# EMPLOYMENT TRIBUNALS

**Claimant** **Respondent**

v

1. Mr B Gokani AFD Software Ltd

**Heard at**: Watford (by CVP)
**On**: 24 March 2025
**Before:** Employment Judge French

**Appearances**
**For the first claimant:** Mr S Harding, Counsel
**For the respondent,** Mr N Fetto KC, Counsel

# RESERVED REMEDY JUDGMENT

1. By Judgment of 17 December 2024, the claimant was unfairly dismissed.
2. There is a 75 % chance that the claimant would have been fairly dismissed in any event.
3. It is just and equitable to reduce the basic award payable to the claimant by 75 % because of the claimant's conduct before the dismissal.
4. The respondent shall pay the claimant the following sums:
5. A basic award of £4340.25
6. A compensatory award of £5879.71

   **Note** that these are actual the sums payable to the claimant after any deductions or uplifts have been applied.

7. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

# REASONS

Introduction

1. The claim was before me for a remedy hearing further to the final hearing which took place on 16 to 17 December 2024. There was insufficient time to deal with remedy on that occasion. There had also been insufficient time to give a decision on Polkey.
2. The respondent was not legally represented at the final hearing, however instructed a representative following the final hearing.

3. At the outset of the hearing there was some discussion as to the scope of the hearing, the claimant's position being that matters covered at the

previous hearing should not be re-visited. The claimant considered that in those circumstances no witness evidence should be called. The respondent agreed that previous matters should not be re-visited but stated that they wished to call witness evidence to deal with Polkey and contributory fault which had not yet been determined.

4. I agreed that the issues of Polkey and contributory fault remained live and allowed witness evidence on those issues. Both the claimant and Mrs Dorricott were called in that regard.

5. There was a separate request for disclosure of the claimant's EziDrops calendar prior to his dismissal and further medical evidence. I refused the application. Oral reasons having been provided at the hearing in respect of that decision, written reasons will only be provided if requested in accordance with Rule 60 of the Employment Tribunal Procedure Rules 2024.

Evidence

6. I had a supplementary bundle consisting 319 pages. This included additional statements from the claimant and Mrs Dorricott.

The law – remedy

7. The Tribunal must consider, if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8.

8. In undertaking this exercise, the Tribunal are not assessing what we would have done; we are assessing what this employer would or might have done. We must assess the actions of the employer before us, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24.

9. The question for the tribunal is whether the particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the claimant in any event had the unfairness not occurred.

10. The Polkey adjustment is only applicable to the compensatory award, not the basic award.

11. The tribunal must assess any Polkey deduction in two respects: 1) If a fair process had occurred, would it have affected when the claimant would have been dismissed? and 2) What is the percentage chance that a fair process

would still have resulted in the claimant's dismissal? Software 2000 v Andrews [2007] ICR 825.

12. Where there is a significant overlap between the factors taken into account in making a Polkey deduction and when making a deduction for contributory conduct, the Tribunal should consider expressly, whether in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and, if so, what its amount should be. This is to avoid the risk of penalizing the claimant twice for the same conduct (see Lenlyn UK Ltd v Kular UKEAT/0108/16/DM).

13. Further, the Tribunal may reduce the basic or compensatory awards for culpable conduct in the circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

14. 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 and 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."*

15. Conduct which was not known to the employer and cannot have caused or contributed to the dismissal may be taken into account Optikinetics Ltd v Whooley [1999] ICR 984.

16. 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."*

17. To fall into this category, the claimant's conduct must be 'culpable or blameworthy'. Save in respect of the basic award, such conduct must cause or contribute to the claimant's dismissal, rather than its fairness or unfairness. Such conduct need not amount to gross misconduct (Jagex Ltd v McCambridge UKEAT/0041/19). It is also possible to make a reduction for contributory conduct even if, had the employer acted fairly, a dismissal would not have occurred at all (Wilkinson v DVSA [2022] EAT 23).

18. In assessing contribution the tribunal should (Steen v ASP Packaging Ltd UKEAT/0023/13/1707):
    1) Identify the relevant conduct;

    2) Assess whether it is objectively culpable or blameworthy;

    3) Consider whether it caused or contributed to the claimant's dismissal; and

    4) If so, determine to what extent it is just and equitable to reduce any award.

19. A helpful framework for addressing the related issues of contributory conduct and a Polkey reduction was provided by the EAT in Dee v Suffolk County Council EAT 0180/18. His Honour Judge Barklem observed that the tribunal should first consider what decision the employer's disciplinary panel would have reached on the issue of whether the claimant was guilty of gross misconduct and/or lesser misconduct had a fair procedure been followed. If it determined that he would have been found guilty of gross misconduct or misconduct, it should then decide what sanction the panel would have imposed. Each factor that was relevant to the tribunal's determinations should be identified and its effect explained. Naturally, the outcome could not be expressed other than by reference to a percentage reduction, but it was important that the basis for this was set out. A similar exercise should then be carried out in relation to the reduction for contributory fault, and confirmation given that the tribunal had 'stood back' and looked at the matter as a whole in order to avoid any double counting and ensure that the final result was overall just and equitable. If a different percentage was to apply to the reductions in the compensatory and basic awards, the basis for that conclusion should also be set out.

20. A claimant is expected to mitigate the losses he suffers as a result of an unlawful act by giving credit for sums received from new/alternative work. A tribunal will not make an award to cover losses that a claimant could reasonably have been avoided. Accordingly, an unfairly dismissed employee is expected to search for other work, and will not recover losses beyond a date by which the tribunal concludes the individual ought reasonably to have been able to find new employment at a similar rate of pay Cooper Contracting Ltd v Lindsey UKEAT/0184/15/JOJ.

21. The question of reasonableness is to be determined by the tribunal itself, with the claimant's wishes and views simply one of the factors in its analysis. Tribunals are encouraged not to apply too demanding a standard of the claimant. It may be reasonable to attempt to mitigate loss by setting up a new business or becoming self-employed Cooper Contracting Ltd v Lindsey UKEAT/0184/15/JOJ.

22. Where an employee has simply made no job applications at all, the employer is entitled to assert, at least as a starting point, that by failing to do so, he has acted unreasonably, subject to the tribunal being satisfied as to the explanation. An employee failing to look for any jobs at all is likely to be sufficient to discharge the employer's burden of proof. It is then for the employee to explain why such a failure was reasonable (Hilco Capital Ltd v Harrington [2022] EAT 156).

Conclusions

*Mitigation of loss*

23. The claimant's position is that following his dismissal he sustained a flare up of his medical condition ulcerative colitis which meant that he was unable to work. Whilst I do not dispute the claimant had a medical condition, on the evidence before me I am not satisfied that it was such that it prevented his working for a period of 8 months. There is also no medical evidence which directly points to a flare up or worsening of the condition at the time of the dismissal to suggest that he was incapable of working from that period.

24. To the contrary, within the claimant's EziDrops calendar as produced by him, I note on page 267 that there is a trip to Munich on 25 September 2023. The claimant's evidence was that this also involved a social event to Octoberfest (a beer festival) and that he simply attended a conference as part of that trip. Regardless of the purpose, the claimant was fit enough to take this trip shortly after his dismissal on 22 September 2023 when he said that his condition was at its worst following an immediate relapse.

25. There follows within the calendar a number of entries related to EziDrops. I do not consider that these were all one-off meetings but rather some are reminder entries around tasks that the claimant needed to do, and I consider these entries are such that would involve an amount of work in the background.

26. His evidence was that the work was outsourced, however I consider that even outsourcing would have involved significant work from him given his position in the company.

27. I also have some doubts as to the claimant's credibility in respect of this calendar because the version that was originally provided by the claimant blocked out a number of tasks that were clearly related to EziDrops and which the claimant was taken to in cross examination.

28. The claimant's account is that his instructions were that he could redact all irrelevant entries and he had removed reminders. I do not accept that explanation where reminders related to his work with EziDrops and clearly therefore would have been relevant. I do consider in those circumstances that the claimant has sought to misrepresent the amount of work he was doing for EziDrops at this time.

29. The claimant's position is that once he was fit enough, he did not apply for any alternative jobs as he decided to invest his time and focus on running the EziDrops company. The claimant's dismissal arose from the respondent discovering that he had set up and was involved in another company, EziDrops which was set up on or around 21 March 2019. It was an established company for which the claimant had invested significant time and effort.

30. I am satisfied that the claimant acted reasonably in seeking to make a success of his already established business as an alternative to looking for work. This is in circumstances where he was 55 years at the date of termination and had been employed for some 23 years. The business had been established for some time and I consider it reasonable for him to consider this as an alternative income on dismissal.

31. However, I consider that a period of 4 months was reasonable for the claimant to establish whether or not this would generate sufficient income for him. Had the company been an initial start-up, I consider this period may have been longer but at the time of his dismissal it had been established for some time. The media coverage obtained by the respondent during the course of these proceedings suggested that the claimant had invested significant time and energy into the company, and this was not disputed by the claimant. I consider that 4 months post dismissal was therefore a reasonable period for the claimant to establish whether the business would succeed or not.

32. I consider that there has then been a failure by the claimant to mitigate his loss by way of looking for alternative employment at that stage, namely once it was clear that his business was not making any profit.

33. I am not satisfied on the evidence that he was medically unfit to work from this period. To the contrary, the evidence before the Tribunal is that he was undertaking work for EziDrops during this time.

34. In evidence the claimant suggested he was unable to be away from home due to his condition. Again, to the contrary, the evidence in his calendar

does not support that he was unable to be away from home. Even if he was his role for the respondent was a remote role and I consider that it would have been reasonable for the claimant to have looked for an alternative remote role, allowing him to work from home around any medical needs. His evidence was that he looked for no alternative at all.

35. The claimant also relies on the restrictive covenant clause that he signed as part of his resignation as to why he did not seek alternative employment. The claimant presented his ET1 on 23.2.24 in which he asserted unfair dismissal. As such I consider that by that stage at the latest, he could not have considered that he remained bound by this and indeed it is likely to have been much sooner given he approached ACAS on 13 December 2023. In any event this prevented him working for direct competitors.

36. I note the respondent's unchallenged evidence of alternative employment at pages 3-12 and 13-16 of the supplementary bundle. I consider that these were roles open to the claimant to apply for in circumstances where his attempts in relation to his business venture had not succeeded.

37. I therefore conclude that the claimant ought reasonably to have been able to find new employment at a similar rate of pay after a period of 4 months. Loss of basic salary is therefore calculated at 16 weeks x £747.00 totaling £11952.00.

38. Other than Polkey and contributory fault the other figures within the schedule of loss are agreed.

*Polkey*

39. In my liability reasons I concluded that the respondent had a genuine belief that the claimant was guilty of misconduct and that this was held on reasonable grounds. In summary, the unfairness arose because the decision to dismiss was pre-determined and there was a lack of investigation into the degree of the claimant’s involvement in EziDrops whilst working for the respondent.

40. Prior to the remedy hearing the respondent has obtained further information (page 86 of the bundle) that on 8 October 2021 the claimant was attending an EziDrops conference when it is alleged he should have been working for the respondent. There is conflicting evidence in relation to whether or not this was booked as leave for the claimant and I need not make a determination myself for the purpose of Polkey.

41. However, Mrs Dorricott's evidence is that despite that conflict of information, she would have been guided by the lead HR record which shows that the claimant did not have annual leave on that day. As such I conclude that had a fair procedure been carried out and further exploration conducted, Mrs Dorricott would have likely concluded that the claimant had worked for EziDrops on a day when he should have been working for the respondent.

42. Further as to the investigation into the degree of the claimant's involvement in EziDrops, as part of the liability hearing the claimant did not disclose his work calendar for EziDrops. For the purposes of the remedy hearing, he has only disclosed the same post-dismissal. I conclude therefore that had Mrs Dorricott made such an enquiry, this information would not have been provided by the claimant because he continues to refuse to provide it even now. This would have been relevant evidence as to his involvement and work for EziDrops alongside his commitment to the respondent.

43. The claimant's position is that this process was so unfair in these circumstances that it is impossible for the tribunal to look forward as to what the respondent would have done. I acknowledge this submission in the context that the decision was pre-determined. However, that goes directly to the conclusion that the respondent did not explore the degree of the claimant's involvement because the decision was pre-determined.

44. I conclude that had they done so they would have likely discovered and concluded that the claimant had attended a conference for EziDrops whilst working on company time. I also consider that Mrs Dorricott would have concluded from the claimant's failure to disclose his EziDrops calendar that his involvement with EziDrops whilst on company time was extensive.
45. In those circumstances I conclude that there is a 75% chance that the claimant would have been dismissed had a fair and reasonable procedure been followed.

46. The compensatory award shall therefore be reduced by 75% to reflect this.

*Contributory fault – Basic award*

47. In relation to the conduct of the claimant prior to the dismissal I rely on the reasons in the liability Judgment as follows.

48. At paragraphs 16 and 17, I concluded that there were provisions in the claimant's contract preventing him from having his own business whilst working for the respondent. He therefore breached his contract.

49. I rejected the claimant's assertion that he did not think this would be an issue because others had done so before and he had been provided with details of the company's patent lawyer. I rely on my observations at paragraphs 63 to 64 of the liability reasons.

50. The claimant also used the respondent's resources to conduct this business, again as outlined in the liability reasons at paragraph 65.

51. I consider that this conduct is such that it is just and equitable to reduce the basic award by 75%.

*Contributory fault – compensatory award*

52. Save in respect of the basic award, such conduct must cause or contribute to the claimant's dismissal, rather than its fairness or unfairness.

53. I conclude that the claimant's conduct was culpable and blameworthy as identified above. I also consider that it contributed to the claimant's dismissal. There was a clear breach of contract, and I consider that the claimant did conceal that from the respondent because he knew it was a breach.

54. However, I do not consider that it is just and equitable to reduce the compensatory award further in circumstances where I have made a Polkey deduction. I have regard to the case law identified above. I step back and look at the case as a whole to ensure that the result is just and equitable. I consider that any deduction to the compensatory award for contributory fault overlaps with the findings made in respect of Polkey such that to apply a further deduction would not be just and equitable because it would amount to double counting.

55. As such I make no further deduction to the compensatory award.

Calculations

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|---|---|
| 56. **Basic award** – agreed by the parties at | £17361.00 |
| Less contributory fault reduction at 75% | (£13020.75) |
| Total | £4340.25 |
| **Compensatory award** | |
| Loss of basic salary at 16 weeks x £747 | £11,952.00 |

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|---|---|
| Loss of statutory rights | £500.00 |
| Loss of estimated commission (calculated based on agreed yearly average of £23,142.60) | £7714.20 |
| Loss of pension 4 months x £716.66 per month | £2866.64 |
| Unused holiday entitlement | £1382.00 |
| Less ex-gratia payment | (£896.00) |
| Total | £23518.84 |
| Less Polkey deduction at 75% | (£17639.13) |
| Total | £5879.71 |
| **Total of basic and compensatory awards** | **£10219.96** |

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Approved by:

Employment Judge French

Date: 1 April 2025

Sent to the parties on: 2/4/2025

For the Tribunal Office

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**Recording and Transcription**
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