EMPLOYMENT TRIBUNALS

Claimant: **Mr B Harding**

Respondent: **Waverley Court Consulting Ltd**

Heard at: **Cardiff by CVP** **On: 30th September & 1st October 2021.**

Before: **Employment Judge R F Powell**

Representation:
Claimant: Mr James, counsel

Respondent: Mr Brown, solicitor

Reasons having been given at the hearing and written reasons having been requested in respect of the judgment on remedy:16003232

REASONS

1. This is the second part of the judgement. The issues that remain outstanding following the judgment on liability relate to the quantum of loss and the level of compensation that is due to Mr Harding following my judgment that his dismissal was unfair.

2. There are two key areas of disagreement which I must determine before addressing the calculation of the claimant's loss. The first is the respondent's assertion that there should be a "polkey" deduction and the second is the respondent's assertion that there should be a deduction in respect of the claimant's culpable conduct which contributed to his dismissal.

3. I asked the parties to address me on the Polkey issue first.

4. Mr James argues that there is no prospect of the respondent proving that "this respondent" would have acted any differently than it did but, if I was against the claimant on that argument, then a reasonable process would have entailed 3rd party assistance in the assessment and management of the claimant, his competence and ability to improve his

performance. All of which would have necessitated a lengthy process, and may have led to the claimant's continued employment.

5. Secondly, with regard to the disciplinary action which commenced with the suspension of the claimant by a letter dated 22nd July 2020, which alleged that the claimant had made unauthorised access to, and downloading copies of, confidential audio recordings of private conversations between Mr Nathan and his wife, Mr Nathan and his legal advisor and business calls. The respondent's evidence should not lead to a conclusion that the claimant would have been dismissed, or at least, not until many months after the effective date of termination.

The Legal Matrix

6. Section 123 of the Employment Rights Act 1996 states:

(1)Subject to the provisions of this section and sections 124, 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.

(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b)any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule 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.

(5)In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—

(a)calling, organising, procuring or financing a strike or other industrial action, or

(b)threatening to do so,

was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

(6)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.

(6A) …

(7)…

(8)…

7. The legal principles to be applied in a case such as this emerge from the authorities cited below. The starting point is the judgment of Viscount Dilhorne in **Devis and Sons v Atkins Ltd** [1977] ICR 662 at 679.

   "… it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed"

8. That is the approach to what is just and equitable. It involves the principle that if a person has suffered no loss, no compensation should be awarded. In **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 the approach was refined, as set out in the speech of Lord Bridge at paras 28 and 29.

9. In **Andrews v Software 2000 [2007]** IRLR 568 at paragraph 54, Elias J (as he then was) summarised the law in this way:

   "54. The following principles emerge from these cases:

   (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. (He might, for example, have given evidence that he had intended to retire in the near future.)
   (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 judgment for the tribunal. But in reaching that decision the tribunal must direct it 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.
(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.
(6) ….
(7) Having considered the evidence, the tribunal may determine:
(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. …..
(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.
(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

10. I also take into account the guidance in **Hill v Governing Body of Great Tey Primary School** [2012] UKEAT 0237/12; that I have to consider the likely actions of *this* Respondent, not a hypothetical employer.

11. Turning first to the issue of reasonable redundancy consultation, I first address Mr James' submissions rather than those of Mr. Brown. In reaching my conclusions I have reminded myself that the burden rests upon the respondent to prove its assertions albeit imay rely on any of the evidence before the tribunal.

12. Mr James has suggested that a fair redundancy process, which included dealing with the claimant's grievance about the redundancy process, might have entailed the appointment of external persons to undertake the investigation and decision making that was undertaken by Mr Nathan. He submitted that, as the documentary evidence proves, Mr Nathan did appoint external investigators to examine the disciplinary allegations. Thus, the respondent could have acted reasonably by adopting the same approach to the redundancy consultation/ grievance.

13. I have difficulty accepting that proposition for the following reasons.

14. Firstly, I do not think there was any likelihood that, having received the claimant's grievance, Mr Nathan would have acted any differently than he did at the time he suspended the claimant's access to the respondent's computer system; because the degree to which he was angered by the content of the grievance is unambiguous from the transcript of his telephone calls.

15. Secondly, whilst it could, in principle be reasonable to appoint an external person to and investigate a grievance or an employee's representations in redundancy consultation, to make findings of fact or suggest provisional judgments for the employer to consider. I do

not consider that this employer or a hypothetical employer would, in the course of a redundancy process allow an external party, unfamiliar with the respondent's business to determine what standard of work should be expected of the claimant or what standard of financial performance should be expected of the claimant in terms of income generated from the claimant's work.

16. Based on my experience as a member of industrial juries, I find it very difficult to accept that a reasonable employer would delegate management decisions of that sort to an external source.

17. I find it very much less than likely that a management of any business, particularly taking account the financial circumstances of this employer, would have allowed an external person to identify the time frame for improvement of the claimant's performance or to be allowed to set financial targets for the claimant or to be allowed to determine the acceptable level of effort that had to be achieved in order to avoid his provisional selection for redundancy.

18. In my judgment, I do not accept it would be reasonable to expect that Mr Nathan would have, or could reasonably have been expected to, abdicate his management responsibilities for the small business of which he was the owner.

19. That said, I have also concluded that in practice, Mr Nathan had already pre-determined that the claimant would be dismissed for his poor performance and no procedurally fair process would have been likely to alter Mr Nathan's pre-existing conclusion in that respect.

20. Turning to the other issue, Mr Brown argues that the misconduct of the claimant during the redundancy process, which is not denied and only partly mitigated in the claimant's evidence before the tribunal, was so serious and so well evidenced that summary dismissal was the almost certain conclusion had the claimant not been unfairly dismissed for redundancy. Further, the dismissal would have occurred by the claimant's effective date of termination or a month thereafter; a period for which the claimant had been paid.

21. I deal with Mr. James' submissions first.

22. Mr. James does not accept the proposition that the claimant would have been dismissed but his main focus argued that, had the claimant's dismissal been by reason of the alleged gross misconduct, the conclusion of that disciplinary process would more than likely have been delayed until the Crown Prosecution Service's had decided whether to prosecute the claimant or not.

23. It is common ground between the parties that by the end of February or early March 2021, the CPS had concluded there was insufficient public interest to warrant a criminal prosecution.

24. We also know from the documents that, within seven days of discovery that the claimant had been listening to confidential recordings of Mr Nathan's telephone calls (initially the communication between Mr Nathan and his solicitor), the claimant had been suspended.

25. I have the letter for 22nd July 2020 which indicated that a disciplinary investigation was anticipated and the claimant was forewarned of the possibility of a disciplinary hearing.

26. I know that the respondent engaged a number of external consultants from a national business that could supply HR experts. It would not have been difficult for the respondent, had it so wished, to appoint an investigator; a reasonable action given that Mr and Mrs. Nathan, the senior officers of the respondent, were both witnesses and alleged victims of the claimant's alleged misconduct.

27. The scope of the investigation would have been modest as the claimant did not deny the conduct. There would have been a need to investigate the claimant's motivation and a need to investigate whether management tolerated staff listening to calls. That may have involved speaking to staff and to Mr Nathan which would not be a lengthy process; something that could be properly done in the course of disciplinary hearing.

28. Applying my knowledge of this case, and this respondent, it seems to me that from 22nd July it would have taken approximately 14 or so days to arrange a disciplinary hearing; time to instruct an external decision maker, time to put Mr Harding on notice of the hearing and time to allow him the requisite period of notice for the purposes of section 10 of the Employment Tribunals Act 1996.

29. Even allowing for a time frame 50% longer than my judgment above. The date of a disciplinary hearing would more likely than not have been on or around the 14th of August 2020.

30. The character of the disciplinary case was one which would not have taken a competent decision maker a great deal of time to reach a conclusion.

31. Mr Harding would, as he did at this hearing, have accepted he had downloaded copies of confidential telephone calls, that he accessed calls by altering a passcode without consent and that he had listened to personal calls and a call to the respondent's solicitor. His defence, that the respondent tolerated staff listening to calls, had it been accepted, would not exculpate him for his unauthorized access by changing a password, nor, on his own account, would it have mitigated his admitted conduct of downloading and retaining copies of private telephone conversations along with those which were work related.

32. The misconduct was clearly an intentional act and the admitted misconduct was clearly a serious breach of trust and a potential criminal offence.

33. I am completely satisfied by the respondent's evidence and submissions that, but for redundancy dismissal, the respondent would have acted quickly to investigate and discipline the claimant for his misconduct.

34. In my judgment the respondent has proven that it would have dismissed the claimant for gross misconduct and such a dismissal would have been without notice.

35. In my judgment such a dismissal would have occurred around the same date as the claimant's effective date of termination.

36. In reaching this decision I have taken into account Mr James' submissions. Given the respondent did not report the claimant's misconduct to the police until the 30th September 2020, a date by which I have judge the internal disciplinary process would have concluded, I cannot accept his submission that the disciplinary process would have been halted pending a CPS decision.

37. I have been cautious of accepting the respondent's evidence. Despite Mr James' submissions I find that the respondent has persuaded me that it is a virtual certainty that the claimant would have been reasonably dismissed for misconduct by the date on which he was dismissed.

38. I note that, as the claimant received a months' pay in lieu of notice, had his summary dismissal for gross misconduct occurred in early September, he would have no loss flowing from a dismissal at that date.

39. For these reasons, I consider that it is just and equitable to make no compensatory award consequent to the unfair dismissal of the claimant.

Employment Judge R F Powell
Dated: 15th November 2021

Judgment sent to the parties on 18 November 2021

For the Secretary of Employment Tribunals Mr N Roche