**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103293/2020**

**Hearing held by Cloud Video Platform (CVP) on 1 November 2021**

**Employment Judge J Young**

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| **A Gordon** | **Claimant**<br>**Represented by:**<br>**Mr A Hutcheson,**<br>**Solicitor** |
| **McPhee Bros (Blantyre) Ltd** | **Respondent**<br>**Represented by:**<br>**Ms N Alistari**<br>**Counsel** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. The Judgment of the Employment Tribunal is that on reconsideration the original decision is confirmed.

**REASONS**

2. In this case the claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed by the respondent. The Judgment of the Employment Tribunal after hearing was that the claimant was not unfairly dismissed in terms of Section 98 of the Employment Rights Act 1996. The claimant made timeous application for reconsideration of that Judgment in accordance with Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Tribunal Rules") and in due course a hearing was arranged on the application.

3. At the hearing each party made submissions on the issue under reference to the initiating application from the claimant and response from the respondent. Full submissions were made and no discourtesy is intended in making a summary.

**Submission for The Claimant**

4. It was submitted that the respondent required to show that they acted reasonably in demonstrating that redundancy was a sufficient reason for dismissal. In this case it was contended that the respondent had founded on information of which they became aware after dismissal and not when the decision to dismiss was made. That was not a legitimate course of action and so could not be held to be reasonable. The evidence used could only be preferable to an argument on compensation in line with ***Polkey v AE Dayton Services Ltd 1988 ICR 142*** and in all the circumstances it would have been too uncertain and speculative to have determined that doctrine applied so as to reduce compensation.

5. Reference was made to ***Devis and Sons -v- Atkins 1977 AC 931*** (in particular Judgment of Lord Dilhorne) and the conclusion that a Tribunal could not have regard to matters of which the employer was unaware at the time of the dismissal. It was not the case that an employer can establish that a dismissal was fair if reliance is placed on matters not known at the time. The question as to whether or not an employer acted reasonably needs to be answered in the circumstances known to the employer at the time of dismissal. It was acknowledged in that case that matters discovered subsequent to dismissal might affect the issue of compensation. In this case it was submitted under ***Devis*** and ***Polkey*** that reliance on matters not known to the employer at the time of dismissal made the dismissal unfair and it was not a case that if there had been further investigation dismissal was inevitable so that compensation should be reduced.

6. Against that background it was submitted that the terms of the claimant's contract were important in stating that his duties were to *"manage the company's warehouse, to promote, develop and extend the company's*

*business and its products…"* together with responsibility for health and safety. There was no evidence this contract had ever been varied. The claimant's position was that his management responsibility had never been removed. He had been seconded to the *"mortar pod"* project and in that period his managerial responsibilities had been substantially reduced but never removed. The respondent's position was that there was no management responsibility prior to the mortar pod project and that those responsibilities had been incorporated into the actings of line managers and their superiors.

7. These were two divergent positions. The Tribunal had found that management responsibilities had been removed. Reliance had been placed on an organisational chart of September 2018 and the evidence of Matthew Wilson who had joined the business as production manager from January 2017. However the organisational chart had never been produced within the consultation exercise and was not founded upon in that consultation. There was no finding in fact that chart played a part in the process. Neither was there evidence that Mr Wilson had played a part in the decision. Ms Hudson only stressed the part that the claimant had played since her arrival in the business from 11 March 2019. That post dated the claimant's experience in management.

8. Reference was also made in the Judgment issued to the " *traveller file"* to point to no input by the claimant but there had been no reference made to those documents within the consultation exercise.

9. It was accordingly submitted that given these matters were not encompassed within the consultation process then there was no evidence to support the view that the claimant had given up management responsibility at the relevant time i.e. the time of dismissal.

10. It was also relevant to consider that in the consultation Ms Hudson had sought to close down discussion on the claimant's responsibilities as she did not believe "*warehouses"* were interchangeable for *"sheds"* whereas that was accepted by Mr Wilson. Essentially it was submitted that Ms Hudson's relatively recent arrival in the business and lack of knowledge meant that she

was obliged to be fully appraised of all the facts and not done so. That was unreasonable and the dismissal was unfair. There had been no proper engagement in the process. Miss Hudson had only been concerned with the *"here and now".* The claimant was able to return to another management position as those responsibilities had never been removed from him.

11. Thus, the input of Mr Wilson and the other matters could only go to remedy and a possible ***Polkey*** deduction.

12. In that respect reference was made to ***Britool Limited -v- Roberts [1993] IRLR 481*** wherein in respect of one of the claimants there was a failure to consult and flawed criteria used in a redundancy process. In that case it was held there was no ***Polkey*** deduction as the onus was on the employer to show that such a deduction should be made. In this case the employer had not put any argument forward to show that a reduction should be made because of information found after the event ***Britool*** stated that once a Tribunal is satisfied that a dismissal is unfair the employee has a *prima facie* loss i.e. the loss of his job. In that event *" very little more is then required of the employee to cause the evidential burden to shift to the employer to show that the dismissal could or would be likely to have occurred in any event".* Here there was no such evidence.

13. Reference was also made to ***Williams -v-Realcare Agency Limited UK*** **EATS/0051/11/B1** wherein the EAT was satisfied that proceedings had been halted before the Employment Tribunal had heard all the necessary evidence and upheld the appeal and remitted the matter back to a different Tribunal. In this case as consultation had been closed down by Miss Hudson the employer required to show that more was done to consider all the evidence otherwise the actings were not that of the reasonable employer and so dismissal was not inevitable. The reasonable employer would have allowed others to have expressed a view of the conflict between the evidence of Mr Wilson and the claimant as regards management responsibilities. The respondent could have gone to other witnesses to get more information on the position. They did not do so and so there could not be any *Polkey* deduction. The employer

had not been able to demonstrate that dismissal was in any event likely to have ensued on evidence after the event. It was speculative to say what these other witnesses would have said and so speculative that dismissal was likely and lead to any reduction in compensation.

**Submission for the respondent**

14. In response it was submitted that the only test for reconsideration of Judgments was that it was "*necessary in the interest of justice to do so"* under Rule 70 of the Tribunal Rules. It was submitted that there no grounds disclosed for reconsideration in that none of the points now made could not have been made at the original hearing.

15. Reference was made to ***Outasight VB Limited -v- Brown 2014 WL 7255767***. There it was emphasised that the present Tribunal Rules were no different in this respect from the Tribunal Rules 2004. While the 2004 Rules set out some specific grounds for reconsideration there was also included that the interests of justice would require a review. The specific grounds within the 2004 Rules could be seen as particular instances of the interests of justice requiring a review. If the application now being made was now to hear fresh evidence then the approach laid down in ***Ladd -v- Marshall [1954] 1WLR1489*** would apply namely that the evidence could not have been obtained with reasonable diligence for use at the original hearing; the evidence must be such that it would have had an important influence on the case; and must be apparently credible. In this case there was no reason why the claimant could not have produced whatever evidence he wished to counter the respondent's case. He had not chosen to do so.

16. The fact of the claimant retaining management responsibilities was an assertion by him. It was considered and rejected. The submission being made seemed to suggest that a different conclusion should have been reached but that was not a ground for reconsideration.

17. In any event the contractual position on an individual being able to perform different types of work was not relevant if a Tribunal was satisfied that work of a particular kind had ceased or diminished. That was the case here and

formed the basis for redundancy. The respondent gave sufficient consideration at the time to the claimant's position. Miss Hudson was well aware of the claimant's responsibilities. The evidence was that she struggled to find work for the claimant subsequent to the "*mortar pod*" project being discontinued. It was not necessary for her to go to others to find out if the claimant had management responsibilities. She knew who the managers were and who was involved in the production process. It was never disputed that the claimant had a prime role in the development of the mixer but at the time of dismissal he was not engaged in production and Miss Hudson well knew that was not his role.

18. The production of the organogram by Mr McFarlane of September 2018 was within the respondent's knowledge. It had been produced specifically to identify the roles which individuals played within the production process. Ms Hudson gave evidence and it was never raised with her or put to her outright that it was not a document that she could rely on.

19. Essentially the points that were now being made either were or could have been made at the original hearing and were simply a rehash of submission made at that time. It was also emphasised that what the claimant might be able to do under his contract was not a relevant consideration in terms of the case of ***Murray –v- Foyle Meats*** **[2001]1AC51** cited in the original Judgment.

20. The case of ***Williams -v- Real Care*** was very different in its factual circumstances and principles. It was not the case that Mr Gordon was disbelieved on the historical points and that he had management experience in the past. What mattered was what he was doing at the time of dismissal and if in the production area. Ms Hudson could see from her own observation what the claimant was doing. She was on site and had been so for some time prior to the redundancy consultation. Ms Hudson had produced her own organogram showing the claimants position at the time so she well knew the role that the claimant played.

21. Given that there was no finding of procedural unfairness then *Polkey* did not apply. In any event it was known as part of the evidence that at some later

date sixteen individuals had been made redundant and that would be a factor that would require to be taken into account.

22. In essence the Tribunal properly considered fairness overall. Mr Wilson could have been cross-examined on the points now made. The "*Traveller file"* was not available at dismissal but given the claim by the claimant he was involved, this file was relevant and it was not a ground to discount the respondents approach. Neither was it fair to say that Ms Hudson had closed down enquiry. That was a line explored at the original hearing and if not as fully explained as might have been by the claimant was not a ground to review the decision in the interests of justice.

**Discussion and Conclusion**

23. The case of ***Outasight VB Limited -v- Brown*** does confirm that the same basic principles apply in the present Tribunal Rules as applied in the 2004 Rules and the same approach should be adopted. In particular, in relation to the introduction of any fresh evidence then the principles laid out in ***Ladd v Marshall*** should be applied.

24. It was also noted that in ***Flint – v Eastern Electricity Board*** **[1975] ICR *395*** Phillips J considered what the "*interests of justice"* might be in reconsideration and identified that those interests were:-

(1) the interest of the employee.

(2) the interests of the employer and *"over and above all that "*

(3) the *"interests of the general public have to be considered…"* and that it was very much in the interests of the general public that *"proceedings of this kind should be as final as possible; that is should only be in unusual cases that the employee, the applicant before the Tribunal, is able to have a second bite at the cherry".* That was stated to be particularly so *"…where the issues are perfectly clear and where the information that he now seeks leave at a further hearing to put before the Tribunal has been in his possession and in his mind the whole time".*

25 The Judgment issued recorded the submission made for the claimant which submission emphasised that insufficient enquiry had been about what it was that the claimant could do under his contract. It was not considered that was a relevant consideration as explained in the Judgment under reference to the case of ***Foyle Meats.*** There is removed the need to consider exactly what an employer can and cannot do under his or her contract or that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. Here the issue was whether the dismissal was caused wholly or mainly by the cessation or diminution of work of a particular kind and it was found that was the case.

26 It was also submitted in the original hearing that there was a dispute over whether the claimant retained at the time of dismissal managerial responsibility and insufficient enquiry made into that position. That submission is now being made more pointedly to say that the evidence relied upon was not available at the relevant time. I do not consider that this was a matter only based on evidence that was not available at the time of dismissal.

27 Ms Hudson had been in the position of Operation Director from 11 March 2019 about a year before a consultation commenced with the claimant on redundancy. In the position of overseeing production she knew who did what. She was on site and able to assess the roles performed by individuals. She could see from her own observation and knowledge of production meetings that the claimant was not involved in overseeing production. He was involved in the *"mortar pod project"* and when that came to an end she found it difficult to find work for him to do. As narrated in the Judgment there were various tasks assigned to him at that time. He was not engaged in any management position.

28 In the course of the consultation she had produced an organisation chart dated 15 January 2020 showing the position and role of the claimant as *"Development Engineer*" which was not one engaged in the production process or management. Before dismissal therefore she had identified the

position of the claimant in a particular role which was not engaged in production or management.

29 Additionally Mr Wilson who had knowledge of the production process and whose evidence was given at the Tribunal accompanied Ms Hudson at the consultation meetings. He was aware of the production process of the mixer. He was aware who was involved in that process. Ms Hudson had recourse to his knowledge. However in her position she had assessed that the claimant did not have managerial or production responsibility. If she was wrong about that and evidence from other individuals would have demonstrated she was wrong then the appropriate witnesses could have been called to the tribunal hearing.

30 Evidence seeking to support retention of management responsibility came from Mr McFarlane who left the business in January 2019. His position was that the claimant had only been "*seconded"* to the mortar pod project but had never lost managerial responsibility. That was at odds with the organogram which he had produced for the respondent of September 2018 showing no management responsibility for the claimant and also the *"Traveller file"* (produced by the claimant) which did not support the proposition made by the claimant that he had retained management responsibility. The evidence that was heard at the Tribunal did not disclose that the respondent was wrong in its assessment that there was no managerial responsibility or oversight being undertaken by the claimant at the time of dismissal.

31 In those circumstances I did consider that the application was essentially a *"second bite at the cherry"* and that it should not be allowed in the interests of justice and the Judgment is confirmed. There being no change to the decision on a fair dismissal then the impact of ***Polkey*** does not arise.

**Employment Judge: J D Young**
**Date of Judgment: 23 November 2021**
**Entered in register: 30 November 2021**
**and copied to parties**

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