EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr P Thorpe **Burrana Limited**

Heard at: Reading (by CVP) **On**: 4 July 2022
Before: Employment Judge Cowen

Appearances
For the Claimant: **Ms Rokad (counsel)**
For the Respondent: **Mr Humphreys (counsel)**

RESERVED JUDGMENT

1. The Respondent shall pay the Claimant £29,670.48 in respect of unlawful deduction of wages.

2. The Respondent shall pay the Claimant £9,480.64 in respect of unfair dismissal.

3. The Claimant's application for reconsideration is dismissed.

REASONS

Background

4. A Judgment in favour of the Claimant in his claims for unlawful deduction of wages and unfair dismissal was made on 7 February 2022. The Claimant applied for reconsideration of that judgment in an application dated 20 February 2022 and received on 1 March 2022.

5. Directions were given for the Respondent to reply to the reconsideration application and for a 1 day hearing for reconsideration and remedy to be listed.

6. A hearing in relation to reconsideration and remedy was held by CVP on 4 July 2022 where both parties were represented. Submissions were made by both counsel and an amended Schedule of Loss was provided.

7. The Judgment of 7 February 2022 outlined that between 17 April 2020 and the Claimant's dismissal on 30 October 2020, the Claimant was subject to an unlawful deduction of wages. It also decided that the Claimant was unfairly dismissed, but that his employment would only have continued for a further four weeks if a fair process had been applied. His damages were therefore limited to four weeks.

Submissions

Unlawful Deductions

8. The Claimant asserted that it was necessary in the interests of justice for me to reconsider my decision in respect of two aspects of the claim. This was necessary as the Judgment had not reflected the evidence provided by the parties.

9. The first point was that the Claimant was entitled to 25% of his salary between 23 March and 17 April 2020, due to the fact that when they commenced the furlough scheme, the Respondent backdated their application to 23 March.

10. The Claimant also submitted that the Claimant is entitled to 19 days pay between 23 March 2020 and 17 April 2020 at £70.58 per day in addition to the payment for unlawful deduction which was made in the Judgment.

11. The Respondent submitted that the Claimant's application in relation to the unlawful deduction was misconceived as the agreement in relation to 'standdown' was not a simple 50% reduction, but was 50% for two weeks, followed by no pay for two weeks. Further that there was an agreement to recoup the overpayment made in March 2020 from the April and May 2020 payments. The Respondent asserted that a reconsideration was therefore not necessary in the interests of justice.

Polkey deduction

12. The Claimant asserted that the decision in paragraphs 63-66 of my Judgment were wrong and should be reconsidered. The Claimant asserted that I ought to have considered whether the Respondent could fairly have dismissed the Claimant and what the chances of that were.

13. He asserted that it was wrong for me to conclude that it would have taken four weeks to have completed a fair procedure, due to the evidence which was before me. Namely, the fact that Mr Nordstrum would have had to take the matter to the Board and that there may have been other factors which would have contributed to the decision on whether to dismiss. The Claimant asserted that without further evidence I could not make a decision on this point.

14. The Claimant also submitted that without further evidence I could not assess why Mr Nordstrum would have preferred Mr Connolly in any event, and further, that the finding that there ought to have been a pool of three Presidents for the position of Global Head of Sales means that I could not say with any certainty that the Claimant would have been chosen for redundancy.

15. The Claimant also asserted that the Respondent did not lead evidence on alternative roles, which means I could not conclude that there were not alternative suitable vacancies.

16. The Respondent asserted that the Claimant's application are matters for appeal not reconsideraton, but goes on to address them in any event. They asserted that I have summarised the law correctly in paragraph 63 of the Judgment and set out my reasoning in paragraphs 63-66. They also said that an assessment of Polkey involves an element of education speculation about what would have happened in a counterfactual world.

17. The Respondent further submitted that it was acceptable to conclude that, as the Board had followed Mr Nordstrum's decision, in the counterfactual world they would also do so. Ultimately the Respondent submitted that if the Claimant wishes to challenge the Judgment, then he may do so by appeal.

18. The Respondent pointed out that paragraph 22 of the Judgment gives the reasons which the Claimant says are missing and therefore there is no ground for reconsideration on this point.

19. The Respondent pointed out that the arithmetic approach to Polkey decisions is not appropriate and that I may use discretion to determine the chances of being chosen for redundancy and the time taken to go through the procedure.

20. Finally the Respondent pointed to the factual finding that there were no alternative vacancies and the fact that this had been part of the Respondent's witness evidence at the hearing.

Remedy

21. The parties accepted that the Tribunal will be require to carry out the calculation of the award as the parties have not yet been able to agree the value of the quantum.

The Law

22. Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 states that a Judgment may be reconsidered upon application by either party or by the Tribunal's own volition where it is necessary in the interests of justice. As with all rules in the tribunal, it must be exercised within the bounds of the overriding objective.

23. The case of *Outasight VB Ltd v Brown* UKEAT/0253/14 sets out HHJ Eady views that the interests of justice is a discretionary ground, which is wide. However it is not boundless.

24. The reasons for a reconsideration do not include where there has been an error on the part of a representative, but may include where new evidence has come to light since the hearing, or the parties and the employment judge had a misunderstanding of the law.

25. Such grounds are in contrast to the basis of an appeal to the Employment Appeal Tribunal, where the party making the appeal considers that the Employment Judge made an error of law, or came to a conclusion which no reasonable Tribunal could have reached, based on the evidence before it.

26. With regard to the law on unlawful deductions, I refer to paragraphs 26 to 40 of the 7 February 2022 Judgement.

27. With regard to the law on Polkey I refer to paragraph 63 of my earlier Judgment and the case of *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 where it was specifically said that compensation can be awarded for the period of time in which the employee would be employed if the procedure had been fair.

28. A further example of compensation being limited in these circumstances was set out in *Mining Supplies (Longwall) Ltd v Baker* [1988] IRLR 417, [1988] ICR 676, where a dismissal was held to be unfair for lack of consultation and the EAT held that had a week was a reasonable period for consultation. Compensation was therefore limited to that period.

Decision

29. It is open to me to reconsider any part of my Judgment if it would be in the interests of justice to do so, under rule 70.

30. The Judgment of 7 February 2020 set out at paragraph 10 that; "*On 17 March 2020 the claimant was sent a letter to say he would be 'stood down' from 23 March 2020. He was told that he would not be paid full pay, but would receive 50% pay for two weeks, followed by no pay for two weeks. He would be allowed to take his annual leave for some time..... The Claimant agreed to a period of unpaid leave and assisted in advising other employees of the same".*

31. I therefore found in the Judgment that prior to the instigation of the furlough scheme (which I found was not validly agreed with the Claimant and led to an unlawful deduction of wages), the Claimant had agreed with the Respondent to be paid 50% for two weeks and then 0% for two weeks. Over the period of four weeks, this is the same as being paid 25% in each week.

32. I did not, as the Claimant asserts, find that he agreed to a standdown at 50% between 23 March 2020 and 17 April 2020. The Claimant's application fails to take into account the Judgment at paragraph 10.

33. The Claimant's application that there was an underpayment during this period does not take account of the factual findings of the Judgment which set out the basis for the overall conclusion. The application for reconsideration is made on an erroneous basis and no additional amount is owed. If I did not make it sufficiently clear in my Judgment, then I do so now; The amount paid to the Claimant prior to 17 April 2020 was correct and in accordance with the agreement reached between the parties to vary his payment due to a contractual 'stand down'. Thereafter, the Respondent asserted that the Claimant was paid in accordance with the UK Government furlough scheme. In my Judgment this was an unlawful deduction from wages, as he had not agreed in writing to enter into the scheme, as was required. I therefore do not allow reconsideration of this aspect of my Judgment on this point and confirm my Judgment of 7 February 2022.

Polkey reduction

34. It is in the interests of justice to ensure that the parties understand the basis of any Judgement of the Tribunal. Where that is questioned by either of the parties, it is appropriate to explain further, or amend, if appropriate. I am therefore content to consider the issue of the Claimant's application.

35. My decision that the Claimant would have been dismissed in any event after four weeks, did not expressly state that the dismissal would have been fair. The Judgment did say in paragraph 63 "*Had a fair procedure been applied to this redundancy process".* I accept that this did not spell out my consideration that it was possible for a fair dismissal to have occurred and therefore I take the opportunity now to do so, having considered the points made by the Claimant and the evidence referred to at the hearing.

36. The Respondent's evidence indicated that they had the benefit of a specialist HR department, albeit not based in the UK and specialist lawyers. It therefore was possible for them to have known and followed a redundancy consultation process which followed the statutory requirement and ACAS guidance.

37. The evidence also showed that the Claimant was available to be consulted with, as he was in communication with his employer throughout the furlough period.

38. Given that Mr Nordstrum had taken his views to the Board, who had supported them in relation to the actual dismissal, I have no reason to believe that he would not have acted in a similar manner in the 'counterfactual' world referred to by the Respondent, where Polkey is considered. Likewise, I have no reason to believe that the Board would not have supported his view of any pool for redundancy.

39. It is clear from the evidence of both parties that the financial situation for the Respondent was genuine and very difficult, with no known end date. I am therefore satisfied that a redundancy process which included the Claimant and the two other Presidents of Sales at that time, would have resulted in a dismissal.

40. In considering whether the Claimant would have been chosen had a pool selection occurred, I accept that I did not have details of the other members of the pool. Evidence was not provided by either party. The evidence before me from Mr Nordstrum indicated that his preference was for Mr Connolly to take on the Global role over the Claimant (see paragraph 22 Judgment). I understood that a direct choice had been made by Mr Nordstrum as an informed CEO. Whether this is considered as a pool, or merely a direct choice, the evidence suggest that the outcome would have remained that Mr Connolly would be chosen over the Claimant. I therefore concluded, based on the evidence I was provided, that the Claimant would have been chosen for redundancy, even if a pool and a fair procedure had been applied. I see nothing in the Claimant's submission to make me consider that this decision was erroneous.

41. Finally in response to the Claimant's submission that in the absence of evidence of the Claimant turning down alternative roles, I could not find that he would not have avoided redundancy by accepting a lower paid role. The Claimant once again has omitted to make reference to my finding of fact that there was "no alternative vacancies suitable for the Claimant" (paragraph 65 Judgment). This was based on the evidence of Ms O'Connor and is set out at paragraph 21; "*There was no list of vacancies within the business at the time, so any possible alternative vacancies were unknown to the Claimant. However, any recruitment process was run by either Mr Pickering or Ms O'Connor and therefore they would have details of any existing vacancies, if asked. At the time of the Claimant's redundancy there had been a global freeze on hiring* ".

42. I find, based on this evidence that there were no suitable vacancies at the time of the Claimant's dismissal and therefore he would not have been able to avoid redundancy by accepting an alternative role.

43. For these reasons the Claimant's application for reconsideration in relation to the issue of Polkey is dismissed and I confirm my Judgment of 7 February 2022.

Compensation

44. In light of my Judgment dated 7 February 2022 and this Judgment, the Respondent must pay the Claimant the difference between the amount he was paid between 17 April 2020 and 31 October 2020 and his full salary, in compensation for his unlawful deduction of wages. £1059.66 x 28 = £29,670.48

45. Further, the Respondent must pay the Claimant a basic award reflecting 6 x 1.5 x £538 = £4,842.00

46. A compensatory award limited to 4 weeks of the difference between £1413.43 and the received amount of £353.77, i.e 4 x £1059.66 = £4,238.64

47. A further award in relation to loss of statutory rights in the sum of £400.

_____
Employment Judge Cowen

Date: ……28 October 2022……..

Sent to the parties on: 3 November 2022

For the Tribunal Office

.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.