EMPLOYMENT TRIBUNALS

Claimant: Miss C Porter

Respondent: One Fylde

Heard at: Manchester Employment Tribunal in chambers **On:** 14 March 2025

Before: Employment Judge Dennehy

RESERVED JUDGMENT ON REMEDY

The judgment of the Tribunal is as follows:

1. The claimant's basic and compensatory award are reduced by **50%** to reflect her own contributory fault.

2. A **75%** reduction in the compensatory award for unfair dismissal will be made under the principles in **Polkey v A E Dayton Service Limited 1988 ICR 142**.

3. The respondent is ordered to pay the claimant within 28 days of this judgment the total sum of **£6,105.11**

4. The award is constituted as follows:

   Basic award (13.5 x £489.61) = £6,609.74
   Less contributory conduct of 50% = £3,304.87
   = subtotal of £3,304.87

   Compensatory Award (prescribed element)
   Net loss of earnings capped at one year (52 weeks x £408.51) =£21,242.52
   Less Polkey reduction of 75% ie £15,931.89 = £5,310.63

Less contributory conduct of 50% = 2,655.32
= subtotal of £2,655.32

Compensatory Award (non prescribed element)
Loss of statutory rights = £500
Loss of pension benefit = £659.33
= £1,159.33
Less Polkey reduction of 75% ie £869.50 = £289.83
Less contributory conduct of 50% = £144.92
= subtotal of £144.92

REASONS

1. The final merits hearing took place on 3,4 & 5 March via CVP. Both parties were represented by counsel. I gave an oral judgment on liability on the 5 March. Mr Islam-Chaudry requested written reasons, and no objection was raised by Mr Ratledge. These are to follow.

2. There was insufficient time to deal with remedy and both parties requested that I deal with remedy in chambers. Both Mr Ratledge and Mr Islam-Chaudry had helpfully agreed the schedule of loss and both had addressed me on Polkey and contributory negligence during their final submissions.

3. Mr Islam- Chaudry and Mr Ratledge had agreed the following sums in the claimant's schedule of loss: gross weekly pay of £489.61; net weekly pay at £408.51; basic award multiplier at 13.5 weeks; loss of basic salary capped at one year at £21,242.52; loss of statutory rights at £500; and loss of pension benefit at £659.33.

ACAS code of practice

4. The claimant relied on the complaint against her being investigated and she had put forward a motive for the co worker making the complaint against her. This was not thoroughly investigated by the respondent, and they did not re interview the co worker to verify her version of events when the claimant had suggested a motive for the complaint or to query the variations between the on call report and later statement of the co worker. Mr Mears in his witness statement says "*I believe that on the balance of probabilities the statement made by the witness was true*..". The claimant genuinely misunderstood the date of the incident, and this was not clarified by the respondent until the postponement of the disciplinary hearing. However, taking everything into account I do not think it is just and equitable to award an uplift to the claimant.

Polkey

5. I had found that the claimant was procedurally unfairly dismissed, and Mr Islam-Chaudhry invited me to find that there should be a 100% reduction to any award irrespective of any procedural effect due to the seriousness of the claimants admitted conduct and lack of insight. Mr Ratledge invited me to

consider a reduction of 0% because if a fair process had been adopted the claimant would not have been dismissed.

6. In undertaking a Polkey reduction, I am not assessing what I would have done I am assessing what the respondent would or might have done. I must assess the actions of the respondent on the assumption that they would this time have acted fairly thought it did not do so beforehand (**Hill v Governing Body of Great Tey Primary School [2013] IRLR 274)**

7. Polkey reductions arise in cases where there has been procedural unfairness and in this case the unfairness lies in the respondent's failure to conduct a thorough investigation, specifically in considering the claimant's explanation for motive of the conduct complaint made against her by a co-worker. This unfairness was not corrected at the disciplinary or appeal stage. It is appropriate in assessing just and equitable compensation what might have happened in the respondent had not acted unfairly in that way.

8. The Employment Remedies Handbook advises that I must assess any Polkey reduction in two respects:

   (i) if a fair process had occurred, would it have affected when the claimant would have been dismissed ? and
   (ii) what is the percentage chance that a fair process would still have resulted in the claimant's dismissal?

9. I find that if the respondent had made further enquiries and re interviewed the claimant's co-worker, who made the allegation of misconduct, there is a very substantial chance that they would still have dismissed the claimant, based on the claimant's own admission of her conduct. Mr Mears when giving his oral evidence to the Tribunal was adamant that the claimant's admitted conduct alone was such a serious breach of the code of conduct that it warranted gross misconduct. Due to the seriousness of the claimants admitted misconduct against a vulnerable adult in the respondent's care I consider that there is a 75% chance that the claimant would still have been dismissed had the respondent conducted a fair investigation and the dismissal would have been within the range of reasonable responses by the respondent. In conducting a thorough investigation, I do not consider there would have been a delay of no more than two weeks to when the claimant was dismissed, as this would have been sufficient time to re interview the co-worker. Accordingly I find a Polkey reduction of 75%.

Contributory Fault

10. Contributory fault inevitably arises on the facts of this case.

11. I must consider whether there is an overlap between the factors taken into account when making a Polkey reduction and when making a deduction for contributory conduct and consider whether it is just and equitable in light of any overlap to avoid the claimant being penalised twice for the same conduct.

12. The Tribunal may reduce the basic or compensatory awards for culpable conduct as set out in sections 122(2) and 123(6) of the Employment Rights Act 1998.

13. Section 122(2) provides as follows:

"*Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just an equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly*."

14. Section 123 (6) then provides that:
"*Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*".

15. Mr Islam-Chaudry reminded me that the two sections are different **Steen v ASP Packaging [2014] ICR 56** and that I must firstly identify the conduct that gives rise to the contributory fault and secondly, I must ask is that conduct blameworthy. Mr Islam-Chaudry invites me to find that the claimant's blameworthy conduct justifies a just and equitable reduction of up to 100%.

16. Mr Ratledge invites me to find that the claimant is not blameworthy at all and to find a contributory fault of 0%.

17. The Employment Remedies Handbook advises that in assessing contribution I should in turn:

(i) Identify the conduct;
(ii) Assess whether it is objectively culpable or blameworthy;
(iii) Consider whether it caused or contributed to the claimant's dismissal; and
(iv) Determine to what extent it is just and equitable to reduce any award.

18. I have identified the following conduct as conduct giving rise to contributory conduct:
(i) The admitted conduct, namely the spraying of deodorant on the clean incontinence pad of a vulnerable service user and on saying that the service user looked pregnant on 19 September 2022. At the appeal hearing the claimant admitted that the spraying of the service user with deodorant was for the claimant's benefit rather than the service users. This conduct happened just before her suspension and was the reason for her dismissal.
(ii) Her lack or reporting any concerns of misconduct by her co-worker. The claimant says she had talks with her co worker re use of the hoist, the smell of cannabis and turning the boiler off. The claimant said she had reported the boiler incident in the cooms book but no evidence of this was provided to the Tribunal. The claimant didn't see the co worker smoking cannabis, only smelt it and felt therefore she couldn't report it,

even through the co worker was in work and had a duty of care towards vulnerable service users and the service user was unhappy with the hoist being hoisted so high but it wasn't dangerous, so the claimant hadn't reported this. This failure by the claimant to report her concerns meant that there was a lack of evidence to support her malicious motive theory which said Mr Mears " *I did not believe that these were reasons alone are evidence of a malicious complaint against the claimant. I did not see nor was I presented with any other evidence of a difficult relationship, between the two*."

(iii) Her lack of insight of how her admitted conduct effected the service user or her co workers Mr Mears said in his witness statement ""*I noted she did not seem to grasp how inappropriate she had acted…this was a vulnerable adult she had known for some time and had a good understanding of their complex needs*

(iv) Her continual and consistent denial that she had not done anything wrong, even though her admitted conduct was a breach of the respondent's code of conduct. Mr Mears in his statement says "The claimant did not demonstrate any empathy or recognition that those behaviours on their own, were humiliating for this vulnerable adult and did not show any regard for their privacy and dignity".

19. All of the above conduct all took place shortly before the claimant's dismissal and was the reason for her dismissal. I find that the claimant's conduct was culpable and blameworthy and in breach of the respondent's code of conduct. I have considered whether the measure of contribution should be 100% and I find that the basic and compensatory award should be reduced by 50% to reflect the claimant's culpability and that this is a just and equitable amount to reduce any award.

20. I have considered whether the claimant is being penalised for the same conduct by a Polkey reduction and contributory fault, and I do not find that she is. The Polkey reduction of 75% is because I find that the respondent would have dismissed even if it had carried out a fair investigation, because it believed that the claimant, on her own admission had committed acts of gross misconduct which warranted dismissal without notice and it accepted the co-worker's statement as being the truer version of events. My starting point for the claimant's contributory conduct had been 100% because it was sufficiently serious to warrant dismissal as it was a breach of the respondent's code of conduct and 50% takes account of the seriousness but is not penalising the claimant twice and is just and equitable in all the circumstances.

Employment Judge Dennehy

Date 14 March 2025

JUDGMENT SENT TO THE PARTIES ON

3 April 2025

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2406111/2023**

Name of case: **Miss C Porter** v **One Fylde**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 3 April 2025

the calculation day in this case is: 4 April 2025

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office