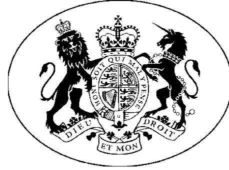

EMPLOYMENT TRIBUNALS

Claimant: S Unthank

Respondent: Spire Healthcare Limited

JUDGMENT

The Respondent's application dated 15 October 2021 to reconsider the Judgment sent to the parties on 6 October 2021 is refused.

REASONS

1. By Judgment sent to the parties on 6 October 2021, the Tribunal decided that:
   a. the Claimant had been unfairly dismissed;
   b. there should be no reduction to the compensatory award under the principles of *Polkey v A E Dayton Services Limited* 1988 ICR 142;
   c. there should be no reduction to the basic/compensatory awards for contributory conduct;
   d. the Claimant's claim of breach of contract was well founded; and
   e. the Respondent should pay to the Claimant the sum of £55,320.48, comprising a basic award of £11,424.00 and a compensatory award of £43,896.48.

2. The Respondent made an application dated 15 October 2021 for reconsideration pursuant to Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Rules"). The Respondent submitted that it was necessary and in the interests of justice for the Tribunal's decision on *Polkey* to be reconsidered as it:

   a. contained insufficient reasons for the conclusion reached; and
   b. reached a conclusion that ignored the commercial realities of the situation, when all the evidence was considered.

Rules of Procedure and relevant law

3. Rule 72(1) of the Rules enable Employment Judges to refuse an application for reconsideration if they consider that there is no reasonable prospect of the original decision being varied or revoked. The test is whether it is

necessary in the interests of justice to reconsider the judgment (Rule 70).

4. Preliminary consideration under Rule 72(1) must be conducted in accordance with the overriding objective which appears in Rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just process.

5. In *Ministry of Justice v Burton and anor* [2016] EWCA Civ 714 Elias LJ confirmed the importance of finality in litigation:

   "An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743, para. 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Iron sides Ray and Vials [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."

6. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 (paragraph 34) per Simler P (as she then was):

   "a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited."

The Application

7. In relation to *Polkey* the Tribunal had concluded that had the investigation been approached in an open and fair manner, irrelevant issues would have been ignored and appropriate witnesses would have been interviewed and re-interviewed in depth to shed light on the working practices and what the agreement with Ms Dineen was. The Tribunal concluded that the Respondent would have come to the conclusion that either there was an agreement for the Claimant to see private clients, or that it was impossible to determine one way or the other but, taking into account the Claimant's long unblemished employment at the Respondent, dismissal was not the

appropriate sanction. The Tribunal decided that no *Polkey* deduction was therefore appropriate.

8. The Respondent's application says that the Judgment contained insufficient reasons for the conclusions reached. The Respondent is referred to the findings of fact made by the Tribunal and the detail set out in the "Conclusions" section of the Judgment, the conclusions in relation to unfair dismissal being almost 3 pages long. It was those conclusions that contain the reasons leading to the Tribunal's decision on *Polkey*.

9. The Respondent's submissions largely ignore certain facts that the Tribunal has found and the conclusions it has reached. In particular, the finding that there were others who saw private clients in the Hospital and so this was not an unusual arrangement. Also that, given the uncertainty of the terms of the agreement, taking into account the Claimant's long unblemished employment at the Respondent, the Respondent would have concluded that dismissal was not the appropriate sanction.

10. The second limb of the Respondent's application is that the Tribunal ignored the commercial realities of the situation. However, the Tribunal found facts and made conclusions on the commercial realities:

    a. the Respondent was a company providing private healthcare

    b. neither Ms Holbert nor Mr Rees Jones worked in the Hospital where the Claimant was employed and evidence showed there were different working practices at different hospitals

    c. there were others who saw private clients in the Hospital, this was not an unusual arrangement

    d. given the context of others seeing private clients it was unreasonable for Ms Holbert not to investigate further this line of enquiry to ask specific questions about what they knew about how and when the Claimant started seeing private patients and whether they knew anything about when and how an agreement was formed. If she had done this Ms Holbert could have been able to fairly make findings, on the balance of probabilities, about what the agreement was between Ms Dineen and the Claimant

    e. the Respondent knew that this investigation could affect the Claimant's ability to work in his profession and that therefore this could affect his livelihood.

Conclusion

11. Cases must be dealt with fairly and justly under Rule 2 of the Rules. There needs to be finality in litigation unless it is in the interests of justice to reconsider the judgment. Reconsideration applications are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis. The

Tribunal concludes under Rule 72(1) that there is no reasonable prospect of the original decision being varied or revoked and the Respondent's application is refused.

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Employment Judge **L Burge**

Date: 27 October 2021

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