EMPLOYMENT TRIBUNALS

Claimant: Mr L Wright

v

Respondent: Discount Electrics Ltd

Heard at: Nottingham (via CVP) **On:** 13 May 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Mr A Rozycki (Counsel)
For the respondent: Mr J Jenkins (Counsel)

RESERVED JUDGMENT ON RECONSIDERATION

1. The reconsideration application succeeds and the judgment dated 20 January 2022 is revoked and replaced with this judgment.

2. The claimant was unfairly dismissed with effect from 29 January 2021.

3. The compensatory award runs until 17 March 2022, which is the date upon which the respondent may have fairly dismissed the claimant following the principles outlined in *Polkey*.

4. The following award is made for unfair dismissal:

    a. Basic Award £1,596.76

    b. Compensatory Award £13,829.92*

    Total award **£15,426.68**

5. The claimant is awarded payment in lieu of notice (4 weeks' pay) in the sum of **£878.92.**

6. Consequently, the total that the respondent is ordered to pay the claimant is **£16,305.60**, subject to the recoupment provisions below**.**

7. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 apply, and for those purposes:

    a. The monetary award is £16,305.60;

    b. The amount of the prescribed element is **£7,489.24**;

    c. The prescribed period runs from **29 January 2021 to 20 June 2022**; and

    d. The amount by which the money exceeds the prescribed element is **£8,816.36**.

8. NB:

    a. the compensatory award is made up of –

        i. *£9,252.90 in respect of immediate loss,*
        ii. *£1,757.84 in respect of future loss, which it was considered just and equitable in the circumstances to award,*
        iii. *£450.00 in respect of lost statutory rights,*
        iv. *£934.96 in respect of lost pension contributions,*
        v. *£327.08 in respect of national insurance contributions, and*
        vi. *£4,169.48 representing a 25% ACAS uplift for unreasonable failure to follow ACAS code of practice,*
        vii. ***Total - £16,892.26***

    *b. *the 52 weeks' gross pay statutory cap has since been applied to the compensatory award (s124(1ZA)(b) Employment Rights Act 1996), which is 52 x £265.96 = £13,829.92.*

    c. The 25% ACAS uplift was applied to the compensatory award only as requested in the schedule of loss.

REASONS

Introduction

1. This is the respondent's application for the reconsideration of the judgment dated 20 January 2022, where I found that the claimants had been unfairly dismissed. Written reasons dated 28 February 2022 were circulated at the respondent's request.

2. The claimant agreed to any reconsidered judgment being made subject to the relevant recoupment regulations, although he maintained that no recoupment

would ensue. The claimant also agreed to the awards for lost statutory rights, lost pension payments, and lost national insurance contributions to be included in his compensatory award, and the above judgment deals with those points. Mr Jenkins also sought to argue that the claimant had benefitted from double recovery on the basis that he had been awarded both a compensatory award for unfair dismissal and had been awarded his notice pay following wrongful dismissal. Once it was explained that, as outlined in the written reasons, the compensatory award was reduced by four weeks to allow for the notice pay to be awarded, the argument was abandoned.

3. The rest of the respondent's application was opposed and, ultimately, has not succeeded if it was intended to further reduce the award which falls to be paid to the claimant. The balance of the application for reconsideration was centred around the provision of additional documents, described as 'new evidence', which was not put before me in the original hearing. Evidence of this nature is only admissible in some circumstances, as outlined below, and so each category of evidence required examination to decide its admissibility first. The second stage of the process was then to decide whether this gave rise to a need to alter my judgment.

4. I delivered reasons for decisions about admissibility of the documents at the hearing, but reserved my decision on the implication of the one document I admitted to ensure I could consider the matter properly. For clarity, I confirm that the reasons for the original judgment stand unless directly contradicted by the reason for reconsideration.

Principles of reconsideration

5. When approaching any application, and during the course of proceedings, the tribunal must give effect to the overriding objective found at *Rule 2 Employment Tribunals Rules of Procedure 2013*. This says:

> *"2 - The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> > *(a) ensuring that the parties are on an equal footing;*
> > *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> > *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> > *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
> > *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

6. The power to confirm, vary or revoke a judgment is found at *Rule 70*. That provides that a judgment can be reconsidered *"if it is in the interests of justice to do so"*. The interests of justice should be measured as a balance between both parties; both the applicant and the respondent to a reconsideration application have interests which much be regarded against the interests of justice (*Outasight VB Limited v Brown [2014] UKEAT/0253/14*).

7. In *Brown*, Her Honour Judge Eady QC said that the general public also have an interest in such cases because there should be an expectation of the finality of litigation. This was an expectation outlined by Mr Justice Phillips in *Flint v Eastern Electricity Board [1975] ICR936*, who said *"it is very much in the interests of the general public that proceedings of this kind should be as final as possible"*. He also said it was unjust to give the loser in litigation a *"second bite of the cherry"* where, having lost and learnt of the reasons for losing, a litigant seeks to re-argue points and bring additional evidence or information which would overcome the reasons given for the loss.

Consideration of new evidence

8. Plainly, it may be in the interests of justice to reconsider a decision where some new evidence is discovered or comes to light which would have changed the basis for the judgment if it had been possible to consider it at the time of the hearing. This is a common issue on appeal in the civil courts. However, the admissibility of new evidence must be balanced against the principles providing for finality of litigation. The primary test for whether 'new evidence' can be admitted comes from Lord Justice Denning in *Ladd v Marshall [1954] EWCA Civ 1*:

> *"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, thought it need not be decisive: thirdly, the evidence must be such as it is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."*

9. The principles outlined by Denning LJ have not always been strictly enforced. It appears, for example, that greater flexibility in terms of the first part of the test (evidence which could not be obtained with reasonable diligence) might be afforded where the other party to the case has hidden or been deceitful about the pre-existing evidence which is the subject of an application for admission (see the House of Lords decision in *Skone v Skone [1971] 1 WLR 812*). In this case, the claimant has not been in a position to interfere with the evidence gathering process from any of the sources of the 'new' evidence, and so I do not ultimately consider this principle to be relevant.

10. What may be considered 'reasonable diligence' was considered in *Crook v Derbyshire [1961] 1 WLR 1360*. In that case, the new evidence was testimony from a joiner who said that a handrail which failed leading to personal injury could not have been safe. The testimony was not present at the first instance trial, where the judge found the handrail to be safe and so dismissed the claim. Although the joiner's knowledge pre-dated the first trial, the evidence was allowed because the

claimant did not know about the joiner or his evidence – and so the evidence was not discovered prior to the first instance trial.

11. In *Saluja v Gill & Netlink Property Services Limited [2002] EWHC 1435*, Mr Justice Laddie found that the party seeking to admit pre-existing but undiscovered evidence exercised reasonable diligence even where it made a conscious decision to stop searching for evidence which it was aware might have existed. In that case, the claimant stopped searching for supporting evidence in the belief that he had sufficient evidence to win his case. Together with his advisers, he made a strategic decision that there would be an inappropriate waste of time and resources to continue to search for further evidence, even though he was aware it may exist. Ultimately, that was a mistaken belief and he lost.

12. When allowing a re-trial with new evidence, Laddie J considered (1) that the new evidence gave a strong sense that a very personally damaging finding of forgery against Mr Saluja was wrong (and so Mr Saluja should have the chance to clear his name), and (2) the decision for Mr Saluja to stop searching for evidence was at that time a reasonable and proper decision to have made in the circumstances.

'New' evidence in this case

13. The respondent asked me to consider three categories of evidence in the hope that I would reconsider my judgment. These were:

    a. A message from Paypal which purports to show that a Paypal receipt I had found to be genuine could not be genuine;

    b. A letter from Nottinghamshire Police about the respondent's complaint after the Crown Prosecution Service declined to proceed with action against the claimant on the basis of there not being enough evidence for conviction; and

    c. E-mails and statements from Rattlebyte which were given to the Police in February 2021.

Paypal evidence

14. In this case, the claimant was accused of stealing computer chips from the respondent. On the basis of the evidence provided at the hearing, I found that the respondent did not perform a reasonable investigation such as to give sufficient grounds to sustain that belief. The claimant produced a receipt from a Paypal transaction between himself and Eriks Kaleys which I found, on the balance of probabilities, to be genuine. The respondent was and remains utterly convinced that he receipt is a forgery. The respondent did not seek to provide any independent evidence that it was a forgery even though it could have sought to do so.

15. Instead, the respondent disclosed a message which is said to be from Paypal and which says that the transaction number given by the claimant on his receipt does not match a transaction on '*Lee Wright's'* account. In my written reasons, I express my concern that the respondent sought to and did then obtain transaction information about a transaction to which it was not a party. I do not repeat that

concern, but it is somewhat surprising to be asked to look again at this evidence which the claimant says constitutes a breach of policy from Paypal and a breach of privacy on the part of the respondent. In any event, I am now shown further messages from Paypal which are said to give context to the single message previously disclosed.

16. I am now shown a message from Paypal from 5 December 2021 to Linda State where Paypal repeat what they said to Ian State about the transaction identification. This particular message was not shown to me in the original hearing but was plainly in the respondent's possession because it is produced now and is dated from some eight months prior to the original hearing. There are other messages in the e-mail chain from Paypal, not relating to the claimant, which assist in placing the thrust of the message in a conversation with Paypal rather than as a standalone message as was shown at the original hearing.

17. Mr Jenkins submits that this evidence was overlooked at the original hearing, which does throw some doubt on whether this can properly be cast as 'new evidence'. Mrs State then explained that she had sent an e-mail to the tribunal and to the claimant's solicitors, prior to the hearing, which invited the tribunal and the claimant's solicitors to log into the respondent's Paypal account and view the messages. I cannot find this email and invitation in the bundle for the original hearing. The issue is not raised in the respondent's witness statements either, only reference to the standalone message which I considered in the original hearing. There was also a preliminary issue on the first morning of the trial relating to disclosed documents and matters pertaining to the bundle. At no point then did the respondent note that this evidence, apparently now crucial, was not included in the bundle.

18. I am not sure it would have been appropriate for the tribunal to have considered the evidence in the form apparently submitted even if the e-mail invitation and login details were in the bundle. The respondent is inviting an Employment Judge to log into their own private Paypal account to peruse messages relating to a transaction in respect of which it may have made an unlawful request for receipt of information. In this sense, I do not consider the evidence to have been properly disclosed. The messages were clearly capable of being formatted and sent in electronic form in the usual way because they appear before me now on a piece of paper having been printed.

19. For the reasons outlined above, I consider that the documents were in the possession of the respondent at the time of the original hearing and, if the respondent wished them to have been considered, then it should have disclosed by them in the usual way and ensured they were before me in the bundle. I consider that seeking for them to be included now is an example of the respondent seeking to have a second bite of the cherry on a factual issue which went against it. Consequently, I do not consider that this evidence should be considered as part of the reconsideration application because it would not be in the interests of justice to do so. The claimant and the general public have an expectation in there being finality of litigation and to reconsider on the basis of this evidence would break open matters which should and could have been dealt with in January 2022.

Nottinghamshire Police evidence

20. The respondent produces a letter from Nottinghamshire Police dated 9 March 2022. The letter is the outcome from a complaint made about the police's handling of the respondent's complaint about the claimant. Most of the information given by the police is irrelevant to the issues in the case, but it appears that the officers handling the case did not act appropriately. It appears that the respondent, as I considered in the original judgment, drove the police to act as they did. It is apparent that the Crown Prosecution Service were concerned that the investigating officer only continued to pursue the case in an attempt to assist the respondent with these employment tribunal proceedings. It appears that those officers no longer work with Nottinghamshire Police.

21. The letter post-dates the original hearing its subject and contents could not have been known to the respondent at the original hearing. This is different to the evidence outlined above, and I consider that the respondent could not with reasonable diligence have produced the evidence at the original hearing. It simply did not exist. Part of the letter describes steps taken in the investigation which I do not consider the respondent was aware of at the original hearing, and is relevant to the issues in the case. It describes how the investigating officer did not believe that the Paypal receipt was genuine. This point was in evidence at the original hearing and had been considered. However, the letter says that the investigating officer also called Paypal about the receipt and was told that the receipt was not tied to that transaction number. The letter says there was to be a follow up email confirmation in writing but it is not said that Paypal did confirm the point in writing.

22. I remind myself that new evidence need not be decisive to warrant consideration, just that it needs to have an 'important influence'. This evidence as to what Paypal told the police, whilst very much hearsay in nature, would have an important influence on determination of the issues. Remembering that the test for unfair dismissal requires me to assess the respondent's actions, not substituting my view, I consider that the respondent could reasonably have acted upon this evidence in disciplinary action against the claimant. I should consider the impact of that. It therefore satisfies the second limb of the *Ladd v Marshall* test. In terms of apparent credibility, I consider that I should be able to trust the written word of a Police Officer. I am conscious that the letter writer is conveying information from the police file, which is also described as not following procedures, but nevertheless I consider the information to be credible.

23. I therefore admit the Nottinghamshire Police evidence as new evidence to be considered, and the impact of that consideration is outlined below.

Rattlebyte evidence

24. The original hearing bundle is remarkably silent in terms of any information from Rattlebyte following the claimant's dismissal. I commented upon this at the time of the original hearing and remarked upon it again in my written reasons. Despite Rattlebyte's central importance to the allegations against the claimant, it appears that the respondent did not secure evidence from Rattlebyte to be considered at the original hearing.

25. Now, the respondent produces two e-mail chains between its Linda State and Eriks Kaleys of Rattlebyte. The first chain begins on 28 January 2022, which is around a week after the respondent was unsuccessful in the original hearing partly due to the factual disputes involving Rattlebyte going against it. The first e-mail is from Eriks and it tells Linda State that the claimant has never bought any chips from him. This contradicts the claimant's evidence. The e-mail to Eriks is not included in the e-mail chain, and so I am unable to determine whether the request was made before or after the final hearing on 19 and 20 January 2022.

26. On 1 February 2022, Linda State e-mails Eriks to ask again for confirmation whether the claimant ever paid him for any chips. The request was explained as something the respondent's solicitor had asked it to do. Eriks replied on 5 February 2022 and when doing so attached two witness statements which he gave to Nottinghamshire Police in relation to the allegations against the claimant.

27. Those two witness statements are produced and submitted as 'new' evidence. They are dated 15 February 2021 and 15 March 2021. In those statements, Mr Kaleys told the police:

    a. Rattelbyte had been contacted by a customer who was having trouble with a chip bought on Ebay from a seller called 'Renaultman', whom had in turn referred him to the claimant;
    b. The chip in question had a serial number which Rattlebyte had traced to the respondent;
    c. The claimant had an account with Rattlebyte;
    d. Rattlebyte had agreed to sell chips to the claimant;
    e. The receipt offered by the claimant was not one to which Mr Kaleys was a party; and
    f. Mr Kaleys had not sold '5 chips' to anyone in the month of December 2019.

28. The second chain dates from between 19 March 2022 and 7 April 2022. The queries relate to the displaying of invoice numbers on receipts and serial numbers on chips, which Mr Kaleys answers. On 7 April 2022, Linda State mentions what the claimant had said at the original hearing about his Paypal account. It also mentions that the respondent had requested the police file in the hope that it could help at the reconsideration hearing. Mr Kaleys replies the same day to advise that the respondent can access the statement he gave to the police, and said again that the receipt given by the claimant did not involve him.

29. Plainly, these documents are relevant to the issues in the case. It would have been helpful to have considered them at the original hearing alongside the rest of the evidence. Although the documents appear to contradict the claimant's evidence, I do note that the argument I accepted from the claimant was that he had bought the chips from Mr Kaleys privately, not through Rattlebyte, as he had been invited to do. I could not, in such circumstances, simply accept what Mr Kaleys says here as evidence which automatically changes my view on the factual background.

30. The biggest issue for the respondent here, though, flows from ***Ladd v Marshall*** and the respondent again runs into difficulties relating to seeking a second bite of the cherry. The respondent argues that the evidence from Rattlebyte could not have been obtained with reasonable diligence prior to the original hearing. It is said that

the respondent was not aware it could have access to the statements given to the police and so they could not have been procured with reasonable diligence.

31. I disagree. At the original hearing, the respondent produced no direct evidence from Rattlebyte about its relationship with the claimant or, most importantly, the receipt offered by the claimant as proof of purchase from Mr Kaleys. The respondent's witness statements are also silent about any discussion with him about the Paypal receipt. It was an area which the respondent appears to have overlooked in preparation for defending the claimant's claim. At the original hearing, both Ian State and Linda State referenced Mr Kaleys giving statements to the police. Neither detailed what the statements said, but both were plainly aware that this evidence was in existence. There was no evidence anywhere that the respondent had asked Mr Kaleys for his views of this evidence prior to the original hearing. Even the correspondence disclosed now, where the requests were made, are dated after the original hearing and appear to have been prompted by the respondent finally opting to take legal advice.

32. In my judgment, the respondent could have accessed this evidence from Mr Kaleys with reasonable diligence, simply by asking him for his views. It is not a similar situation to *Saluja*; the respondent is not defending an allegation akin to fraud with significant impact, and it could not reasonably have considered that its factual argument without Rattlebyte evidence was sufficient to have decided to not ask for that evidence. It seems as if the requirement for the evidence was not considered until it was apparent that not including it had been an oversight.

33. The lack of evidence from Rattlebyte at the original hearing was a glaring omission on the part of the respondent's preparation for the final hearing, and I do not consider that it would be in the interests of justice or in accordance with the overriding objective to allow the respondent to have a second bite of the cherry on this point having (1) lost the factual argument in relation to Rattlebyte, and (2) taken legal advice after receiving an unfavourable judgment.

34. I therefore do not admit the Rattlebyte evidence to be considered as part of this application.

Effect of new admitted evidence on the original decision

Overall finding of unfair and wrongful dismissal

35. In the original hearing, I found that the respondent's decision to dismiss the claimant fell outside the reasonable range of responses at the time of dismissal. I also found the dismissal to be procedurally unfair, and I considered *Polkey* but made no reduction for the reasons set out in my written reasons. I considered whether there should be a reduction to the award to reflect any culpable or blameworthy conduct on the part of the claimant but found none.

36. The new Nottinghamshire Police evidence cannot change my judgment about what the respondent could have reasonably done around the time of the dismissal because the contents of the letter were not known to the respondent at that time; it did not exist. Without the police officer involved giving evidence to the tribunal, and perhaps production of the material referred to, I do not consider that I can change

my mind about the claimant being wrongfully dismissed in breach of contract either. To do so would require me to accept the letter writer's hearsay evidence about what another officer did, and then reported, as being of greater weight than all of the material I considered in my original judgment as giving favour to the claimant on the key factual disputes. In my view, it is not open for me to do this without introducing some level of perversity.

Reduction for Polkey

37. However, the new evidence from Nottinghamshire Police would have changed my mind on *Polkey* because there is now a fixed date where the respondent receives evidence, which I accept and consider credible even if of limited weight, that confirms in some degree the respondent's belief that the claimant committed the misconduct alleged. *Polkey* can operate in one of two ways to reduce the compensatory award. The most common way is to make a percentage reduction to reflect the chance that the claimant would have been dismissed had a fair procedure been followed. I did not make that deduction because I could not see that a fair procedure would have resulted in the claimant's dismissal based on a reasonable employer's consideration of the evidence and information available to the respondent even at the time of the original hearing.

38. The second way in which *Polkey* may operate is to stop the compensatory award at the date which the tribunal considers that the respondent could have fairly dismissed the claimant. In my judgment, a reasonable employer may have fairly decided to begin fresh disciplinary proceedings upon receipt of the Nottinghamshire Police letter. The letter is dated 9 March 2022. Allowing sufficient time for a fair process, with a further investigation, giving the claimant time to present his case properly, convening a disciplinary meeting, and considering sanction, I consider that the claimant could have been fairly dismissed two weeks thereafter on 17 March 2022.

Reduction for culpable or blameworthy conduct which led to dismissal

39. The Nottinghamshire Police evidence post-dates dismissal. It does not dislodge the core factual findings in my original decision. The letter supports the view that the Police felt that the claimant had committed some blameworthy conduct, but this point was already considered at the original hearing. I do not consider that the new evidence assists in identifying blameworthy conduct which caused or contributed to the dismissal and so I make no reduction for culpable or blameworthy conduct.

Overall conclusion on the effect of the new evidence

40. Consequently, my original judgment is altered. I now apply a *Polkey* reduction with the effect that the compensatory award runs until 17 March 2022 and the claimant's future losses end from that date. I note that, due to the function of the statutory cap, the claimant's compensatory award is not in fact reduced at all despite this element being reconsidered.

41. The respondent must pay the claimant the total sum of £16,305.60. Of this, £8,816.36 should be paid within fourteen days in the usual way. The remainder should be held according to the recoupment provisions to allow the Secretary of

State to request recoupment of any qualifying benefits. Following this, the respondent must pay the claimant the remaining balance.

Employment Judge Fredericks

20 June 2022