EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105583/2023

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Held in Glasgow (in Chambers) on 5 August 2024

Employment Judge Murphy

10 **Mr P Gahagan** **Claimant**

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Openreach Ltd **Respondent**

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DECISION ON RECONSIDERATION

1. A final hearing took place (in person) at the Glasgow Tribunal. The Tribunal sent a judgment with written reasons to parties on 16 May 2024. The Tribunal declared the claimant (C) was unfairly dismissed and made an award of compensation. On 29 May 2024, C sent an email to the Tribunal seeking reconsideration in relation to the amount of the compensatory award. He said he felt the amount his award was reduced by was on the high side. Though C did not explicitly identify the reductions to the award he wished to challenge, it appeared to me based on his emails that he was advancing an argument that the **Polkey** and contributory fault deductions were too high. He also raised an issue with respect to an uplift for a breach of the ACAS Code on Disciplinary and Grievance. No uplift was awarded in the judgment and he said he felt it should be awarded.

2. C sent a further follow-up email to the Tribunal on the same date adding some additional points which he wished to be taken into account in connection with his application.

3. Parties were invited to express a view by 6 June 2024 as to whether the application could be determined without a hearing. The respondent's representative, Ms Page, sent an email on 30 June and, among other matters, she commented that R's view was that a hearing was not necessary and would not be in line with the overriding objective. She observed, in effect, that the expense would of a hearing would be disproportionate in circumstances where, if C was successful in securing the uplift sought for breach of the ACAS COP, and an award of 10% was made, this would lead to a modest increase in the compensation of only around £112.

4. C made no comments on whether he felt a hearing was required by 6 June or at all. Having regard to the response received to the notice sent under Rule 72(1) of the ET Rules 2013, seeking views on whether the application could be determined without a hearing, I decided that a hearing was not necessary in the interests of justice. Parties were invited to submit further written representations or information by 2 August 2024.

Polkey reduction

5. In emails of 29 May, 19 June and 29 July, C identified the following matters which, it is understood, are said to support a lesser **Polkey** reduction to his compensatory award:

   (i) He feels it has not been accepted how much R relies on gas testing data and how significant a factor the inaccuracy of this data was in his dismissal. He said that M Monteith, appeal manager, had, during the appeal meeting, accepted the GDU data was used by the dismissing officer to dismiss C. He said he tried to question Mr Monteith on this at he hearing but that Ms Page and I intervened because this was not in the transcript of the appeal hearing (which had been created by transcribing an electronic recording). C suggested in his email of 29 May that it had been omitted deliberately or accidentally from the transcript.

   (ii) C asserted a suspicion that a statement by J McGowan which was produced to the ET but which had not been provided to C during his disciplinary process "could have been produced after the appeal

process or altered at that stage". He noted that JM referred in the statement to the GDU being there and said the investigating officer would surely also have known this while looking through the case.

(iii) He asserted a further difference between the appeal audio and the transcript and suggested that the audio showed (in the minutes between the 17th and 23rd) that the appeal manager did not remedy any of the failings of the original dismissal.

(iv) C made a series of general points about procedural fairness which he said were fundamental and maintained employee trust and morale. **Polkey** reductions, he said, weakened deterrence against unfair practices and it was inherently challenging to prove hypothetical outcomes if fair procedures were followed. He said **Polkey** reductions had the scope to be abused by employers as a loophole and may be seen as prioritising employer convenience. He said the reduction in his award would serve to embolden R . C said in his email of 29 July that if he was treated fairly, he could argue there was a 100% chance he would still be employed by R.

6. Ms Page said that, with respect to C's questioning of Mr Monteith, her recollection was that the intervention regarding C's questioning of the witness was that it related to the actual dismissal. As M Monteith was not the dismissing officer, she said his views about reliance on the GDU data were merely speculative. In any event, she said, at the appeal stage Mr Monteith knew about the GDU data error and still felt C should be dismissed so the issue would make no material difference to the outcome.

7. With respect to C's comments about J McGowan's statement, Ms Page said C had the opportunity to test the validity of the document at the hearing, but did not do so. She said there was prejudice to R if he was now allowed to raise this as witnesses would have to be cross examined on the matter. It was not raised in C's ET1, said Ms Page, and R did not have notice of this matter. Even if L Keith had disregarded J McGowan's statement, Ms Page pointed out she could still conclude that the moving of the GDU was a serious health and safety breach which would amount to gross misconduct.

8. With regard to the audio transcript of the appeal, Ms Page noted that C had access to the full audio recording for some time prior to the hearing and made no attempt to resolve what he believed to be errors in the transcript.

5 9. With regard to C's more general points about the **Polkey** principle, Ms Page observed that the arguments laid out by C in his email of 29 July could be made by any claimant who receives a **Polkey** deduction. She said R could not identify any reason why it should be reconsidered in this case.

10 *Discussion and decision on **Polkey** reconsideration arguments made by C*

10. Rule 70 of the ET Rules 2013 allows a Tribunal to reconsider a judgment where it is necessary in the interests of justice to do so. Rule 71 provides that 'Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing … and shall set out why
15 reconsideration of the original decision is necessary.'

11. A central aspect of the interests of justice has been observed by the Employment Appeal Tribunal (EAT) to be the principle of finality in litigation (**Ebury Partners v Acton Davis** 2023] EAT 40). The EAT commented (at para 24) that it is unusual for a litigant to be given a 'second bite at the
20 cherry' and the jurisdiction to reconsider should be exercised by the tribunals with caution. While it may be appropriate to consider a decision after a procedural mishap which has denied the litigant a fair and proper opportunity to put their case, it should not be used to correct a supposed error made by the tribunal after the parties have had a fair and proper
25 opportunity to put their case. This, the EAT noted, is particularly so where the error alleged is one of law which is more appropriately corrected by the EAT.

12. **R's reliance on gas testing data and the significance of this in C's dismissal.** It was accepted in the judgment dated 13 May 2024 that the
30 GDU data was made available to LK (the dismissing officer) before the disciplinary hearing and that she reviewed that data before C's hearing (para 46). It was further accepted that LK focused heavily on the time line during the disciplinary hearing and that this was because LK had seen the

GDU data which contained an error of which she was unaware at the time she considered her evidence and reached her decision (para 58). It was also found that the appeal manager knew about the GDU data error by the time of the appeal decision. Having already made the finding which the claimant apparently seeks (namely that LK relied on an inaccurate understanding of the GDU data when she decided to dismiss), I do not accept that Mr Monteith's speculative evidence about LK's use of the data to dismiss C would have made any difference to this finding in fact.

13. In any event, having reviewed my note of the hearing, I do not accept there was any procedural mishap which prevented C from adducing relevant evidence at the material time. The importance attached by LK to the GDU data was not within Mr Monteith's knowledge. C was permitted to and did cross examine LK on whether she had seen the GDU data at the time of the dismissal decision. LK said that she had not. That evidence was challenged by C at the hearing and, as set out above, I accepted C's contrary assertion that she had indeed seen it at the material time and considered it in her dismissal decision. Given I have made the finding for which C contends, it is difficult to see that the GDU data point could impact upon the reasoning in the judgment regarding the application of the **Polkey** principle in this case.

14. I accepted in the original judgment that DR had given C to believe that, so long as the GDU was switched on, C could accept a final written warning (para 169). C said in his reconsideration application of 29 May that "I do not feel it has been accepted just how much OpenReach rely on the gas data testing and how it being wrong is ultimately why I was dismissed." In the assessment of what would have happened if a fair procedure had been followed, I acknowledged that LK would have had the correct data before her and would have known the GDU was switched on at material times. It appears that C may be seeking to argue (at this reconsideration stage) that, if it was appreciated by LK that the GDU was switched on, there is zero percentage chance that she would have dismissed C. Other than DR's speculative comments on the matter, C has adduced no evidence to sustain that proposition, either at the original hearing or in support of the present reconsideration application. DR's evidence was considered and discussed in the **Polkey** analysis at paragraph 193. There is no new

relevant evidence which was not previously brought to light. No procedural mishap prevented C leading relevant evidence at the hearing about LK's use of the GDU data or about the importance R attaches to such data when deciding whether to dismiss employees generally. Such evidence as was led on those matters was heard and considered. I do not accept that it is necessary in the interests of justice to reconsider the original judgment on this ground.

15. **C's suggestion J McGowan's statement first created or altered after the appeal.** It seems that C alleges that the date borne on the face of the witness statement of 30 May 2023 was incorrect. As Ms Paige pointed out, C had the opportunity to test or challenge the authenticity of McGowan's statement at the hearing, but he did not do so. Nor was any challenge to this foreshadowed by C's ET1, such that R had no notice that it be contentious. Mr McGowan was not called by R as a witness at the Tribunal hearing in those circumstances. At the reconsideration stage, it remains the case that C has produced no evidence to support any suspicion he may have developed that the statement was produced after his appeal or that it was improperly altered. Appropriate weight requires to be given to the principle of finality of litigation. I decline to reconsider the original decision on the basis it is not necessary to do so in the interests of justice.

16. **C's allegation of a variance between appeal audio and transcript.** At the hearing, C made no attempt to correct any perceived errors which were said to be material between the transcript of the appeal hearing and the audio. Ms Page has advised that C had access to the full audio recording for some time prior to the hearing. The audio was not admitted into evidence at the hearing but I read the lengthy transcript in full during an adjournment following discussion with the parties. C made no assertion during that discussion that the transcript was materially inaccurate. He made no application at the time for the audio recording to be played (either between minutes 17 and 23 of the meeting, or at all). C has not explained in support of his application for reconsideration the detail of what specifically this evidence would have demonstrated that he says was omitted from the transcript. In his email of 19 June, C says that this would have shown that Marc Monteith did not remedy failings of the original dismissal. I have, in any event, already found in the original judgment that

Mr Monteith's appeal process did not remedy the original failings and I have made a declaration that the dismissal was unfair. In all of the circumstances, I am satisfied that it is not necessary in the interests of justice to reconsider my original decision on this ground. Again, I give particular weight to the principle of finality of litigation in coming to this conclusion.

17. **C's general arguments about procedural fairness and Polkey.** The series of points C made in his email of 29 July 2024 about the importance of procedural fairness and the risks of applying **Polkey** deductions to awards were not made at the hearing. C had the opportunity to make s submission and did so. He did not address the matter. In a PH note sent to parties before the final hearing on 27 March, a list of issues was set out, in accordance with the discussion at the preliminary hearing itself. This made it clear that the following issues would be decided:

    - *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*
    - *If so, should the claimant's compensation be reduced? By how much?*

18. There was no procedural mishap that prevented C from addressing me more fully on the **Polkey** principles at the hearing if he wished to do so. He had notice this would be an issue for the Tribunal's consideration. I am mindful that reconsideration should not be used to correct a supposed error made by the tribunal after the parties have had a fair and proper opportunity to put their case. As the EAT noted in **Ebury**, is particularly so where the error alleged is one of law which is more appropriately corrected by the EAT. It seems to me that, to the extent C is alleging any error on the Tribunal's part in his email of 29 July, it appears the error asserted is applying a **Polkey** reduction at all on the basis that he says doing so compromises fairness and justice in dismissals and, as a general proposition, may lead to negative consequences in the workplace environment and may embolden R in the future. I decline to reconsider my original decision on the basis it is not necessary in the interests of justice and would unduly undermine the principle of the finality of litigation.

Contributory fault reductions

19. In his emails of 29 May and 19 June, C identified the following matters which, it is understood, are said to support a lesser contributory fault reduction to his compensatory award:

    (i) C referred to a training record which R had produced and which had been referred to in evidence. He said this had been incomplete and / or edited to hide a comments or observations section where, he said, there should have been a record of comments that he was told he needed more training around the gas unit. He said the other side should be asked to produce his safety check from May 2023 in an unedited format.

    (ii) In his email of 19 June, C said he required further training.

20. Ms Page said Mr Gahagan did not raise this at the hearing or prior to the hearing and, in his own submission, fell short in this. She said that, in any event, it would have no material impact on the overall outcome.

Discussion and decision on Contributory Fault reconsideration application

21. C did not challenge the training record document at the hearing or put to R's witnesses that it was incomplete. Nevertheless, C had the opportunity to, and did lead evidence on the training he had received on the GDU in February 2023 as well as a further training need identified later following a safety check carried out on his return from paternity leave by Simon Ritchie. He described SR asking him to do a mock job and asking him about what he would do if gas was detected and whether or not C should leave the GDU *in situ* in the hole in such event. He explained in evidence that SR had corrected his misunderstanding that he should leave the GDU *in situ* and said that SR had told him that this was not a big deal and that C wasn't failing the training on the basis of this point but that he would come out and re-coach him on that aspect. C gave evidence that, in the event, this never happened before the events of 30 May 2023 which led to his suspension and dismissal.

22. I did not include findings in fact regarding passage of evidence because it was not relevant to any of the issues I had to decide in C's claim. Assuming the evidence C gave about this exchange with SR were accepted, it was of little or no materiality. C was not dismissed because he failed to remove the GDU from a hole after gas being detected. On his own evidence, any proposed re-coaching was to deal with that particular point. C accepted he had been previously been trained in the use of the GDU before the exchange with SR and was ticketed to use it. Even if SR's exchange with him were recorded somewhere in C's full training record, it would have been of no materiality.

23. I decline to reconsider my original judgment on this ground. It is not necessary in the interests of justice. First and foremost, the matter was not raised at the hearing, and to reconsider my decision would undermine the principle of finality of litigation. Separately and in any event, the alleged omission from the training record produced has negligible or no bearing on the analysis in the original decision in relation to the question of contributory fault.

ACAS COP uplift

24. In his email of 29 May, C said "*In regard to the 25% uplift. I was under the impression that because I had requested it in my ETS that it was clear that I was asking for it to be awarded. I do also recall it being brought up at Tribunal but in any case I have always made it clear that they didn't follow procedure and feel it should be awarded.*"

25. Ms Page observed that despite having sight of R's written submissions referring to uplifts, C had made no effort to mention an uplift during the case. She said it was clarified during the preliminaries that the parties agreed that they were not relying on an ACAS uplift for a specific failure . She invited me to check my notes of that discussion. She said C was changing the goal posts and placing R on an unequal footing such that reconsideration of this aspect would not be in the interests of justice.

26. Ms Page further asserted that, had the matter been progressed at hearing, R would have argued no uplift should be applied. She said R complied with the 6 key principles of the COP. She acknowledged an invite letter was not

sent but said this was not a case where R had made a mess of their procedure entirely or acted in bad faith. The omission was simply an error and C wished to continue the disciplinary hearing anyway, having – in Ms Page's submission – knowledge of the evidence, the charges and the arrangements for the hearing.

Discussion and decision re C's application for reconsideration of omission to award a percentage uplift for breach of ACAS Code.

27. C did not refer to the ACAS Code in his ET1 or to any alleged breach or to an uplift to any award. I checked my notes of the preliminary discussions referred to by Ms Page on 16 April 2024, but they did not include a record of the discussion she believed she recalled in her email of 30 May during the preliminaries. I therefore requested from HMCTS and listened to the audio recording of that section of the hearing (only). Having listened to the preliminary discussion on the first day of the final hearing (15th April), I am satisfied the matter of any breach of the ACAS Code or consequent uplift was not specifically discussed.

28. There was reference to an uplift in C's Schedule of Loss (SOL) which he had sent to the Tribunal on 28 December 2023 in response to an Order following a CMPH on 11 December 2023. In that document, he said: My employer didn't follow the ACAS Code of Practice so I think the Tribunal should increase the compensatory award by 10%". The SOL was in the bundle of productions but I was not taken to it by C during his evidence or submissions.

29. Following a further PH on case management, I had set out the issues in the case as in the PH note sent to parties on 27 March 2024. So far as relevant with respect to remedy this included the following issues:

...

Remedy

a. *If there is a compensatory award, how much should it be? The Tribunal will decide:*

   i. *What financial losses has the dismissal caused the claimant?*

> *…*
>
> *vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
>
> *vii. Did the respondent or the claimant unreasonably fail to comply with it?*
>
> *viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*
>
> *…*

30. As with other reconsideration grounds, I have carefully considered the whole circumstances with regard to this aspect of C's application. I have concluded that it is not necessary in the interests of justice to reconsider the original decision. C had notice in the PH note that the Tribunal would decide the issue of remedy generally and the question of the ACAS uplift more specifically at the hearing. He had the opportunity to lead such evidence as he felt relevant and to give a closing submission (which he did). C didn't address this point at the original hearing and indeed, even at the stage of his reconsideration application and his subsequent expansion upon it, C has not set out any specific provision of the ACAS Code of Practice which he says has been breached or addressed me on why he asserts such breach is said to have been unreasonable. He has merely said that R "didn't follow procedure" in his email of 29 May. Nor was there specification of the particular breach alleged in C's Schedule of Loss had that document had been referred to at the hearing (which it was not). In the circumstances, I am satisfied that there are no good grounds for interfering with the principle of finality of litigation in relation to this matter.

Conclusion

31. I have considered all grounds for C's reconsideration application and for the reasons set out, I decline to reconsider any of the aspects of the original decision to which his application relates.

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Employment Judge:	**L Murphy**
Date of Judgment:	**06 August 2024**
Entered in register:	**07 August 2024**
and copied to parties	

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