



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms F Delladio

AND

ENI Trading & Shipping SPA (UK Branch)

Judgement

The Respondent's application dated 18 May 2021 for reconsideration of the Judgement dated 5 May 2021 (the Judgment) is refused. In reaching this decision the Tribunal took account of the Respondent's response to the application dated 25 October 2021 (the Respondent's Rebuttal).

Reasons

The Reconsideration Application

- 1) I have considered the application by the Claimant dated 18 May for a reconsideration of certain parts of the Judgement dealing with deductions to be made from the compensatory award. 2021 (the Reconsideration Application)
- 2) The Reconsideration Application was unfortunately not forwarded to me by the Tribunal administrative staff until 22 September 2021 at a time when I was on annual leave. The Tribunal apologises for this delay.
- 3) The Reconsideration Application concerned those elements of the Judgement involving the relationship between the deductions from the compensatory award under Polkey under section 123 (1) of the Employment Rights Act 1996 (the ERA) and that for contributory conduct under s. 123 (6) of the ERA and in particular as to whether it was appropriate within the context of what was "just and equitable" to apply a deduction of 65% for contributory conduct when there had already been a deduction of 80% under Polkey.

- 4) For the avoidance of doubt the Tribunal has not at its own initiative sought to reconsider any aspect of the Judgment.

General principles

- 5) I have considered the application in accordance with the provisions set out in Rule 70 of The Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules) which provides that reconsideration is only appropriate where it is necessary in the interests of justice and under Rule 72 there is a reasonable prospect of the original decision being varied or revoked.
- 6) Reconsiderations are limited exceptions to the general rule that employment tribunal decisions should not be reopened and relitigated. It is not a method by which a disappointed party to proceedings can get a second bite of the cherry.
- 7) Reconsideration is not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced, which was available before.
- 8) A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' in accordance with Rule 2.
- 9) In considering the application regard needs to be given to not only the interests of the party seeking the reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

Discussion and conclusions

Relevant paragraphs within the Judgment

- 10) Following a hearing between 20 and 26 April 2021, with the Tribunal considering its Judgment in Chambers on 27 April 2021, a reserved decision was promulgated which held that the claim for unfair dismissal succeeds but subject to deductions on account of Polkey and contributory conduct.
- 11) The Judgment set out the applicable principles for a Polkey reduction in paragraph 152 and for a deduction in respect of contributory conduct in paragraphs 153 to 155.
- 12) The Tribunal set out its decision in respect of the Polkey reduction in paragraphs 194 to 204.
- 13) In paragraph 194 the Tribunal assessed the likelihood of the Claimant's dismissal in the event that a reasonable investigation had been undertaken at 80%. The Tribunal set out its reasons for the reduction, and the amount thereof, in paragraphs 195 to 204.
- 14) The Tribunal set out its conclusions that the Claimant had contributed to her dismissal in paragraphs 205 to 208 and at paragraph 209 its assessment that a further reduction of 65% to the compensatory award would be appropriate.

15) The Tribunal's reasons for this reduction were set out at paragraphs 206 to 208. Inevitably there was significant overlap, but not verbatim repetition, between the factors justifying a Polkey reduction and that for contributory conduct.

The Reconsideration Application

16) This can be summarised as follows:

- a) There is a significant overlap in the reasons given for the Polkey deduction and that under S123 (6) of the ERA.
- b) The factors which support the reduction to the compensatory award under s.123 (6) of the ERA are a subset of the broader list of Polkey findings.
- c) That what is just and equitable as a deduction under s.123 (6) of the ERA is affected by what has already been deducted under s.123 (1) of the ERA as per Rao v Civil Aviation Authority (1994) ICR 495, CA.
- d) That the Tribunal should have "stood back" and looked at the matter as a whole, avoiding double counting and ensuring that the result is just and equitable in accordance with Dee v Suffolk County Council UKAEA T/0181/18
- e) That in respect of s.123 (6) of the ERA the impugned conduct was not known about the time of dismissal and therefore could not have contributed to the dismissal.
- f) That the Tribunal took into account in making a deduction under s.123 (6) of the ERA matters not known by the decision maker at the time of dismissal.
- g) That the appropriate deduction under s.123 (6) of the ERA is nil.

The Respondent's Rebuttal

17) This can be summarised as follows:

- a) The Reconsideration Application fails to establish that it is necessary in the interests of justice.
- b) That the Claimant has elected not to appeal the judgment on liability to the EAT.
- c) That it was legally permissible and open to the Tribunal to make a further reduction to the compensatory award pursuant to s.123 (6) of the ERA.
- d) That sections 123 (1) and 123 (6) of the ERA address different issues.
- e) That there is nothing in the relevant authorities to preclude a tribunal's reasons for a reduction under Polkey overlapping with that for contributory conduct but the tribunal should consider its findings in the round and be satisfied that its findings in relation to the compensatory award under both s.123 (1) and s.123 (6) are just and equitable.

- f) That the Tribunal's findings in relation to Polkey and contributory fault are evidentially sound, properly reasoned and there is no error of law nor perversity to be found in its Judgment on liability.
- g) That any reconsideration would need to be considered by the full Tribunal at a hearing.

Conclusions

- 18) I do not consider the claimant's decision not to appeal to the EAT is a relevant factor. Further, the claimant should not be penalised as a result of a delay in the Reconsideration Application being forwarded to me by the tribunal's administrative staff.
- 19) I consider that the only issue is whether there should have been a further reduction for contributory conduct under s. 123 (6) of the ERA. I do not consider that the Reconsideration Application seeks to challenge the fact or amount of the Polkey reduction. In any event I do not consider that there is any basis for a reconsideration of this element of the Judgment which was carefully considered and clear and comprehensive reasons given for the Tribunal's finding.
- 20) The only issues which need to be considered are therefore whether it was just and equitable for the Tribunal to make a further reduction of 65% for contributory conduct under s.123 (6) of the ERA and whether the factors relied upon by the Tribunal in reaching its finding on this issue were matters known to the Respondent at the time of dismissal.
- 21) In relation to the 65% figure the Tribunal considered this both in isolation but also in conjunction with the 80% reduction under Polkey. The Tribunal was fully aware what effect the cumulative deduction would have on the compensatory award and considered this figure appropriate given its finding that whilst the investigation undertaken by the Respondent was outside the range of reasonable responses that had a reasonable investigation been undertaken the Claimant would certainly have been dismissed but also its finding that by her conduct the Claimant contributed significantly to her dismissal.
- 22) I consider that whilst the findings at paragraphs 206 to 208 are as asserted by the Claimant, a subset of the reasons given for the Polkey deduction in paragraphs 195 to 204, that the overall findings are equally applicable to both deductions and it would be wholly artificial to seek to delineate them. Given the length of the Judgment there was an element of abbreviation in the contributory fault findings given that overlap. As such paragraph 206 represents a summary of the more detailed findings on the same issues as set out at paragraphs 196 to 199. Paragraph 208 represents a summary of the more detailed findings in paragraphs 200 to 204.
- 23) Whilst it is acknowledged that it is possible that the Tribunal may have taken account of the Claimant's failure in respect of a small section of the test results and that some of these results may not have been known to the Respondent at the time of her dismissal I nevertheless consider that based on

the totality of the chronology, evidence and findings made by the Tribunal that the finding as to a deduction, and its amount, would not have any prospect of being varied or revoked in the event of the full Tribunal reconsidering this element of its Judgement at a hearing. In any event I consider that this would be a wholly artificial exercise as the Tribunal's findings were made in the round given its assessment of the evidence.

- 24) I therefore do not consider that the Reconsideration Application would in accordance with the interests of justice make it appropriate for there to be a reconsideration of the Judgement at a hearing before the full Tribunal.

Employment Judge Nicolle

Dated: **26 October 2021**

Sent to the parties on:

26/10/2021

For the Tribunal Office