EMPLOYMENT TRIBUNAL'S

Claimant		**Respondents'**
Ms M Mulumba	**AND**	Partners Group (UK) Ltd (R1) Partners Group (USA) Inc (R2)

Heard via CVP 21 March 2024

Before: Employment Judge Nicolle
Nonlegal members: Ms C James and Ms C Marsters

Representation
For the Claimant: in person
For the Respondents': Mr D Craig KC

Judgment

1. There should be a 100% reduction of the compensatory award pursuant to Pokey.

2. The claimant is awarded a basic award of £1016.

Reasons

The Hearing

3. The purpose of the hearing was to consider what, if any, reduction should be made to the compensatory award pursuant to Polkey. The Claimant opposed a hearing at this juncture to determine Polkey given that she has a number of outstanding appeals to the EAT. Mr Craig KC summarised the status of those appeals.

4. I considered that it had clearly been stated that the purpose of the hearing was to consider whether any Polkey reduction would be appropriate. Unfortunately the hearing had been delayed, initially as a result of my non-availability on account of long term sickness absence and then further whilst a

mutually convenient date was listed. I did not consider it appropriate to postpone the hearing given that there is no issue with the Polkey question being addressed notwithstanding outstanding appeals. As in many instances the Tribunal's determination of this question is subject to any of the outstanding appeals being successful and the implications that may have on the Tribunal's determination.

5. The Claimant also said that the structure of the hearing was prejudicial to her as the Tribunal had previously stated that she would not be able to give evidence. She indicated that this was the subject of an appeal. Whilst I advised the Claimant that it would not normally be necessary for witness evidence to be given on the determination of what, if any, Polkey reduction should apply, and that she would be able to address the Tribunal by way of submissions, I nevertheless permitted her to provide witness evidence if she wished to do so. The Claimant subsequently submitted a four page witness statement but was not cross examined on this by Mr Craig KC.

6. There was a hearing bundle comprising of 349 pages. This primarily comprised the Tribunal's earlier judgments.

7. Both parties submitted skeleton arguments which are summarised below.

Respondent

8. The Respondents' say that there should be a 100% reduction under Polkey. The Respondents' skeleton argument comprised a summary of relevant findings of fact and conclusions contained in the Tribunal's judgment on jurisdiction dated 10 January 2020 (the Jurisdiction Judgment) and primarily the liability judgment dated 4 January 2022 (the Liability Judgment).

9. The Respondents do not take issue with a basic award of £1,016 being awarded and as such do not seek for this to be reduced on an equivalent basis to that which they contend should apply to the compensatory award.

Claimant

10. The Claimant provided a 59 page skeleton argument. Very little within that skeleton argument directly related to the issue of Polkey. The Claimant did, however, make various assertions primarily comprising of:

- Her opposition to the hearing and its format.
- An assertion that the end of the so called "Accommodation Period" is a superficial and sanitised reason for why she was dismissed with the actual reason being discrimination.
- That a reconsideration application she had submitted in early January 2022 had not yet been addressed.

11. I advised the Claimant that much of the material contained in her skeleton argument in effect represented an attempt to re-litigate the liability issues. That would clearly be outside the scope of this hearing.

The Claimant's January 2022 reconsideration application

12. I was directed to this application and it appeared to be outstanding albeit it had not been brought to my attention since my return to active judicial duties on 2 March 2023. I advised the parties that this would be considered but there was no need to defer the consideration of the Polkey question pending the outcome of that reconsideration application.

The Law

13. The issue the Tribunal needs to consider is what, if any, reduction should be made to the compensatory award in accordance with the principles enunciated in Polkey v Dayton Services [1988] ICR 142.

14. As explained by Buxton LJ in Gover v Propertycare Ltd [2006] ICR 1073 at paragraph 19 the analysis is simply an application of s123 of the Employment Rights Act 1996 which directs that "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances".

15. The tribunal may make a finding as to the period it would have taken to dismiss fairly. Alternatively, and more normally, the tribunal may decide to make a percentage "loss of a chance" deduction; in other words the employee may be compensated for the loss of chance they that would not have been dismissed.

Discussion and Conclusions

16. We consider that a 100% Polkey reduction would be appropriate. In reaching this decision we refer specifically to the following paragraphs within the Tribunal's earlier judgments.

Jurisdiction Judgment

17. Paragaraph 78 which included a finding on the balance of probabilities that the Claimant's employment in London was significantly extended as a result of the Respondents' express wish to assist her, given her immigration status, and her wish to avoid returning to the DRC.

Liability Judgment

18. At paragraph 317 the Tribunal's finding that the WhatsApp message from Mr Bhangal on 21 September 2017 was indicative of his having perceived that the Claimant did not have a long term expectation of remaining with the Respondents.

19. At paragraph 337 our finding that the Claimant's failure to receive any offer from any team reflected the reality that she did not perform well enough.

20. At paragraph 540 our acceptance of Mr Truempler's evidence that most Associates who do not receive an offer in the first 12-15 months start considering

alternative options. In this paragraph we then went on to find that the Claimant was treated more favourably in that rather than her employment being terminated at 24 months she was given the opportunity of up to a further 12 months during which she could seek to demonstrate to London Listed Private Markets that she was worthy of the offer of a permanent place but if not endeavour to secure alternative employment and regularise her UK immigration situation.

21. At paragaraph 580 to include "her situation was exceptional, and we consider it had been clear to her that the primary purpose of the Accommodation Period was to facilitate her to address and regularise the UK immigration issues and seek to secure alternative employment outside Partners Group.

22. At paragraph 602 to include "the Claimant simply failed to demonstrate the outstanding level of performance which would have been a prerequisite of serious consideration".

23. At paragraph 603 to include "Whilst there is no specific date at which the possibility of progression ceased to apply it became increasingly unlikely and we considered that this would have been apparent to the Claimant. This is consistent with the evidence that she became progressively demotivated and spending an increasing amount of her time pursuing other activities to include seeking to secure alternative employment, addressing her immigration status, considering the possibility of setting up venture capital type investment business, attending training and so on".

24. At paragraph 626 our finding that the Claimant was dismissed because she had come to the end of the Accommodation Period.

<u>Our finding that the Claimant's dismissal was unfair</u>

25. We refer to paragraph 643-650 of the Liability Judgment. There is no need for us to repeat them. In summary we found that the Claimant's dismissal was unfair given that we did not accept that she had been given notice of her dismissal on or about 30 August 2017, any such notice was not put in writing and there was therefore scope for uncertainty. We therefore found, at paragraph 646, that it was not until the meeting on 5 July 2018 that the Claimant was unequivocally advised that her employment was to be terminated.

26. At paragraph 649 we expressly raised the issue as to whether the grounds for unfairness would have made any difference to the outcome. We stated that arguably had a fair procedure been followed the Claimant would have been dismissed at or about the same time i.e. 31 August 2018.

27. Further, at paragraph 650 we stated that the shortcoming we had identified was as a result of a failure of the Respondents to provide an unequivocal and properly documented communication to the Claimant of the expiry of the Accommodation Period, and hence her employment, rather than there being a deficient capability or conduct dismissal procedure which, in any event, we found not to have been applicable.

28. Given our findings in the Jurisdiction and Liability Judgments we consider that no possibility would have existed, had unequivocal written notice been provided earlier, that the Claimant's employment would have been extended. We have already found that her employment had been extended by an additional 12 months to that anticipated for Associates as a result of the Accommodation Period. Our findings were that it became progressively unlikely, and ultimately impossible, that the Claimant would be offered a permanent position of employment. We consider that she had effectively acknowledged this situation given our findings regarding her decreasing motivation and her engagement in alternative activities.

29. Whilst we considered whether it would be appropriate for there to be a short additional period of notional employment to reflect unequivocal notice being given we consider that would be wholly artificial and inappropriate. The reality was that the Claimant was aware, if there was any doubt proceeding this time, by no later than 4 July 2018 that her employment was to be terminated as of 31 August 2018. We do not consider that there is any additional procedure which the Respondents could productively have followed which would have made any difference to this outcome. The Claimant's employment situation had effectively become a fait accompli once she had failed to demonstrate the exceptional level of performance which would have been required for her to receive an offer of permanent employment in London Listed Private Markets.

30. We consider that there would have been no possibility of any alternative outcome, which would potentially have justified a percentage reduction in the Polkey award as opposed to its 100% extinguishment on the basis that there was no possibility of any alternative outcome being reached.

Employment Judge Nicolle

Dated**: 5 April 2024**

Sent to the parties on:

12 April2024

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For the Tribunal Office