies and they thought that number was low. In the usual case where there is poor performance, there will be some sort of procedure, the purpose of which is to give the employee a clear understanding of the employer's expectations and a reasonable opportunity to meet them. Poor performance can arise through misconduct in terms of failing to do work which was clearly required and within the employee's capability, or through lack of capability. Normally the procedure would establish whether the employee was simply not doing what was required or was incapable. None of these formal assessments or formal meetings involving communication with the Claimant about the Respondent's expectations took place.

16 I found there was evidence of a degree of concern, largely by the Ambassador, about the low number of companies onboarded by the Claimant onto the platforms with which she had arrangements to support

Danish companies. Against that, I also found that the feedback forms which had been produced which the Respondent suggested indicated poor performance did not in fact do so. The response of Danish companies towards the Claimant individually was generally very positive, apart from one company which appeared to have had intrinsic difficulties with the technical systems. The number of companies onboarded, on its own, was not an indicator of poor performance. There were no targets set for the number of companies to be onboarded. There was no evidence provided by the Respondent that they had analysed the reason for the number of companies on boarded. Additionally, there was no evidence to support the assertion that the Ministry of Foreign Affairs had reviewed the London project and concluded that it had not produced the desired outcome.

17 The Respondent had latterly set the Claimant a target of calling a certain number of companies per day and there was no evidence that she did not do so, rather she questioned the rationale for it. That alone does not mean the employee is a poor performer or that she did not understand the approach. The Respondent did appear to consider that a more sales focused approach was required but had not undertaken any market research to evaluate whether more companies would have been prepared to onboard if some additional contact had been made with them.

18 This is not a case where there were difficulties with the procedure, rather there was no procedure and no analysis of why the number of companies onboarded were at that level. I therefore considered whether it is possible to speculate about what might have happened if this same situation had been addressed with a fair procedure.

19 The outcome of my conclusion that the real reason for the Claimant's dismissal was the assumption that she had was guilty of poor performance is that there is no percentage likelihood that the Claimant would have been dismissed fairly in any event.

20 I reach this having speculated, as Tribunals are encouraged to do. It is clear that the job the Claimant was doing continued, as did the funding for it. As I have noted, she could only have been dismissed fairly following a series of meetings at which her performance would have been discussed. There are many potential outcomes. The Claimant might, having been made aware of the concerns shown by the Respondent and having the opportunity to understand, she could have focused her attention in the manner the Respondent required. The Respondent might have analysed its concerns and concluded they were not the Claimant's responsibility but rather a question of the approach and strategy chosen which has which was in the process of being changed. In any event while the performance process was underway, the new approach was being introduced and that would have led to a different focus and potentially different outcomes.

21 Given the positive responses in the feedback forms about the Claimant's personal interaction with those entities, it is my view that a procedure would have required the Respondent to analyse why the Claimant had onboarded the number of companies that she had and, as they did not do that, there is no evidence from the Respondent on which there is scope to conclude any percentage chance that the Claimant was actually performing poorly or that her performance would not have improved with the benefit of a proper procedure. There is on the evidence, no percentage chance that she would have been dismissed fairly at a later date or after a fair procedure in any event.

22 The Respondent's submissions were made before the Liability Judgment but the general tenor of them is that if there had been a fair procedure, the Claimant would have been required to apply for the new role and if she had gone thought a proper process, she would not have been selected as Mr Ranieri-Svendsen's view was that the Claimant was not successful in her role, based on the number of companies on-boarded. This assumes a situation in which the Claimant was given the proper opportunity to apply for the new role. It was not my conclusion that the dismissal was due to a re-organisation in which the Claimant was unsuccessful in applying for a new role, or due to a genuine fixed term contract ending. However, I noted that in either case, a fair procedure still required that the Claimant should have been given the opportunity to be considered for that new role and interviewed as she had submitted her CV and applied for it and the Respondent was on notice that she had the skills required to be considered for the role. While I considered the possibility of a reorganisation in the Liability Judgment, and thus a need for the Claimant to apply for the new role, the evidence overall suggested the new role was not driven by a general re-organisation. I do not intend to repeat the findings in the Liability Judgment, but I have considered to what extent, if this had been a reorganisation or indeed a genuine fixed term contract ending, and a fair procedure had been followed which involved the Claimant applying for the new role, what percentage chance is there that she would not have been successful.

23 The Software case provides: *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.* The evidence from the Respondent is the assumption about the Claimant's performance based on doubts that 9 companies on-boarded was enough and the feedback forms. This brings me back to the basis for that assumption. As I have noted, the new role was very similar to the Claimant's own role, and she had the experience. The assumption that the Claimant was performing poorly was made without any proper analysis and thus unsubstantiated. If the feedback forms were properly analysed, they showed the Claimant got good personal feedback.

24 I bear in mind the fact that I am to look at the question of chance and not to shy away from speculation. I note there were no other suitable candidates identified by the Respondent in response to either their first or second version of the job advert. In those circumstances, if a fair process had been followed, there is no reasonable evidence that I consider shows the Claimant might not have been selected.

25 My conclusion therefore is that there is no Polkey reduction.

Employment Judge N Walker

22 October 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25/10/2021

FOR EMPLOYMENT TRIBUNALS