EMPLOYMENT TRIBUNALS

Claimant: **Mr J Sutton**

Respondent: **Sequin Art Ltd**

Heard via CVP **On:** **2nd May 2023**

Before: Employment Judge A Frazer

Representation
Claimant: Mrs J Bradbury (Counsel)
Respondent: Mr J Feeny (Counsel)

UPON a reconsideration of the judgment dated 16th March 2023 on the Respondent's application under rule 71 of the Employment Tribunals Rules of Procedure 2013 dated 31st March 2023.

RECONSIDERATION

The Respondent's application is refused and the judgment dated 16th March 2023 is confirmed.

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REASONS

1. On 31st March 2023 the Respondent applied for a reconsideration of the Judgment dated 16th March 2023 ("The Judgment"), specifically the findings that there was no *Polkey* reduction and that the Claimant was wrongfully dismissed.

2. In respect of the wrongful dismissal finding, the Respondent submitted that the Claimant had been found to have been culpable in a number of ways:

   2.1 The Claimant had no trust or respect in the new leadership and was taking

sides with Edward Marcus against Jonathan Marcus (para 43);

2.2 The 'drive by shooting' email was 'insubordinate' (para 45);

2.3 The Claimant had said to Alison Cutter 'there was a light at the end of the tunnel' which was 'equivalent to a statement that he wanted the director out' (para 46) and

2.4The Claimant was 'openly insubordinate towards Jonathan Marcus [and] towards other members of staff including those who were also in conflict with Jonathan Marcus (para 47).

3. It was submitted that given those findings there was no other answer reasonably open to the Tribunal than the Claimant had fundamentally breached is contractual duty of fidelity to his employer and/or the implied term of mutual trust and confidence through such conduct. It followed that the wrongful dismissal could not succeed if the Tribunal found that the Claimant was in fundamental breach by the time of his dismissal. The Tribunal had found that the Respondent had breached the implied term of trust and confidence by the time that the Claimant was dismissed but the Claimant did not accept it. The contract subsisted and therefore the conduct committed by the Claimant was the repudiation which founded the acceptance by termination on the part of the Respondent. The Respondent relied on the dicta of Jack J in **Tullett Prebon Ltd v BGC Brokers LLP [2010] EWHC 484 (QB) para 83**:

> *'The ordinary position is that, if there is a breach of a contract by one party which entitles the other to terminate the contract but he does not do so, then the contract both remains in being and may be terminated by the first party if the second party has himself committed a repudiatory breach of contract.'*

4. As concerned *Polkey*, the Respondent submitted that the Tribunal had at paragraphs 32 and 34 found as a fact that the Claimant was contemplating resigning if Jonathan Marcus remained in control of the company and while not recorded in the judgment it was agreed between the parties that Jonathan Marcus remained in control twelve months on. At paragraph 50 the Tribunal had determined that there should be no *Polkey* reduction because the Claimant's resignation would have been a constructive dismissal but that was to view the position only from the date of dismissal. The Tribunal had not decided what would have happened had the Claimant not been dismissed but had affirmed the contract and waived the Respondent's breach. The Respondent submitted that it would have been inevitable once it became clear to the Claimant that Jonathan Marcus remained in control, that the Claimant would have resigned. The Respondent requested a variation of the judgment and a finding that there was a 100 per cent chance of the Claimant resigning after 3 months.

5. On behalf of the Respondent Mr Feeny expanded that it was necessary to disregard the constructive dismissal likelihood and consider simply what had

happened if the Claimant was dismissed fairly. Either he would have resigned or there would have been a fair dismissal down the line for some other substantial reason on the basis of a relationship breakdown. Mr Feeny directed me to **Hill v Governing Body of Great Tey Primary School UKEAT/237/12**.

6. On behalf of the Claimant it was submitted by Mrs Bradbury that the Respondent was urging the Tribunal to say that anything a bit insubordinate would have amounted to a fundamental breach. There were two behaviours that the Tribunal had found which warranted a deduction for contributory fault of 25 per cent. Those were the findings that the Tribunal had made. It was for the Respondent to adduce evidence that the Claimant, had he remained, would have resigned shortly after. The Tribunal must look at what would have happened had the dismissal not taken place. That is limited by the evidence and in particular the evidence concerning Mr Watts (the new sales recruit). All the evidence was that the Claimant wanted to stay. The incident where he told his solicitor that he was contemplating resigning happened before the dismissal. The Tribunal was being asked to find something so distant from hypothetical that it was not possible.

Decision and Reasons

7. I have been asked to reconsider my decision firstly in respect of the conclusion of wrongful dismissal and secondly in respect of the *Polkey* reduction. I am grateful for counsel's submissions and for the direction to the authorities of **Tullet Prebon plc and others v BGC Brokers LLP [2010] EWHC 484** and **Hill v Governing Body of Great Tey Primary School UKEAT/237/12**.

8. I had regard to Rule 70 of the Employment Tribunal Rules of Procedure 2013. A Tribunal may on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the original decision may be confirmed, varied or revoked. If it is revoked, it may be taken again. I had regard to Rule 72 insofar as if I did not consider that there was a reasonable prospect of the original decision being varied or revoked the application should be refused and the Tribunal should inform the parties of the refusal.

9. In this case it was agreed that since the application for reconsideration from the Respondent pre-dated the remedies hearing it would be heard today and the parties agreed to an extension of the time estimate of the hearing for it to be considered. I agreed with the parties' representatives that I would hear submissions on the reconsideration application and then decide whether there were no reasonable prospects of success. If I did, that would be the end of the matter. Otherwise I would go on to make a substantive determination of the application, which is what I have done.

10. The first ground of the application was that having made the findings that I did in relation to the Claimant's conduct it followed that I ought to have found that the Claimant was in breach of the implied term of trust and confidence such that the Respondent ought not to have wrongfully dismissed him. In terms of the first point, I do not vary my decision. I did not find that the Claimant's conduct as found was a breach of the implied term of trust and confidence in the circumstances. Inferentially I had already found that the drive by shooting was insubordinate but not grossly so and that it was in the form of banter. To this extent I had reflected that finding in the finding that I made for contributory fault as at 25%. As concerns the second point raised which related to the Claimant's conduct towards Alison Cutter on 14th March, I do find that this was insubordinate but I have already found that the context was relevant in that it was after the Respondent had breached the term of trust and confidence as the Claimant had come into work and found that a new sales person had been recruited. I found that the Claimant had made comments after he was reeling from the news. I do not find that given the context, which is relevant, the Claimant was in breach of the implied term of trust and confidence either singularly or cumulatively. Therefore the wrongful dismissal stands.

11. As for *Polkey*, I remind myself of the principles in **Software 2000 v Andrews [2007] IRLR 569** and also that Tribunals are often tasked with speculating as to what might happen in the future. It was submitted that if the Respondent had conducted itself fairly and the Claimant waived the breach in respect of the sales personnel then the submission was that given the background the Claimant would have been fairly dismissed, perhaps for some other substantial reason or might have resigned (not in response to a breach) in any event. The premise for this was the general background of the relationship between Jonathan Marcus and the Claimant and the Claimant's email to his solicitor where he says that he '*could not stand another 3 weeks of that idiot'*. I take into account that the Claimant had experienced some difficulties with Jonathan Marcus in the past yet had remained in post. The submission is whether Jonathan Marcus would have dismissed him fairly for some other substantial reason by June. The assumption would have been that the Claimant had kept his position. I have to say that this is difficult to hypothesise. I would have to assume that the Claimant would have remained in post and kept his post with the additional individuals also in post as sales personnel. Given the findings that I have made about the breach of contract by the Respondent in terms of their recruitment, I find that those findings would be difficult to go behind: I would have to speculate that the Claimant would have remained in post working in such a way that his position had been unaffected by the recruitment (see paragraph 33). Were I to assume this, which I consider not to be possible given those findings, and that the Claimant had waived any breach I find it too speculative to say that he would have resigned or been dismissed in any event because of the relationship generally between himself and Jonathan Marcus. The burden is on the Respondent to lead evidence that this is what would have most likely have happened and I did not have any evidence of this. I do not therefore vary my original decision.

Employment Judge A Frazer
24th May 2023

DECISION ON RECONSIDERATION AND REASONS
SENT TO THE PARTIES ON

5 June 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

GDJ