EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Ms N Harrington

Respondent: Vodafone Group Services Ltd

On: 20 May 2025

Before: Employment Judge Adkin
Ms L Jones
Mr D Scofield

Appearances

For the claimant: Mr A Sendall, Counsel
For the respondent: Mr J Chegwidden, Counsel

JUDGMENT

(1) Deductions will be made for **Polkey**/**Chagger** to the awards for unfair dismissal and victimisation on the following basis:

a. To reflect a **20%** chance that the Claimant would have been fairly dismissed for a non-discriminatory reason on **31 October 2022**;

b. To reflect that had she not been so dismissed, a further **20%** chance that the Claimant would have been fairly dismissed for a non-discriminatory reason on **31 March 2023**.

REASONS

1. Following on from a final hearing held on 22 – 25 October and 10, 12, 16 December 2024, the Tribunal unanimously found the complaint of unfair dismissal (admitted by the Respondent) well-founded and two allegations of victimisation well-founded with the remaining allegations being dismissed. That decision ("the liability decision") which was sent to the parties on 4 March 2025 was subject to (protective) application for reconsideration under rule 68 of the Employment Tribunal Rules 2024 in relation to Polkey/Chagger on the basis that these were issues still before the tribunal which needed to be resolved.

2. I agreed with counsel for both sides at a case management hearing held on 20 March 2025 that the Tribunal would decide what are called in legal shorthand the "**Polkey**" and "**Chagger**" points based on further written submissions provided in light of our findings of fact and conclusions.

Submissions

3. We have had the benefit of helpful written submissions from counsel for each side, Mr Sendall for the Claimant and Mr Chegwidden for the Respondent who each exercised a brief right of reply in writing.

4. We are extremely grateful for those submissions.

Evidence

5. The Tribunal has already made findings of fact at paragraphs 7 – 225 of the decision sent to the parties in March 2025.

6. We have received no new evidence and relied upon the documentation and witness statements provided at the liability hearing.

Law

7. We have been referred by the parties *inter alia* to the following:

   7.1. **Section 123(1) and 139 of the Employment Rights Act 1996**, i.e. the compensatory award for unfair dismissal is in "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer";

   7.2. **Polkey v A E Dayton Services Ltd** [1988] A.C. 344 the Tribunal has the power to limit compensation by reference to the percentage likelihood that, had a fair procedure been carried out, the claimant could/would have been dismissed in any event, and/or by reference to a date by which the tribunal considers that this is likely to have transpired;

7.3. **Gover v Propertycare Ltd** [2006] ICR 1073 CA. In that case changes to the rate of the claimants' commission were found to amount to a repudiatory breach of contract amounting to unfair dismissal. The Tribunal found that even had a fair process been followed and reasonable (non-repudiatory) terms proposed the claimants would still have rejected them. Compensation was therefore limited to 4 months plus notice. The Court of Appeal upheld that decision.

The Respondent submits it follows that "it is not the case that Polkey is inapplicable if factually it is found that the employer's dismissal would have been unfair in any event. A tribunal is still entitled to approach s.123 ERA1996 and assess the percentage chance that an employee would have been dismissed if a fair procedure had followed."

7.4. **Software 2000 Ltd v Andrews** [2007] IRLR 568 confirming the principles on Polkey reductions generally and that there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of impression and judgment for the tribunal; but in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

7.5. **Abbey National Ltd v Chagger** [2010] ICR 397 CA in assessing compensation for discriminatory dismissal, it is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss (paragraph 57). In that case there were two candidates for redundancy of which C was one. There was a realistic chance that might have been made redundant absent the discrimination;

7.6. **Williams v Amey Services Ltd** [2015] UKEAT/0287/14/MC in which the EAT emphasised the broad discretion given to the Tribunal and confirmed that the Polkey exercise may require the Tribunal to apply a percentage reduction to the compensatory award or to award for a discrete period of time or both;

7.7. **Gourlay v West Dunbartonshire Council** [2025] EAT 29 in which Lord Fairley summarised principles in Chagger and compensatory for a statutory tort and held that the effect of the discrimination on the successful claimant's ability to find work should be considered.

This is relied upon by the Claimant. The Respondent argues that the focus on future job prospects is premature at the present stage.

8. We have also considered:

8.1. **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691 EAT in which Langstaff P gave clear guidance at paragraphs 24 and 32 that the **Polkey** exercise is to assess the likelihood of *this particular employer* fairly dismissing not a hypothetical fair employer. That should be a predictive approach relating to the actual employer rather than a review based on the Tribunal's own view of the case.

Conclusions

9. In the interests of brevity there is no benefit in reproducing all of the submissions of counsel and replies. We have taken careful account of these submissions.

Disclosure

10. We accept Mr Sendall's submissions (sub-paragraph 14(5) & (7)) that the disclosure by the Respondent has been inadequate in relation to the redundancy process, consultation, selection leading to terminations in 31 October 2022 and there is very little disclosure or rationale in relation to the later redundancy "waves" in March and June 2023. We made various observations about disclosure in our liability decision.

11. We do not accept all of the criticisms of the Respondent's evidence made on behalf of the Claimant, however.

12. The fact that there is some discrepancy between the content of the redundancy list on 31 August 2022 and the earlier list from early July 2022 is not necessarily surprising, since there may have been changes during that period, although it does raise questions about exactly what additional decisions were made in that period. As to the argument that this 31 August disclosure undermines Ebru Ozguc's evidence that there were 7 in her department being made redundant, we are not persuaded by this. We understood that Stephanie Twineham was the HRBP for the relevant team of which the Claimant was part. Ms Twineham's name appears against the names of seven individuals including the Claimant. The list of 31 August contains the name of HRBPs rather than line managers.

13. This does not entirely explain the discrepancy whereby two of the Respondent witnesses refer to 8 people being made redundant in October 2022 whereas there only 7 names on that document. On balance we accepted that 8 people were made redundant. In the context of the numbers overall this difference is not material.

Exercise of assessment

14. We accept in part the Claimant's criticisms of the Respondent's evidence and lack thereof and accept that as of the exercise in June 2023 the exercise is so riddled with uncertainty that no sensible prediction can be made (Software 2000). This is dealt with further below.

15. As to the redundancies in October 2022 and March 2023, we do not find that exercise is so riddled with uncertainty that no sensible prediction can be made. We take the view that this is necessarily a speculative exercise which the Tribunal is required to carry out to do justice between the parties. We accept Mr Chegwidden's submission that we are dealing with percentage likelihood rather than necessarily findings on the balance of probabilities.

16. The **Polkey** exercise requires us to assess the likelihood of a fair dismissal occurring at 31 October 2022 and two further points in March and June 2023.

17. The **Chagger** exercise we have carried out is by considering "but for" victimisation following the Claimant's protected acts on 31 March, 1 April and 22 July 2022 was there a chance that the Claimant might have been dismissed?

18. We have considered the available evidence that even before 31 March 2022 there was some possibility, absent victimisation, of the Claimant's role being selected for redundancy. We have used the term "non-discriminatory" and the slightly inelegant term "non-victimisation" synonymously in these reasons.

19. Insofar as Mr Sendall argues that we should consider the psychological impact of the Respondent's unlawful treatment, and the effect on her future employment prospects in reliance on **Gourlay** we accept Mr Chegwidden's submission that the time for that assessment is at the remedy hearing not the present exercise.

20. For the reasons advanced by Mr Chegwidden in his primary written submission on the Polkey/Chagger question at paragraphs 12-14 we accept that although there is a distinction between Polkey and Chagger, in the context of the present case in which there is both unfairness and victimisation the practical distinction is limited.

21. This is necessarily a broadbrush and not a scientific exercise, but a question of impression for the Tribunal based on our view of all of the evidence. The approach we have followed is to make an assessment of the likelihood of a fair and non-discriminatory dismissal and made combined Polkey/Chagger deductions at two points.

31 October 2022

22. Was there a chance that the Claimant might have been dismissed for a fair and non-discriminatory reason (i.e. a non-victimisation reason) on 31 October 2022 which was the date of her actual termination of employment?

23. It is contended for by the Respondent that the likelihood of that fair, non-discriminatory dismissal as at October 2022 was as high as **60%**. Mr

Chegwidden's submission is that the non-occurrence of standard consultation for other redundant employees is fully explained by their decision to enter settlement terms. We find that in practice all other employees did accept settlement terms.

24. We find that the Respondent has overstated the likelihood of a fair, non-discriminatory dismissal by elevating it to a *probability* of 60% rather than a mere possibility.

25. Nevertheless we find that there is sufficient evidence to lead us to a conclusion that there should be some reduction to reflect the possibility of a fair, non-discriminatory dismissal. First, there was a genuine redundancy situation within the business marketing team. Employees in that team were faced with the risk of dismissal by reason of redundancy.

26. Second, we cannot see a reason why the Claimant would have been especially protected from her role being placed at risk of redundancy. Following the demand from the Respondent's finance function the business marketing team needed to reduce headcount.

27. Given the limited evidence about the basis of selection and the individuals actually made redundant, we have had to focus on the evidence we have. The Tribunal has taken as its starting point that there was a genuine redundancy exercise which was going on leading to dismissals at the end of October 2022. The department was attempting to reduce by €1.3m annual operating expenses. A figure something over half of that was employee costs. The consequence of that genuine redundancy exercise was that eight individuals within the Business Marketing team under Amanda Jobbins were made redundant.

28. There were approximately 80 people in that team. Leaving aside individuals and roles for one moment that meant that approximately **10%** (i.e. 8/80) of the team led by Ms Jobbins were made redundant in October 2022.

29. Are there any reasons to believe that the Claimant would have been more or less likely than the average team member to be dismissed?

<u>High pay</u>

30. We have considered the Respondent's argument that as a relatively high paid employee the Claimant's role was at greater risk of redundancy. Looking at those at risk on the RAG chart, and the range of salaries, the evidence that this redundancy exercise was particularly focused on high paid roles is limited. The difference of salary between the Claimant and others in her immediate team was not very large. This has led us to doubt that high pay was a significant factor in selection.

<u>Evidence that Claimant's role was at risk</u>

31. The Respondent submits that we should look at the process leading to dismissal which demonstrated that the Claimant's role was at risk. The

Claimant's name was on the red – amber – green ("RAG") chart on 8 July 2022 which contained 18 roles (21 individuals).

32. The difficulty is that the Claimant's fate was likely already sealed three months earlier (liability decision paragraph 341) at the time of the meeting of 7 April and follow up email of 8 April 2022 which followed on from the protected act the previous week. The process leading to the inclusion of the roles, including the Claimant's role on the RAG chart is opaque. The Tribunal has significant doubt that the Claimant's name would have been on this RAG chart but for victimisation, although we find it was a possibility.

Lack of substantive replacement

33. The Respondent puts particular emphasis on the fact that the Claimant's role has not been substantive replaced (liability decision paragraph 220). It is argued that the longer that "stable" state of affairs continues, the more this demonstrates that there was a genuine restructure of the management line which lead to the Claimant's role being deleted.

34. On the Claimant's side, Mr Sendall emphasises that the Claimant's unchallenged evidence at the liability hearing was that Ms Homer was now interim head of the AR team. The Respondent by reply points out the Tribunal's finding that there was no substantive replacement. These two points are not mutually exclusive. The has been no substantive replacement. The Claimant's evidence on the point about the interim replacement was not challenged.

35. While that dispute was pursued between counsel in submissions, we find that looking at events *subsequent to* the Claimant's dismissal is of limited value in evaluating the chance that it might have occurred for a fair and non-victimisation reason.

36. The difficulty with the Respondent's argument in reliance on the lack of substantive replacement is that it pre-supposes that the genesis of the restructure was non-discriminatory and the deletion of Claimant's role as the single manager of the AR team flowed from that restructure. Although there is one document dating from October 2022 which mentions the restructure leading to the removal of the Claimant's role, the Tribunal did not see documentation showing the development of the rationale for the restructure. If as we find the Claimant's fate was likely (although not certainly) already sealed in early April 2022 as a result of the protected acts, this was before the redundancy exercise even got underway. If the Claimant (or strictly her role) had been earmarked to be made redundant this early because of victimisation following the protected act, all of the events that followed are "tainted" and do not in our view provide convincing evidence that flattening out the management structure was a plan unrelated to the protected acts. If the Claimant had been earmarked, her role was very likely to appear at risk in the RAG analysis and the deletion of her role was likely to change the team structure.

37. If there was a genuine untainted redundancy of the AR team manager role, it would not be replaced. If the redundancy was tainted by victimisation, the Respondent was on notice that replacing the Claimant's role, even after an

interval would be risky. The Claimant raised on 13 September 2022 that she felt she had been made redundant because of her grievance about discrimination and by 4 November 2022 had commenced the ACAS early conciliation period. A claim presented to the Tribunal on 13 December 2022 alleged unfair dismissal and victimisation rather than a genuine redundancy. Replacing the Claimant's role substantively at any stage would plainly suggest the Claimant's concerns were right.

Events pre-dating protected acts

38. The Tribunal finds that a better approach to understand the possible risk of a fair and non-victimisation dismissal is to look at events *before* the first protected act on 31 March 2022.

39. Viewed from Ms Jobbins' perspective, even before the protected acts there were some reasons to believe that the reporting line from Ms Jobbins between herself and the AR team was not working effectively.

40. What the Tribunal must not do in the Polkey/Chagger exercise is to apply a reduction to compensation arising from a risk of a different sort of unfair or discriminatory hypothetical dismissal. While a fair redundancy exercise must have a objective and rational basis for selecting individuals, the reality is that a head count exercise of this sort might lead to the restructure of a team in a variety of different ways. When the Respondent was looking to make cost savings and remove roles as it needed to do to meet the operational expenditure challenge, the perception of a less than functional reporting line running through the Claimant to the AR team might have led to the flattening out of this reporting line legitimately coming onto the agenda for discussion.

41. The reality is that the period January 2022- 31 March 2022 (the date of the first protected act) was characterised by dysfunctional dynamics in management of the AR team. This is reflected by the content of the liability decision paragraphs 13-18 and 27-62). This dysfunction was evident before the protected acts. It is in that context that the Tribunal accepts that there was some possibility of a change to the structure fairly and for a reason other than the protected acts coming onto the agenda for discussion as part of the early stages of a redundancy exercise.

42. Dressing up a dismissal for performance as a redundancy would not be a fair basis for identifying the Claimant's role as at risk of redundancy. We have been careful not to give credit to that possibility in our assessment. Given that concern and the limited evidence we only make a limited allowance for the possibility of the Claimant's role being made redundant leading to a fair and non-discriminatory dismissal over and above the 10% general risk of redundancy within the business marketing department.

43. The Tribunal is required to consider the counterfactual situation that a fair process was followed by this particular Respondent. We accept that there was some possibility of the Claimant being dismissed fairly and for non-discriminatory reasons.

44. There was, we find some chance that the Claimant role might have been fairly put at risk and fairly selected for redundancy and dismissed fairly for this reason. It might well have been the case that before a dismissal took effect, that the Claimant would have chosen what other colleagues did and accepted the terms of the settlement agreement. That would not in itself make the process or dismissal in this counterfactual scenario unfair.

Consultation

45. We accept Mr Sendall's submission that a fair redundancy consultation might have led to various different outcomes and different ways to achieve a cost saving within the Analyst Relations team even had the Claimant been placed at risk of redundancy. In other words it was not a foregone conclusion that even being placed at risk of redundancy would have led to her dismissal had a fair process, including consultation occurred. We accepts that this submission somewhat mitigates against a high Polkey reduction.

Gover or Hill: was there no chance of a fair dismissal at all?

46. We considered the significance of the case of Gover, highlighted by the Respondent, and also the case of Hill.

47. The circumstances of **Gover** are significantly different to the present case. Nevertheless we take from this that the nature of the exercise being applied under section 123 is to look at the counterfactual situation that a fair procedure was being followed. Focussing the fact that a fair procedure may not have been followed for other employees it seems to us would be likely to lead us into error.

48. In relation to **Hill**, we did consider whether this would support the Claimant's argument that there was simply no chance of any fair dismissal in this case given the seemingly universal practice of entering settlement agreements. What we understand Hill to say however is that it is not for the Tribunal to make its own assessment of likelihood of a fair dismissal by a hypothetical fair employer, but looking at a counterfactual situation within this particular Respondent. Within this Respondent there was a redundancy process. We have assessed the possibility that a fair dismissal may have arisen from the circumstances of the Claimant following that process. It follows from our conclusion immediately below that we find that the probability of a fair (and non-discriminatory) dismissal was relatively slight but nevertheless we do not find that there was no chance at all of a fair dismissal occurring for the Claimant under the Respondent's redundancy policy.

Conclusion on likelihood of dismissal in October 2022

49. Taking account of all of these factors, for the reasons given we did not find it more likely than not that the Claimant would have been fairly dismissed and for a non-discriminatory reason in October 2022 which the Respondent's proposed reduction of 60% would represent.

50. Nevertheless, looking at this from the point of view of likelihood, and giving some allowance for the arguments made by the Respondent, we find that there was a slightly greater possibility that she would have been dismissed than the overall average 10% risk (based on 8 roles redundant out of the team of approximately 80).

51. Using a broad brush we assessed this slightly greater possibility of a fair and non-victimisation dismissal taking effect on 31 October 2022 is in our assessment **20%**.

March 2023 redundancy

52. Was there a chance that the Claimant might have been dismissed for a fair and non-discriminatory reason (i.e. a non-victimisation reason) in March 2023 which was when a further 8 people were made redundant in the department?

53. It is contended for by the respondent that the chance of that fair/non-discriminatory dismissal at this stage was as high as **75%**. In our assessment that significantly overstates the likelihood.

54. We accept that there was a possibility of the Claimant being dismissed fairly and for non-discriminatory reasons at this stage.

55. Again given the limited other evidence, looking at the arithmetic again, the evidence of Ms Jobbins is that she commenced as Business Marketing Director in November 2021 with a team of approximately 80 heads, which by the time of her producing the witness statement for this Tribunal was 50 heads. We do not have precise detail of exactly where and how that reduction occurred. It seems reasonably safe to conclude that by the round of redundancies in March 2023 there were in the region of 70 heads. A further eight roles were made redundant. That would represent roughly 11% of the department.

56. We accept Mr Sendall's submission that the disclosure in relation to this second redundancy is inadequate. We are however satisfied that on balance eight more people from the department were made redundant and found accordingly.

57. The same considerations as for the October 2022 round apply here. It seems that the Respondent was seeking further cost reductions. We find that there was some possibility that a decision to flatten out the line management might have occurred at this stage, although the Tribunal has doubts about there been a high likelihood of a fair, non-discriminatory dismissal for precisely the same reasons set above in relation to October. In the interests of brevity we have not repeated all of the same considerations as above but the competing arguments and resulting conclusion are the same.

58. This possibility of a fair and non-discriminatory dismissal taking effect in March 2023 is in our broad brush assessment **20%**.

59. We were not given a date for when this second redundancy round took effect, so we have taken 31 March 2023 on an assumption that it was the end of the month as had occurred in October.

June 2023 redundancy

60. Was there a chance that the Claimant might have been dismissed for a fair and non-discriminatory reason (i.e. a non-victimisation reason) in June 2023 which was when a further 2 people were made redundant in the department?

61. It is contended for by the Respondent that the chance of that fair/non-discriminatory dismissal by this stage was as high as 80%.

62. Looking at the arithmetic again, based on the figures above and the overall reduction in size of the department, it seems reasonably safe to conclude that by the round of redundancies in June 2023 there were approximately in the region of 60 heads. Two roles were made redundant. That would represent roughly 3% of the department.

63. The Respondent preys in aid the fact of the permanent removal of the Claimant's role in support of a contention that the Claimant's role would be 80% likely to be fairly removed by June 2023. We have significant doubts for the reasons set out above in relation to events in October 2022. Further, and additionally considering the counter-factual situation in which the Claimant had remained employed up to that point, we are not persuaded that it was likely that a decision to flatten out the management structure would have spontaneously occurred in June 2023. At this stage only two people were being made redundant. The Respondent has not led evidence to demonstrate to the Tribunal that it was carrying out a restructure or flattening the hierarchy generally at this stage such that the Claimant's role was likely to be at risk.

64. Had the Claimant survived two rounds of redundancies in October 2022 and March 2023, we find it increasingly unlikely that she would have formed part of a very small further redundancy exercise in June 2023 which we know very little about. There is merit in Mr Sendall's submission that in a shrinking department retaining some experience and expertise had a value.

65. Given the comparatively small redundancy exercise (very approximately 3% of the department) and the paucity of evidence, the Tribunal has come to the conclusion that assessing a further reduction in June 2023 would be too speculative (per **Software 2000**). Accordingly we make no further deduction in relation to June 2023.

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Employment Judge Adkin

Date 9 July 2025

SENT TO THE PARTIES ON

10 July 2025

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FOR THE TRIBUNAL OFFICE