



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**Respondent**

AND

Mrs Juliet Dines

Royal Devon & Exeter  
NHS Foundation Trust

**ON** 21 April 2021

**EMPLOYMENT JUDGE** Goraj

## JUDGMENT ON APPLICATION FOR RECONSIDERATION

The Judgment of the Tribunal is that the respondent's application for reconsideration is refused.

## REASONS

### Background

1. The respondent has applied for a reconsideration of the reserved judgment with reasons dated 15 December 2020 which was sent to the parties on 19 December 2020 ("the Judgment"). In the Judgment the Tribunal held that :- (a) the claimant was (constructively) unfairly dismissed by the respondent pursuant to sections 95 (1) (c) and 98 (4) of the Employment Rights Act 1996 ("the Act") and (b) the claimant was not entitled to a statutory redundancy payment pursuant to sections 136 and 139 of the Act.

2. The grounds for the respondent's application are set out in an email dated 31 December 2020 which was received by the Tribunal on that date ("the reconsideration application"). In summary, the application relates to two aspects of the Judgment namely in respect of :- (a) the decision by the Tribunal that the claimant's dismissal was unfair for the purposes of section 98 (4) of the Act and (b) the decision by the Tribunal that there should be no reduction in any compensatory award for the purposes of section 123 (1) of the Act (the Polkey issue). The respondent requested an oral reconsideration hearing. The respondent stated in the reconsideration application that it was made without prejudice to any appeal to the Employment Appeal Tribunal which it might pursue.
  
3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure ("the Rules"). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The written reasons were sent to the parties on 19 December 2019 and the reconsideration application was received by the Tribunal on 31 December 2019. The reconsideration application was therefore received within the relevant time limit.
  
4. By a letter dated 5 January 2021, the claimant opposed the respondent's reconsideration application on the grounds that there was no reasonable prospect of the decision being varied or revoked / that the claimant should, in any event, be given an opportunity to respond including on whether it could be determined without a hearing.
  
5. The Tribunal wrote to the parties by letter dated 15 January 2021 advising the parties that it was not satisfied that it was possible to conclude for the purposes of Rule 72 (1) of the Rules that the respondent's reconsideration application had no reasonable prospects of success and therefore inviting the claimant's comments on the reconsideration application (including whether it could be determined without a hearing).
  
6. By a letter dated 28 January 2021, the claimant submitted a detailed response:- (a) opposing the respondent's reconsideration application on its merits and (b) requesting that the reconsideration application be determined on the papers (as it would be in accordance with the overriding objective in all the circumstances of the case) subject to the respondent been given an opportunity to submit further written submissions prior to such paper determination.

7. By a letter dated 17 March 2021 the Tribunal wrote to the parties advising them that the Tribunal was satisfied, for the reasons set out in that letter, that it was appropriate for the matter to be determined on the basis of written submissions and without the need for an oral hearing and inviting the respondent to make any final written submissions limited to matters arising from the claimant's submissions submitted on 28 January 2021.
8. The respondent submitted further written submissions in reply dated 31 March 2021. In the submissions dated 31 March 2021 the respondent contended that the claimant had misunderstood the nature of the claimant's application and clarified that the Tribunal was invited :-
  - (i) " To reconsider one of the bases for its finding of unfairness, namely that at paragraph 121 of the judgment (if indeed that is correctly understood to have constituted one of the bases for the finding of unfairness). If the Tribunal accedes to the application on that point, the dismissal will remain unfair, but for the reasons found at para. 89 only;
  - (ii) "To reconsider its conclusions on Polkey, not by reference to the percentage chance that the Claimant would have been dismissed fairly in any event on the basis that there would have been a kind of non-redundancy redeployment process (when there was no evidence that there would have been), but by reference to the Respondent's case that the Claimant would inevitably have resigned anyway had the unfairness identified at para. 89 not occurred".

### **The respondent's appeal to the Employment Appeal Tribunal**

9. The Tribunal was advised by the Employment Appeal Tribunal on 10 March 2021 that the claimant had lodged a valid appeal (on 29 January 2021). The Tribunal had not previously been made aware of the appeal. The Notice of Appeal contains 11 grounds of appeal. Grounds 10 and 11 of the Notice of Appeal largely mirror the grounds for the reconsideration application as clarified in the respondent's submissions dated 31 March 2021.

## **THE LAW AND THE CONCLUSIONS OF THE TRIBUNAL**

### **THE LAW**

10. The Tribunal has had regard in particular to: -

- (a) Rules 70 -73 of the Rules referred to above including, that the grounds for reconsideration are limited to those set out in Rule 70, namely that it is necessary in the interests of justice to do so. The interests of justice apply to both parties.
- (b) The guidance contained in **Trimble v Supertravel Ltd [1982] ICR 440 EAT**, including that if a matter has been ventilated and argued at a Tribunal hearing any error of law falls to be corrected on appeal and not by review. The considerations of the Tribunal are therefore strictly limited to the matters referred to at paragraphs 8 (i) and (ii) above.
- (c) The contents of the reconsideration application together with the submissions of the claimant dated 28 January 2021 and the further submissions of the respondent dated 31 March 2021 together with the authorities referred to therein.
- (d) The paragraph numbers referred to below are to paragraph numbers in the Judgment.

## **THE CONCLUSIONS OF THE TRIBUNAL**

### **Issue 1 of the reconsideration application – the fairness of the claimant’s dismissal for the purposes of Section 98 (4) of the Act (paragraph 8 (i) above).**

- 11.** The Tribunal understands that, for the purposes of the reconsideration application (and without prejudice to the impending appeal), the respondent does not challenge that the claimant’s dismissal was unfair for the purposes of section 98 (4) of the Act for the reasons set out at paragraph 89 of the Judgment (Issue 2 (ii) of the List of Issues - in essence procedural unfairness amounting to a breach of the implied term of trust and confidence ) or as set out at paragraph 121 of the Judgment (in so far as it relates to unfairness in the way in which the process was conducted (paragraph 5 of the respondent’s submissions dated 31 March 2021). The Tribunal has therefore proceeded on that basis.
- 12.** The Tribunal further understands that the reconsideration application for reconsideration in respect of section 98 (4) relates to:- (a) “the apparent reliance upon the anticipatory breach of express terms itself as an aspect of unfairness, when that was the principal reason for resignation (dismissal) found by the Tribunal (at paragraph 103) to have been the principal and potentially SOSR reason (paragraph 114) and for which the Tribunal found that there to have been reasonable and proper cause (paragraph 96) such that there was no breach of the

implied term of mutual trust and confidence in respect of it” (paragraph 6 of the respondent’s submissions dated 31 March 2021) and (b) the further matters set at paragraphs 7- 9 of the respondent’s submissions dated 31 March 2021 relating to the application of section 98 (4) of the Act including that as there was in this case a potentially fair reason for dismissal (and for which there was also reasonable and proper cause) it could not constitute unfairness for the purposes of section 98 (4) of the Act/ be outside the range of reasonable responses.

### **The findings in the Judgment**

- 13.**With reference to the agreed List of Issues (appended to the Judgment), the Tribunal held in the Judgment that:- (a) the respondent had acted in anticipatory repudiatory breach of the express terms of the claimant’s contract of employment (paragraphs 79 - 84 of the Judgment), and (b) that the respondent had also, without proper cause, acted in breach of the implied term of trust and confidence in respect of the matters identified at paragraph 89 of the Act. The Tribunal further concluded that having had regard to its findings regarding the anticipatory breach of the express terms and the breaches of the implied term of trust and confidence that it was satisfied that the claimant had been constructively dismissed for the purposes of section 95 (1) (c) of the Act (paragraph 109).
- 14.**The Tribunal therefore went on to consider (Issue 6 of the List of Issues) whether the respondent had established a potentially fair reason for dismissal for the purposes of section 98 (1)/ (2) of the Act. The Tribunal concluded that, notwithstanding the repudiatory breaches of contract by the respondent which entitled the claimant to terminate her contract of employment pursuant to section 95 (1) (c ) of the Act, the respondent had established, on the balance of probabilities, a potentially fair reason for the claimant’s dismissal namely, the transfer of the management of the Community Radiology Service to the respondent’s Medical Imaging Team in the respondent’s special services division and the associated reorganisation of the management of the Community Radiology Service which reason constituted some other substantial reason (SOSR) for the purposes of section 98 (1) of the Act ( paragraphs 114- 115).
- 15.**The Tribunal therefore went onto to consider whether the claimant’s dismissal was fair for the purposes of section 98 (4) of the Act. The Tribunal agrees with the contention at paragraph 7 of the respondent’s submissions dated 31 March 2021, that the question under section 98 (4) (a) of the Act is whether the employer acted reasonably in all the circumstances of the case (having regard to all of the factors contained

in section 98(4) of the Act) as sufficient reason for the dismissal of the claimant. Further, the Tribunal reminded itself (at paragraph 73) that as part of this process the Tribunal has to consider whether the decision to dismiss the claimant and the process adopted was within the range of responses of a reasonable employer.

- 16.** Having given the matter further consideration in the light of the further helpful submissions from both parties in relation to the reconsideration application the Tribunal remains of the view that the claimant's dismissal was unfair for the purposes of section 98 (4) of the Act. For the avoidance of doubt, this applies in respect of both of the established breaches namely :- (a) the anticipatory repudiatory breach of the express terms of the claimant's contract of employment (paragraphs 79– 84) and (b) the breaches of the implied term of trust and confidence (paragraph 89).
- 17.** The findings at paragraphs 79-84, 89 and 121 of the Judgment identified a number of serious failings on the part of the respondent which amounted to an anticipatory repudiatory breach of the express terms of the claimant's contract of employment and /or also the breach of the implied term of trust and confidence including the respondent's failure to appreciate / acknowledge the correct contractual position with regard to the claimant's existing terms and conditions and the unilateral imposition of the new job title / job description/ terms and conditions notwithstanding the objections by the claimant to the nature and extent of the proposed changes to her role.
- 18.** The Tribunal rejects any contention by the respondent that the fact that the respondent has established a potentially fair reason for "dismissal" namely, SOSR in respect of the transfer / re-organisation of the Community Radiology Service (paragraph 114 (3) ) and/or that the Tribunal found that the respondent had reasonable and proper cause in respect of such changes (which was in respect only of the elements of the claimant's claims relating to the alleged breaches of the implied term of trust and confidence (paragraph 96 of the Judgment), precludes the claimant's constructive dismissal from being unfair/ outside the range of reasonable responses for the purposes of section 98 (4) of the Act (including in respect of the Tribunal's conclusion that the respondent had acted in anticipatory breach of the express terms of the claimant's contract of employment).
- 19.** As acknowledged by the respondent, in cases where a respondent is able to establish a potentially fair reason for dismissal the question of whether the claimant's dismissal was fair or unfair depends upon whether "in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted

reasonably or unreasonably in treating it as sufficient for dismissing the employee” which shall be “determined in accordance with equity and the substantial merits of the case”. Accordingly, although a respondent may have a potentially fair reason for dismissal it may not, in the circumstances of the case, be sufficient to dismiss that employee.

- 20.** The Tribunal remains of the view that in the circumstances of this case, the claimant’s dismissal was, with regard to both the established anticipatory repudiatory breach of the express terms of the claimant’s contract of employment (and of the implied terms of trust and confidence – which aspect is not challenged by the respondent for present purposes), unfair for the purposes of section 98 (4) of the Act (including that it was outside the range of responses of a reasonable employer). The claimant was a longstanding (since 2005) and well-regarded employee. The respondent is a large NHS Foundation Trust with access to specialist HR support. Notwithstanding the respondent’s size and administrative resources, the respondent committed serious breaches of the claimant’s contract of employment (express and implied) including that :- (a) it did not take appropriate steps at an early stage of the process to ascertain the nature of the management structure in the Community Radiology Service / properly to understand the nature of the claimant’s management role and responsibilities (b) failed properly to acknowledge the claimant’s legitimate concerns regarding the nature and extent of the proposed changes to her existing role including the transfer/ replacement of her management responsibilities for the Community Radiology Service with responsibilities of the development of the capital programme for the wider imaging team and (c) notwithstanding the claimant’s clear objections to the changes to her existing terms, unilaterally imposed the new job title / job description / terms and conditions ( paragraphs 49 – 52 ) upon her including without any consideration with the claimant of any other alternative way forward which may have avoided the dismissal of a longstanding and well regarded employee.
- 21.** In all the circumstances, the Tribunal is not satisfied that there are any grounds / that it is in the interests of justice to vary and/or revoke its conclusions that the claimant was unfairly dismissed for the purposes of section 98 (4) of the Act in respect of the anticipatory breach of the express terms of the claimant’s contract of employment (or otherwise) and this aspect of the reconsideration application is therefore dismissed.

**Issue 2 of the reconsideration application - whether for the purposes of section 123 (1) of the Act the claimant would inevitably have resigned any way had the unfairness identified at paragraph 89 not occurred (paragraph 8 (ii) above.**

**The findings of the Tribunal (Issue 18 of the List of Issues)**

22. At the original hearing, the Tribunal was required, (Issue 18 of the List of Issues) to consider whether, if the claimant's dismissal was procedurally unfair, the claimant would have been fairly dismissed in any event for the purposes of section 123 (1) of the Act.
23. The "Polkey issue" was very much a subsidiary issue at the liability hearing. The Tribunal was provided with very limited oral/ written submissions at the liability hearing. Neither party requested the Tribunal to defer its determination of this issue pending receipt of the Tribunal's findings on liability. The respective contentions of the parties at the liability hearing are summarised at paragraphs 132 (the claimant) and 133 (the respondent) of the Judgment.
24. In summary, the claimant contended that if she had been correctly assessed as redundant a fair procedure would have been followed which would have included putting her on the deployment list which, given the size of the respondent, is likely to have led to a job being found for her elsewhere. The claimant further contended that if the trust and confidence between them had not been undermined she would have been amenable to reasonable offers from the respondent.
25. In summary, the respondent contended that if there was any procedural unfairness, the claimant would have resigned anyway because she sought a redundancy payment or was unwilling to accept any change to her role in the run up to her retirement.
26. The Tribunal declined on the basis of the limited available evidence / submissions to make, for the reasons stated at paragraphs 134- 135, any reduction for the purposes of section 123 (1) of the Act to reflect the chance that the claimant would, in any event, have been fairly dismissed. In summary :- the Tribunal concluded that :- (a) it was not satisfied that the claimant had resigned in order to obtain a redundancy payment (paragraph 104) and (b) that it was however satisfied that if the respondent had properly appreciated that it was not entitled unilaterally to vary her existing contract/ impose the Radiology Services Support Manager role it is likely that the respondent would have considered further with the claimant possible alternative management roles for the claimant in order to avoid her dismissal.



### The reconsideration application

27. The submissions of both parties have developed / expanded following the delivery of the Judgment.
28. The respondent's case on reconsideration was clarified and refined in the respondent's submissions dated 31 March 2021 (which were submitted in support of the respondent's original reconsideration application and in response to the claimant's submissions dated 28 January 2021).
29. In essence the respondent :- (a) challenges what it describes as the conclusion of the Tribunal that the respondent would have engaged in a redeployment process – to another role in the absence of the unfairness identified at paragraph 89 (paragraph 19 (c) of the submissions dated 31 March 2021) and (b) contends that on the basis of the Tribunal's existing conclusions it was inevitable that the claimant would have resigned anyway in the absence of the unfairness recorded at paragraph 89. The respondent therefore does not ask the Tribunal to adopt a "percentage chance" reduction approach to section 123 (1) of the Act.
30. The respondent relies in support of its contentions on the approach adopted by the EAT in the Judgment of **Ros and anor (t/a) Cherry Tree Day Nursery v Fanstone (14.9.17, UKEAT/0273/07)** which relies in turn on the principles relating to the limiting of forward loss of earnings identified in the EAT authority of **Gover and others v Property Care Limited [2005] UKEAT045805 (which was subsequently approved by the Court of Appeal ([2006] EWCA CIV 286))**. In **Ros** the claimant, who was dismissed ten minutes before her one month's notice of resignation took effect, was held not to be entitled to forward loss of earnings on the grounds that her loss of earnings were not attributable to the dismissal as she would have resigned in any event .
31. The claimant's submissions dated 28 January 2021 (which were submitted in response to the respondent's original reconsideration application) relied upon/ developed the claimant's contentions at the liability hearing. These submissions were originally advanced on the basis that the claimant should have been correctly assessed by the respondent as being redundant in which case she would have been placed on the redeployment list for other roles. Further, in such circumstances, the trust and confidence between the parties would not have been undermined and it is likely that the claimant would have been provided with alternative employment.

32. The claimant contended in the submissions dated 28 January 2021 that, notwithstanding that the claimant was not found by the Tribunal to have been redundant, on the facts found by the Tribunal and on the further evidence called by the parties at the liability hearing, the claimant would, but for the unfairness of the respondent, in any event, have remained in the employment of the respondent.
33. The claimant relies in particular on the contentions at paragraph 13(ii) of the submissions dated 28 January 2021 including that:- (a) the thrust of the respondent's case was that notwithstanding that the respondent did not recognise the matter as a redundancy situation it attempted to mould a new job for the claimant (b) that it was in accordance with the respondent's organisational change policy (c) the Tribunal's conclusion that other roles would have been available is supported by the respondent's own evidence, including at paragraph 18 of Mrs Hall's statement, in which she suggested that the claimant could take over management of the administration team in recognition of her appreciation of how much the claimant would miss being a line manager (d) the claimant's departure and other developments prompted the respondent to make changes to the management structure including a band 7 Cluster support manager and band 6 Admin Services manager (paragraph 25 of Mrs Hall's witness statement ) and (e ) that this demonstrated that the respondent could have identified suitable work for the claimant if it had not been fixated on requiring the claimant to undertake the Radiology Services Support Manager role.

### **The conclusions of the Tribunal**

34. Having giving careful consideration, to the Judgment and evidence/ submissions referred to above (and including the authority of Ros & another) the Tribunal is not satisfied that there are any grounds/ that it would be in the interests of justice to vary or revoke its existing decision (at paragraph 134) that it is not appropriate in the circumstances of this case to make any reduction to claimant's compensatory award pursuant to section 123 (1) of the Act.
35. Doing the best that it can with the available evidence, the Tribunal is still not satisfied that if the respondent had adopted a fair procedure, which was within the range of responses of a reasonable employer, with regard to the matters identified at paragraph 89, it is inevitable that the claimant would, as contended by the respondent, have resigned in any event.
36. When reaching such conclusions the Tribunal has taken into account in particular that :- (a) the claimant was a longstanding (since 2005) and

well respected manager who had worked all her professional life with the respondent/ its predecessor in title in a community management role of which capital management work had played a small part (paragraphs 9-10 and 80-81) (b) if the respondent had taken appropriate steps to ascertain the nature of the management structure at an early stage of the process (including consultation with the claimant's line manager, Mrs Cameron) it would have appreciated the proper nature of the claimant's role and responsibilities (including the extent of the managerial element of the role/ the importance of such duties to the claimant) and (c) although this was not a redundancy situation it nevertheless involved a reorganisation of the Community Radiology Services and associated working arrangements / roles.

37. The Tribunal is further satisfied that in the context of such a reorganisation, an employer of the respondent's size and resources acting within the range of responses of a reasonable employer, would if it was unable (as was the case here) to address the claimant's legitimate concerns regarding the nature of the claimant's proposed role as Radiology Services Manager considered with the claimant the possibility of re- deployment to other available suitable alternative roles in the respondent in order to avoid the claimant's resignation / dismissal. When reaching this conclusion the Tribunal has further taken into account that :- (i) the respondent was at that time still unclear as to the nature of the capital projects which the claimant would be required to undertake (paragraph 42) /the uncertainty over the grading of the role (paragraph 66) (ii) the subsequent decision not to proceed with the Radiology Services Support Manager role and the recruitment to other management roles (paragraph 66) and (iii) the further emergence of other potential alternative roles as referred to at paragraph 33 above. Further, the Tribunal is satisfied that if the respondent had handled the matter in a more sensitive manner there was an increased likelihood of the parties have being able to reach agreement on the way forward which would have avoided the claimant's constructive dismissal.
38. Moreover, the situation in this case is very different to that in Ros upon which the respondent sees to rely. In that case the employee tendered her resignation and was serving her notice when her employment was terminated by the respondent due to alleged gross misconduct – none of which applies in this case.
39. In all the circumstances the Tribunal is not satisfied that there are any grounds/ that it is in the interests of justice to revoke or vary the Tribunal's finding that there should not be any reduction to the claimant's compensatory award for the purposes of section 123 (1) of

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the Act and this element of the reconsideration application is also dismissed.

Employment Judge Goraj  
Date: 21 April 2021.

Judgment sent to Parties: 26 April 2021

FOR THE TRIBUNAL