



EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant
MR D HIDE**

AND

**Respondent
FARGRO LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 4TH SEPTEMBER 2023

**EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)**

MEMBERS:

APPEARANCES:-

FOR THE CLAIMANT:- WRITTEN SUBMISSIONS

FOR THE RESPONDENT:-

RECONSIDERATION JUDGMENT

The judgment of the tribunal is that:-

The claimant's application for reconsideration of the judgment in respect of contributory fault is dismissed.

REASONS

1. Following my earlier judgment the respondent has appealed to the Employment Appeal Tribunal. By the order of HHJ Tucker dated 9th August 2023 the respondent has been given permission to apply for reconsideration of one aspect of my decision, my conclusion that I would not make any further deduction for contributory fault, having made a 66% Polkey deduction. The basis of that grant of permission is that in my original decision I declined to make a finding that there had been contributory fault on the basis that I had heard no "direct evidence" that would allow me to make such a finding, and as part of the appeal the respondent

contends that as a matter of law that would and should not preclude such a finding.

2. In accordance with HHJ Tucker's order the respondent has made an application for reconsideration of that part of my decision dated 11th August 2023.
3. In principle that application raises two questions. The first is whether direct evidence was necessary, and the second, in the event that I was wrong about the first, is what indirect evidence does the respondent contend was sufficiently cogent or reliable to allow me to make findings of fact as to contributory fault.
4. In respect of the first I fully accept that as a matter of law direct evidence is not automatically or inevitably required in that in appropriate cases there may well be sufficient evidence to allow conclusions to be drawn without direct evidence of the wrong doing being brought before the tribunal.
5. The issue is therefore the second question. If the respondent considers that I was wrong in my assessment that in this case direct evidence was required to allow me to draw conclusions as to contributory fault, what in the background evidence does it contend was sufficiently cogent and reliable to compel me to draw an such conclusion and in respect of which allegations. .
6. The fundamental basis for my decision was although I had been provided with all the relevant material with which to consider whether the dismissal was procedurally and/or substantively unfair, and to consider whether to make a Polkey deduction, there was no direct evidence in respect of the allegations faced by the claimant. As is set out in the judgment the claimant did not accept that he was guilty of the conduct alleged against him, and did not accept that it amounted, if true, to misconduct, let alone gross misconduct. Whilst this did not affect the tests I had to apply in respect of the unfair dismissal claim or the Polkey deduction, in my view in order to make a finding of contributory fault I would be required to make primary findings of fact from which I could assess any appropriate level of culpability. As set out above, whilst there may be cases in which it is possible to make such findings, for example where some or all of the underlying factual allegations are not in dispute in my original view this was not such a case. In those circumstances I took the view that it was not possible for me to make any direct findings of fact as to what the claimant had or had not done, and the level of any culpability and I did not, therefore make any additional deduction for contributory fault
7. The difficulty I have with the current reconsideration application is specifically why the respondent contends that I was or should have able to make any specific findings of fact as to contributory fault, and on the basis of what information. In the reconsideration application itself the respondent simply asks me to reconsider on the basis of the cross examination of the claimant, and the documentation provided in the bundle. The respondent has not set out which of the factual allegations it contends there is sufficient evidence to make primary findings of fact or what that evidence is. In effect the respondent invites me to reconsider that

evidence in the hope that I might find something which on reconsideration would persuade me to change my view, without providing any specific assertion or submissions as to what that something might be. With due respect to the respondent this appears to me by definition simply to be a second bite at the cherry on the basis of information, indeed all the information, already before the tribunal. In the absence of any specific identification by the respondent of any evidence in the bundle, or any specific evidence given by the claimant in cross-examination which it contends should cause me to reconsider there is no material before me which would allow or cause me to do so.

8. In the circumstances I remain of the view that this was not an appropriate case in which to make a finding in respect of contributory fault. However in order to assist the EAT in respect of the appeal if the respondent does wish to make a further reconsideration application with reference to specific aspects of the evidence I will, of course, consider it.

EMPLOYMENT JUDGE CADNEY
Dated: 4th September 2023

Sent to parties on
21 September 2023 By Mr J
McCormick

For the Tribunal Office