Neutral Citation Number: [2022] EAT 5

Case No: EA-2020-000174-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 March 2021

Before :

HIS HONOUR JUDGE SHANKS

- -

Between :

MS N BROWN **Appellant**

- and -

CASTLEROCK GROUP LTD **Respondent**

- -
- -

Mr L Ogilvy for the **Appellant**
Ms L Quigley (instructed by Calderbank Consultancy) for the **Respondent**

Hearing date: 30 & 31 March 2021

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The Appellant was employed by the respondent as a field care worker. She was dismissed for gross misconduct following allegations that she had stolen money from a client.

The ET found that the dismissal was unfair because of a number of procedural issues (in particular that there should have been an adjournment of the final disciplinary hearing) but that the Appellant was not entitled to any compensation because (a) applying Polkey, if a fair procedure had been followed it was inevitable that she would have been dismissed and/or (b) the compensatory award was reduced by 100% pursuant to section 123(6) of ERA 1996. The ET also dismissed the Appellant's claim for wrongful dismissal on the basis that she had committed an act of gross misconduct which justified her summary dismissal.

On appeal the EAT upheld the ET's decision and found that the EJ was entitled to set compensation at nil both under Polkey and section 123(6) and to reject the claim for wrongful dismissal.

HIS HONOUR JUDGE SHANKS:

1. This is an appeal by the claimant, Ms Brown, against a judgment of Employment Judge Nicolle sent out on 17 January 2020 following a four-day hearing. The employment judge upheld the claimant's claim for unfair dismissal against her employer, Castlerock, but made a reduction to nil in her compensatory award under **Polkey** [1987] IRLR 503 and made a one-hundred-percent reduction to her compensatory and basic awards under section 123(6) and 122(2) of the **Employment Rights Act 1996** respectively.

2. The background is this. The claimant worked as a field care supervisor for the respondent. Her employment started on 21 December 2011. Her duties included attending vulnerable and elderly clients at home and shopping for them. In March and April 2018 the local authority, the Royal Borough of Kensington and Chelsea, received complaints from one of the service users who the claimant looked after, a lady referred to as LS, that the claimant had stolen money from her. The important allegations for the purposes of this case were set out at the top of page 7 of the Employment Judge's judgment, and they were that the claimant had made three unauthorised ATM withdrawals of cash from LS's HSBC account without her knowledge or consent and that she had not given the money to LS. The withdrawals were £300 on 2 March 2018, £300 on 3 March 2018 and £200 on 6 March 2018. Unfortunately, the respondent reacted slowly to these allegations. The claimant was interviewed by the police on 8 September 2018, and in the interview she made admissions to the effect that she had indeed made the three withdrawals I have mentioned, but, she said, she was authorised to do so by the client and that she had given the money to the client.

3. There were safeguarding meetings about the matter on 12 September 2018 and 12 October 2018, when the case was discussed. The police officer involved expressed dissatisfaction that the respondent had taken no action against the claimant. A Ms Underwood, the respondent's Director of

Quality and Care, became involved, and the claimant was suspended. Meanwhile, a Mr Mbatang, the respondent's Senior Coordinator, had made an unauthorised visit to interview LS on 18 September 2018, and it was found that he should not have done that and he did not conduct the interview with the user properly. Mr Mbatang also interviewed the claimant on 16 October 2018. Again, during that interview, as with the police, she admitted withdrawing the money but said that she had given it all to LS.

4. There was a further safeguarding meeting on 30 November 2018. The police officer confirmed the notes of his interview and also criticised Mr Mbatang for interviewing LS on his own. A Ms Lodia, the London regional manager, was then appointed to carry out an investigation. She apparently went on to conduct the disciplinary procedure that followed from that investigation, and she wrote a letter to the claimant inviting her to a disciplinary meeting on 30 November 2018. I have been provided with a copy of that letter by the claimant in a supplemental bundle which I am afraid was the source of a certain amount of angst in relation to the hearing, but, anyway, at page 94 of the claimant/appellant's supplemental bundle, there is a copy of the letter to Ms Brown from Ms Lodia of 30 November 2018, and it says:

> **"Invite to a disciplinary hearing**
>
> **I am writing to inform you you are requested to attend a disciplinary hearing on 4 December. The meeting will be held at Hammersmith and Fulham branch. The purpose of the hearing will be to discuss your alleged gross misconduct, namely allegation of theft from service user, Mrs [LS]."**

5. Two documents are attached to the letter. One is what is described, I think wrongly, really,

as a bank transaction record, but in any event it makes clear the three withdrawals that it is dealing with; and the other is notes of the interview of Ms Brown by Mr Mbatang at which, as I say, she admitted making the withdrawals.

6. The meeting on 4 December did not proceed, because bizarrely the claimant's chosen representative was Mr Mbatang, and when she and he turned up, it was realised that that was clearly not appropriate. So, the hearing of 4 December was put off until it was rearranged for the 11th. In any event, before the rearranged hearing, Mr Ogilvy, who has represented the claimant at this hearing and at the Employment Tribunal, became involved on I think 10 December 2018. He wrote a long letter to the respondents criticising the process that they had been through and pointing out its unfairness and saying that his client would not attend the hearing, which was the following day. Ms Lodia decided to proceed in any event, and she wrote a dismissal letter dated 12 December 2018. She referred to the disciplinary hearing, which she says was held on 11 December. She said it was arranged to consider the allegation of theft, and then she went on to say this:

> **"This was the second time the disciplinary hearing had been rearranged, and, given the circumstances of you not attending, the hearing was held in your absence. I considered all the evidence and I can confirm that the organisation has established to its reasonable satisfaction, based on the balance of probabilities, the allegation of theft is substantiated and, as a result of this, your employment will be terminated. "**

7. And it was terminated, according to the letter, as of 11 December. It will be clear from what I have just read out that Ms Lodia gave no explanation in the letter as to what evidence she had relied on in making her finding that the allegation of theft had been substantiated. Ms Lodia did not attend the Employment Tribunal when the hearing took place before that body, because by then she had left the respondent's employment in somewhat unfortunate circumstances. The letter of 12 December to

which I have referred was for some reason not received by the claimant, and in due course she was treated as having been dismissed on 14 January 2019. She started her Employment Tribunal proceedings, incidentally, for unfair dismissal on 7 February 2019.

8. She gave evidence at the Employment Tribunal about what had happened and denied that she had committed any theft. Her position was that she had been authorised, indeed told to withdraw the cash and that she had given it to the user, LS. She also said for the first time at that hearing that she had telephoned her responsible coordinator, telling him that she was going to use the bank card to make withdrawals. That and a number of other features of her evidence are set out by the Employment Judge at paragraphs 67 to 78 of his judgment, and it is plain that he took account of what the claimant was telling him. The Employment Judge found that, notwithstanding the lack of reasoning in Ms Lodia's letter, the reason for the dismissal by the respondents was indeed gross misconduct by stealing from LS, and that as a finding that was plainly justified.

9. The Employment Judge also found that there was sufficient evidence for the respondent to find that the allegations of theft were indeed proved and that they therefore had reasonable grounds for the finding of gross misconduct, and his reasons in relation to that are set out at paragraph 94 of the judgment, where he says that the finding is based on the following points: The claimant had admitted withdrawing large sums of money from LS's HSBC account on 2, 3 and 6 March 2018 and no explanation was provided by the claimant as to the purpose of such withdrawals. Further, the timing and amounts of the withdrawals invited suspicion regarding whether they were in fact at the instigation of LS. This suspicion was compounded by LS advising Ms Mattock, who is a council representative, on 22 March 2018 that she had inadequate money in her HSBC account to pay her gas bill (the original complaint by LS in relation to the three withdrawals had come about because she had endeavoured to use her HSBC account to pay her gas bill and there was nothing in it.

10. The next point, reverting to the judgment, was that LS stated she had never used the HSBC account for cash withdrawals, only a post office account. The third thing was HSBC had subsequently reimbursed the money to LS's account on the basis that it constituted unusual banking activity for that account, as LS had only previously used it to make purchases by phone or cheque, not to withdraw cash via an ATM machine. The next point, LS's HSBC account was completely emptied in the three transactions, and I referred to that a moment ago. The next point, the total of £800 withdrawn from LS's HSBC account was never seen by other care workers in her flat; nor were any new purchases noted. Finally, the absence of appropriate records and receipts (in relation to that, that there was evidence about procedures and processes that should have been gone through on a transaction like this, which obviously included the requirement to keep proper records). So, on the basis of that material, the judge found that there were reasonable grounds for the conclusion that the claimant had committed theft, and, indeed, in another context at paragraph 123 of the judgment, he described that evidence as "overwhelming". Finally, at paragraph 100, he found that dismissal was a fair sanction for the misconduct, which the respondents had good reason to find proved. He says, "The misappropriation of substantial sums of money from a vulnerable service user's account is a serious offence amounting to gross misconduct".

11. Notwithstanding those findings, he also found that the claimant had been unfairly dismissed because of a number of procedural failures. These can be identified as follows: (1) the lack of a proper investigation, in particular the steps taken by Mr Mbatang which I have referred to; (2) the failure to suspend the claimant earlier; (3) Ms Lodia's investigation was also considered inadequate, and she as the investigator should not have herself conducted the disciplinary hearing; (4) Ms Lodia should have granted an adjournment of the hearing of 11 December 2018 in the light of the points being made by Mr Ogilvy in his letter, and that would have allowed the claimant to attend with a representative of her choice at a later date; and (5) Ms Lodia should have given more by way of reasons for her conclusion that the claimant had indeed committed theft.

12. It should be noted at this stage that the only one of those procedural failures which is really prejudicial to the claimant in relation to the decision that she had committed theft and that she should be dismissed is what I identified as number (4), namely that she was deprived of the opportunity to put her case. The other matters were either to her benefit, like the failure to suspend her earlier, or could not have influenced the decision, like the failure to give reasons. Having said that that was the only matter, it is of course an absolutely fundamental procedural matter that an employee should be given an opportunity to put her case and make representations before a decision of this nature is made.

13. In spite of the finding that there was an unfair dismissal on that basis, the employment judge said that the claimant should get no compensation, first of all because there should be a one-hundred-percent **Polkey** reduction, and secondly because there should be a hundred-percent reduction under section 122(2) on the basic award and 123(6) on the compensatory award. There was also a claim for wrongful dismissal which failed. In relation to **Polkey**, the judge's decision is at paragraphs 117 and 118 of the judgment:

> **"117. I find that if the Respondent had undertaken a proper and timely investigation, it was inevitable that the decision would have been that the Claimant should be dismissed for gross misconduct. I consider that there would have been no chance that the Claimant would have been given the benefit of the doubt had such further investigations been undertaken. I therefore find that there should be a 100% reduction in the compensatory award.**
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> **118. Further, I do not consider there should be any notional extension of the Claimant's period of employment during which an investigation should have been undertaken. This is partly on the basis there was already a period of over a month for which the Claimant received payment after the disciplinary hearing scheduled for 11 December 2018 which she did not attend."**

14. So far as the wrongful dismissal claim was concerned, that decision is at paragraph 128 in the judgment, where the judge says:

> **"128. For this claim unlike the unfair dismissal claim I need to consider the evidence for myself and decide whether the Claimant was guilty of gross misconduct. On the balance of probabilities, I found that she was in relation to the unauthorised withdrawals of money from Ms LS's HSBC account in the period 2 to 6 March 2018. I therefore find that the Claimant was dismissed for gross misconduct. She is not entitled to notice pay."**

15. HHJ Auerbach allowed the claimant's appeal to proceed on three grounds relating to **Polkey**, the section 123(6) finding and wrongful dismissal. The grounds which Judge Auerbach allowed through are carefully and helpfully set out in his order made on 29 September 2020 after the Rule 3(10) hearing at which Mr Ogilvy represented the claimant. Those grounds, as expressed in the order, set the agenda for my decision today. Ground one related to **Polkey**, and says this:

> **"The tribunal erred in making a Polkey reduction to the compensatory award of 100 per cent (as opposed to some lesser percentage) because it did not have a sufficient basis in the evidence and findings before it to support its conclusion that it was "inevitable" that the appellant would have been dismissed had there been a proper investigation."**

16. The legal position is that the **Polkey** exercise is part of the Employment Tribunal's assessment of compensation and in particular of the loss flowing from an unfair dismissal. That assessment is based on the Employment Tribunal's "common sense, experience and sense of justice", a phrase I take from the decision of Elias P in the well-known Software 2000 decision. The EAT is wary of interfering in a tribunal's decision on all aspects of a **Polkey** assessment, not just as Elias P refers to on a finding that there is no sufficient basis for making a reduction, and in accordance with general principles, the Employment Tribunal would only interfere if a decision on the matter was perverse

or wholly unsupported by evidence. It is by definition an exercise in assessing the chance of what might have happened in other circumstances, so it is inevitably in some sense rough and ready. There is certainly no need for an all-or-nothing decision, as Mr Ogilvy rightly stressed. Indeed, I accept that it is unusual to find a one-hundred-percent **Polkey** reduction, but it is perfectly possible in principle if a fair dismissal was indeed "inevitable". As shown by a decision I was referred to called **Brito-Babapulle v Ealing Hospital. NHS Trust** [2013] IRLR 854, it is wrong simply to assume that dismissal would be the outcome of a proper finding of gross misconduct. There may be circumstances where mitigation would indicate that a dismissal was not the inevitable consequence of such a finding.

17. I am quite satisfied in this case that the Employment Tribunal were justified in concluding that the evidence before the respondent was as outlined in paragraphs 94 and 123 of the judgment, which I will not refer to again but all the points that are outlined there are reflected in documentation that I have seen that would have been before the decision-maker. I am also satisfied that if unanswered, that evidence was overwhelming as to the claimant's guilt of the theft allegation. The Employment Tribunal, unlike the respondents and Ms Lodia, had the benefit of hearing the evidence from the claimant and her answers to the matters that gave rise to what the judge called the overwhelming evidence of her guilt. It is plain, although it would have been better if it had been expressly stated by the employment judge, that he rejected her evidence on the crucial points that she was authorised to withdraw the money and that she gave it to LS. I have already mentioned that the important features of her evidence were set out by the employment judge at paragraphs 67 to 78, and in a different context he identified a number of features of the way that she had conducted herself after the allegations were made at paragraph 126, which plainly undermined her credibility in his eyes. In those circumstances, I am quite satisfied that the Employment Judge was entitled to find, notwithstanding the failures in procedure and that the claimant did not have a full opportunity to put her case to the respondent, that it was nevertheless inevitable that the respondent would have found that she had indeed stolen £800 from LS, which is clearly an act of gross misconduct, even if she had

had the opportunity she ought to have had to put her case.

18. However, I have hesitated in relation to whether it follows from that that a fair dismissal was also inevitable, as the employment judge says at paragraph 117 of the judgment, or whether this was a case like **Brito-Babapulle**, where it was possible that a different result would have followed notwithstanding a finding of gross misconduct. Unfortunately again the employment judge does not expressly deal with this question. Mr Ogilvy says that there was mitigation that could have been raised at a hearing in front of the respondent's decision-maker. Clearly, although he suggested it could have been raised, there would have been no viable mitigation relating to the offence itself since the claimant consistently denied that she had taken the money. The fact that the police did not prosecute, which was a point Mr Ogilvy relied on, was on any view irrelevant. But Mr Ogilvy also referred to the fact that the claimant had ten years' service, had a clean record; the fact that she was a single mother of three and would effectively lose her profession if dismissed; and he says that those factors could and should have been considered and that there may have been another sanction other than dismissal.

19. Ms Quigley for the respondent points first of all to an answer given by the claimant at the Employment Tribunal while being cross-examined whereby she accepted that theft from a user or client would normally result in dismissal, and Ms Quigley also referred to the employment judge's separate finding, which I have mentioned already, at paragraph 100 of the judgment, that dismissal in this case was a fair sanction, and that is a finding that he made separate from the issues about procedure. It seems to me unlikely that this issue was articulated at the Employment Tribunal in the context of a **Polkey** debate, although Mr Ogilvy has faintly suggested that it was, but in any event and perhaps more importantly, though ideally the employment judge would have (even if very briefly) expressly addressed it in his judgment, I am quite satisfied that even if these points had been expressly referred to in the Employment Tribunal, the employment judge would have been fully entitled to

conclude that they would have made no difference and that dismissal would indeed have been the inevitable result of a finding of theft. On that basis, it seems to me that the decision on the **Polkey** matter was really unassailable.

20. Mr Ogilvy raised a number of other points on this part of the case which seem to me misconceived. First of all, he said that the ACAS uplift that he was seeking on behalf of the claimant should have been considered before or independently of the **Polkey** issue. It did not seem to me that that had anything to do with it given the **Polkey** decision was that the compensation should be reduced by a hundred per cent. Secondly, he mentioned again the lack of evidence as to the decision-maker's rationale for her decision, and again that, it seems to me, is beside the point. The exercise that was required in relation to **Polkey** was to reconstruct what would have happened if a fair procedure had been followed so that what was or was not in Ms Lodia's mind and the fact she did not express it was neither here nor there.

21. The third point related to timing, which is a part of the **Polkey** exercise: he said there was no considered of how long a proper, fair procedure might have taken. In fact, as I have already read out, in paragraph 118 of the judgment it is plain that the employment judge does have timing in mind, and he expressly says that in fact the claimant was treated as working on into January, which covers any time point. It is also worth noting that the earlier procedural issues led to substantial delay, which was not to the claimant's prejudice but was in fact to her benefit, because she remained in employment for quite a few months after the initial accusations.

22. The fourth point that Mr Ogilvy has made, as I understood it, was that since part of the reason for the claimant's dismissal was the respondent's decision based on an unfair procedure, there could not be a one-hundred-percent reduction. That point seemed to arise from an isolated sentence in a case which actually related not to **Polkey** but to section 123(6), but, in any event, even in the context

of section 123(6), I was quite satisfied the proposition was not valid. It is quite possible to have a one-hundred-percent **Polkey** reduction and/or a section 123(6) one-hundred-percent reduction in a case where there has been an unfair dismissal on procedural grounds. So, for all those reasons, I reject the appeal on ground one.

23. That brings us to ground two, which relates to section 123(6). I will first summarise the decision. The decision on section 123(6) is at paragraphs 119 to 126 of the judgment. The judge starts off by saying that given the decision on **Polkey**, it is not necessary to make a separate finding on contributory conduct but that if it had been, he would have made a finding of a hundred-percent reduction. He then reminds himself of the law on section 123(6), which I need not go into. Then, at paragraph 123 he said, "I find there is overwhelming evidence that the claimant had taken the money from LS's HSBC account without her authorisation for the reasons set out earlier in this decision but repeated as follows". I have already gone through those reasons. What is a bit odd about that is that the judge does not say at this point, "and further I find that the claimant did steal LS's money and that that conduct did contribute to his dismissal". For some reason, he leaves it as a question of the evidence. Then he refers to some other law at paragraphs 124 and 125, which relate to cases where the contributory conduct arises from an explanation given to an employer for something that has happened or the manner in which an employee conducts himself during a disciplinary process, and then at paragraph 126 of the judgment the employment judge says:

> **"In this respect there are a number of factors I took into account to include:**
>
> **• the comment made by PC McMeekin following his interview with the claimant on 8 September 2018 that she was 'arrogant' in her attitude and consistently answered no comment;**
>
> **• the giving of what in many instances I consider to have been conflicting and/or evasive**

responses;

• a failure to mention material matters during the course of either the police interview or the internal meeting with Mr Mbatang, to include the very surprising failure to mention that she had sought prior authorisation for each of the individual cash withdrawals from her coordinator;

• the complete failure by the claimant to follow up after 10 December 2018 until attempting to return to work on 14 January 2019 shows a failure to properly engage with the process; and

• the failure to exercise a right of appeal once she had been properly informed of the decision to terminate her employment and the continuing availability of a right of appeal."

24. So, that is a summary of the decision, and, as I say, it does not expressly take the most obvious route of saying, "I find that she committed the theft, that was the cause her dismissal and therefore her compensation should be reduced by a hundred per cent under section 123(6)".

25. Judge Auerbach's grounds on this part of the case are as follows: that the tribunal erred in reducing the compensatory award by a hundred per cent under section 123(6) as opposed to some lesser percentage, because "(a) it failed to take into account when deciding whether the appellant's conduct on which it relied had caused or contributed to the dismissal of the lack of evidence it had as to the more specific findings and reasonings which led the respondent to dismiss the appellant and/or (b) it relied in part on things that could not have contributed to the decision to dismiss". As to (a), I am afraid, with the greatest of respect to Judge Auerbach, I have read it time and time again and I just cannot understand what he has in mind. The reason for the dismissal was plainly the theft, which was plainly culpable conduct by the claimant. The underlying evidence about that and the rationale for it does not seem to me to come into the matter. So, it does not seem to me that I should allow an appeal

on that ground.

26. So far as point (b) is concerned, certainly on the basis that it is put at paragraph 126 of the judgment, it seems to be a valid point. There were things relied on in that list that do not seem to me to have been strictly relevant. Indeed, I do not really see what the claimant's response to the investigations and to questions put to her is really relevant at all in this case to section 123(6), and in any event some of those points clearly came after the dismissal and so cannot be said to have caused it in any sense. If the employment judge had taken the course I mentioned of simply saying that the theft had contributed or caused the dismissal, there would have been nothing in this point, and if paragraph 123 can be read as meaning that, then it seems to me that the appeal on this point would be unarguable. But if the judge meant something different and if the points outlined at paragraph 126 were indeed part of the consideration, then it seems to me the appeal may have something in it. The question is, does it matter? And the answer to that is clear. Given my conclusions that the **Polkey** finding was one that the employment judge was entitled to make, it would not make any difference whether he had made an error in the way he dealt with section 123(6). So, notwithstanding I am left in a small amount of doubt by the way he expressed himself, it does not seem to me that it is of any materiality, and so I simply deal with it that way.

27. Finally, wrongful dismissal. Judge Auerbach identified the following point. He said that it was a ground of appeal that the tribunal erred in dismissing a claim for wrongful dismissal because it failed to make sufficient findings to support its conclusions that the appellant's conduct in respect of the HSBC withdrawals amounted to a fundamental breach of contract. It is true that the conclusion at paragraph 128, which I have already read, is stated somewhat baldly, but reference is made in the last sentence in the judgment to the matters listed as justifying a finding that there should be a one-hundred-percent reduction in the compensatory award for contributory conduct. Those matters are, first of all, the overwhelming evidence he referred to at paragraph 123 and the comments at paragraph

126 that really amount to a commentary on the claimant's credibility and could easily be set out as grounds for rejecting evidence. So, by reference to those paragraphs, it seems to me that the material at paragraphs 123 and 126 considered together were clearly sufficient to warrant the finding of theft and gross misconduct which the tribunal judge makes at paragraph 128, and that finding clearly meant that the wrongful dismissal claim had to fail.

28. Mr Ogilvy also raised a point in this context to the effect that the respondents were themselves in breach of the claimant's contract by failing to follow fair procedures in the investigation. This point does not in my view get him anywhere even if the procedure was contractual, because the respondent was, given the gross misconduct, entitled to summarily dismiss the claimant following the theft, even if they did not know that was the case, and in those circumstances no loss has been suffered by the claimant as a consequence of any contractual failure to follow procedures, and that really disposes of the point. The only issue was whether the employment judge was satisfied himself on the evidence he had that there had been gross misconduct by theft, and he clearly was.

29. So, for all those reasons, I dismiss this appeal.