Case Number: 3306438/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Tracey Webb	**v**	London Underground Limited

Heard at: Bury St Edmunds (CVP) **On:** 24 February 2023

Before: Employment Judge R Wood; Ms S Elizabeth; Ms S Blunden

Appearances
For the Claimant: Mr Jones (Counsel)
For the Respondent: Miss Thomas (Counsel)

JUDGMENT ON REMEDY

1. Although the Claimant was unfairly dismissed, the procedural irregularities highlighted by the Tribunal would have made no difference to the outcome.

2. The claimant's compensatory award is therefore reduced by 100% pursuant to the 'Polkey' principle.

3. The claimant's conduct in relation to this matter was blameworthy and culpable. The basic award is reduced by 75% on this basis.

4. Accordingly, the respondent is to pay to the claimant the sum of £3,564.25 in respect of the basic award.

5. The respondent is to pay to the claimant the sum of £3,720.45 in respect one unpaid holiday entitlement. This is a gross sum. The respondent is liable to pay income tax and national insurance contributions which are due.

SUMMARY REASONS

1. The reasons below were handed down orally at the conclusion of the hearing.

2. This is a claim which involves allegations of direct race discrimination, unfair dismissal, and non-payment of accrued holiday pay. The Tribunal

previously gave judgment on liability, finding that that the claimant was unfairly dismissed, but dismissing the claim of race discrimination. The Tribunal also allowed the claim in respect of three weeks of accrued holiday entitlement which was unpaid by the respondent.

3. By agreement, there are two issues for the Tribunal to deal with today. First, is the question of a deduction from any compensatory award according to the 'Polkey' Principles. Secondly, whether there should be deductions from any basic and/or the compensatory award on the ground of any blameworthy and culpable conduct on the claimant's part.

4. Again by agreement, we have made findings on these issues based on submissions alone. No further evidence was called by either party.

5. We deal first with the question of a 'Polkey' deduction. Put another way, whether the claimant would have been dismissed in any event notwithstanding the procedural irregulars highlighted by the Tribunal in its previous judgment. The burden of proving that it would have made no difference is on the employer. The standard of proof is the civil standard, i.e. on the balance of probabilities. The matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference.

6. In reaching its conclusion, the tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so. Furthermore, the enquiry is directed at what the particular employer *would* have done, not what a hypothetical fair employer would have done. We have further considered the matters set out in the case of *Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT*. The Tribunal has had regard to any material and reliable evidence that might assist it in fixing just and equitable compensation.

7. We find that it is just and equitable in this case to reduce the compensatory award by 100% on this basis. We do so on the basis of our previous findings which we do not repeat her in their entirely. It hopefully suffices to say that we take the view, as previously stated, that the respondent was left with no option to dismiss the claimant. Put another way, the dismissal was inevitable. The original conduct was serious and persistent. Further, the claimant lacked any significant insight and remorse into what she had done, and the impact it had had on her employer and work colleagues. In the circumstances, it was our view that the respondent could not have failed to have acted in the way that it did.

8. This is not to overlook the deficiencies which we identified in the respondent's procedure. However, it is our judgment that they did not have a significant impact on the outcome, not least because in large part they manifested themselves after the original decision had been made i.e at the appeal stage. We agree with Miss Thomas that it was inevitable that Mr Howarth would have gone on to confirm that decision to dismiss, even if he

had properly taken into account the factors which we identified i.e. mitigation etc. He was adamant that the only issue which might have affected his decision was a display of remorse. This was not forthcoming from the claimant, even in her presentation to the Tribunal, where she continued to rely on her rights under article 10 of the ECHR.

9. In short, these were offensive, inflammatory, and racially divisive posts which placed the respondent into a situation where it had no viable alternative but to dismiss. We therefore make a 100% deduction of the compensatory award under the 'Polkey' principle.

10. We then turn to the question of contributory fault. We make no further deductions of the compensatory award for the obvious reason. Had we not already reduced this aspect of the award by 100%, we would have made a deduction to reflect contributory fault. We accept the proposition put by Mr Jones that in a case such as this, involving findings of misconduct, that there would be a significant element of 'double counting' in any event, if there were deductions under both 'Polkey' and contributory fault.

11. However, we are satisfied that the question of contributory fault applies to the basic award. A reduction on the ground of the employee's conduct must be made where 'the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent' (s.122 of the ERA 1996). the conduct of the employee should be 'culpable or blameworthy'. The correct approach is for the Tribunal to:

> -identify the conduct which is said to give rise to possible contributory fault
>
> -decide whether that conduct is culpable or blameworthy, and
>
> -decide whether it is just and equitable to reduce the amount of the basic award to any extent.

1. The size of the reduction to the basic award is a question of judgement for the tribunal and requires an assessment of the circumstances, including whether the employee's actions could be categorised as gross misconduct. Where a tribunal decides to make a reduction — particularly a 100 per cent reduction — it must give clear reasons for doing so. The EAT in *Steen* confirmed that a reduction to nil should be an unusual finding.

2. In coming to its decision on this aspect of the case, the Tribunal has attempted to strike a balance between the serious nature of the misconduct, against the long and unblemished previous employment record of the claimant, and the fact that the respondent made serious procedural errors when dealing with the claimant's disciplinary process. Having regard to what is just and equitable, looking at the evidence as a whole, we take the view that a further significant deduction is justified. However, we bear in mind that

100% deductions of the basic and compensatory award are unusual. Whilst this is a serious case, it is not one of those unusual cases referred to by the appeal courts.

3. In our view the appropriate dedication from the basic award is 75%.

4. The total basic award in this case is agreed at £14,257. Applying a deduction of 75%, this means that the claimant is entitled to £3,564.25 in respect of the basic award.

5. The Tribunal has already allowed the claim for holiday pay. The parties agree that this claim is calculated at £3,720.45 for the relevant three week period. We made that award. This is a gross sum. The respondent is liable to pay income tax and national insurance contributions which are due.

Employment Judge R Wood

Date: 24 February 2023…….

Sent to the parties on: 28 March 2023
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For the Tribunal Office