EMPLOYMENT TRIBUNALS

Claimant: **Ms M Lucy-Dundas**

Respondent: **ODT Professional Services Limited**

RECONSIDERATION JUDGMENT AND REASONS

Background

1. By very lengthy correspondence dated 11 July 2022 the Claimant, through Mr Capek, made three requests for clarification, six requests for reconsideration and a provisional application for costs.

2. The correspondence was not forwarded to me until 11 August 2022 by which time I was on annual leave. I asked the tribunal's administration to notify the parties that I would deal with the matter on my return.

Request for clarifications

3. I answer these requests as follows:

   (i) The *Polkey* reduction only applies to the compensatory award.
   (ii) The order of deductions and the way they are made is a matter of law on which there is caselaw guidance. See e.g. *Digital Equipment Co Ltd v Clements* [1997] EWCA Civ 289.
   (iii) It is not really a question of one cause of action prevailing over the other. It is a question of awarding compensation for both successful complaints, subject of course to ensuring that there is no double recovery for the same loss. *If* it be the case that the Claimant is entitled to 3 month's notice pay as compensation for wrongful dismissal then she would not lose that compensation purely (*if* it be the case) because her compensation for unfair dismissal amounted to less than that. I remain entirely open minded as to what the Claimant's remedy should be. The references here simply pick up on what Mr Capek said.

Applications for reconsideration.

4. <u>None of the applications for reconsideration have any reasonable prospect of success. I refuse the applications pursuant to rule 72(1).</u>

(i) It was a matter for the Respondent whether it wished to call Mr Buckland or not (and if so, and if needed, to seek a postponement in order to facilitate that). The Respondent chose not to call Mr Buckland. The Claimant had/has no right to require the Respondent to call Mr Buckland and neither did/does the tribunal. That is sufficient to dispose of this ground. I would add that I do not agree that the Respondent gave the impression that Mr Buckland was "*at death's door*". It gave the impression that he was suffering from a significant illness that was a barrier to his participation in the proceedings. However, I do not accept that the information in the Claimant's application for reconsideration is necessarily inconsistent with that. It is perfectly possible to be unfit for one purpose (such as dealing with a particular person or a particular matter like tribunal proceedings) but nonetheless fit for work. It would be entirely wrong to reopen the liability hearing and to require the Respondent to call Mr Buckland.

(ii) I certainly agree that care must be taken to avoid penalising the Claimant twice, once by *Polkey* and once by a deduction for contributory conduct, in a way that double counts the same thing. However, I do not accept that is what the tribunal did. In fact the *Polkey* reduction and the contributory conduct deductions related to different things:

a. The essential reason for making the *Polkey* deduction was stated thus: *"The Respondent's view was (and would still have been even absent charges 1 – 4) that the Claimant did not have permission to carry out work for another firm <u>and did not believe herself to have permission</u>* [emphasis added]*." On that assessment of the facts, which was a reasonable one, it would have been within the band of reasonable responses to dismiss the Claimant…."*. The sting of this the disciplinary matter was doing the equity release work for another firm in the absence of a belief that there was permission to do it. That is what made the disciplinary matter potentially the stuff of a fair dismissal.

b. In order to deal with contribution the tribunal had to and did form its own view on the permission to carry out equity release work issues. Its view was importantly different to the Respondent's (though we found that the Respondent's view was open to it). Our view was that the Claimant *did* believe herself to have permission to carry out the work. We therefore excluded from our assessment of contributory conduct, the very thing at the heart of the *Polkey* reduction. Had the *tribunal* found that the Claimant was carrying out the equity release work in the absence of a belief that there was permission to do it, following a conversation with an equity partner in which permission had been sought but not granted it would have assessed the level blameworthiness of the Claimant's conduct totally differently and analysed the case accordingly differently.

c. It is true that when assessing contributory conduct, we did find blameworthy and take into account the Claimant's failure to obtain permission in writing for the equity release work and her conduct in dealing with the matter so loosely in an oral conversation. However, those are related but distinct, additional matters that were not taken into account in our assessment of *Polkey.* They were matters that were not serious enough to justify dismissal, though they were blameworthy and did contribute something to the dismissal.

d. I note that we did refer to charge 5 in our analysis of *Polkey* but it did not increase the amount of the *Polkey* reduction. Charge 6 was the operative matter. And charge 6 was, of itself, sufficient to put a dismissal in the absence of the identified unfairness, in the band (see para 268). There was therefore no double-counting when the factual matters behind charge 5 were taken into account in the assessment of contribution.

(iii) The tribunal gave careful thought to the amount of each deduction. They simply are not inconsistent with the tribunals' wider reasons.

(iv) It is true that the tribunal did not deal with s.207A TULR(C)A uplifts. That was not one of the matters that it was agreed would be dealt with in the present tranche of the hearing nor one of the matters the parties addressed the tribunal on. It is a matter for the remedy hearing if the parties are unable to agree remedy.

(v) This ground seeks to reargue the Claimant's case that she was entitled to pay during the material period of sickness absence. The tribunal's analysis of the law, it's decision and the reasons for them speak for themselves. They are not fairly characterised in the application for reconsideration. They hold good notwithstanding the various points made in the application for reconsideration.

(vi) This ground also seeks to reargue the Claimant's case that she was entitled to pay during the material period of absence. It asserts that the Claimant was entitled to wages on the basis that she spent many hours preparing for the disciplinary process.

It is obvious that the Claimant did indeed spend many hours preparing for the disciplinary process during her period of sickness absence. However, no argument was developed at trial (either in the Claimant's witness statement nor in Mr Capek's closing submissions) as to why or on what basis it followed from the fact she spent time preparing for a disciplinary hearing that she was entitled to her usual (or any) wages.

The witness statement said this:

> 282. However, in spite of PB's refusal to allow me to work from home, in one fundamental sense, I did indeed do so, inasmuch as I spent scores of hours preparing for my disciplinary hearings which eventually took place in my absence on 07.02.19 and 18.03.19.

The closing submissions said this:

> "C said at para 282 of her witness statement that in one fundamental sense, she did *"work from home"* during the final period of her employment from January 2019 onwards (particularly from early Feb 2019 to mid-March 2019) by virtue of the scores of hours that she spent working on her defence against the disciplinary allegations that she faced. I do not recall this point being challenged by Mr Paulin."

Preparing for a disciplinary hearing was 'work' of a sort, just as all kinds of arduous activities one might do could be described as 'work'. However, it was not the work that the Claimant was contracted to do / that she was entitled to payment for under the express terms of her contract. The contract made no reference at all to be being paid for such endeavours, nor if so, how many hours would be paid for nor at what rate. Given that, some other legal basis obliging the Respondent to pay the Claimant for time spent preparing for the disciplinary hearing needed to be identified and argued in order to even begin to mount a claim that there was an unauthorised deduction from wages on account of this 'work'. However, no legal basis was argued or identified. If there was one, it could and should have been argued/identified at trial but it was not. No legal basis has been identified even now, though even if it had been it would be too late.

Costs

5. The Claimant makes a provisional/contingent application for costs. She indicates the application will not be pursued if the Respondent does not make any application. According to the file and the check the administration made on my behalf today, the Respondent has not made any application.

Case management orders

6. I repeat that the parties should liaise to try and agree remedy. The case management orders I made in relation to this continue to apply but I extend the deadline in order 3 to 31 October 2022.

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Employment Judge Dyal
Date: 2 September 2022

Sent to the parties on
Date: 2 September 2022