Case Number: 2300756/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **CROYDON**

BEFORE: **EMPLOYMENT JUDGE J CROSFILL**
(Sitting Alone)

BETWEEN:

Ms STEPHANIE SAMUELS

Claimant

-and-

WANDSWORTH BOROUGH COUNCIL

Respondent

ON: **5 March 2017 in Chambers**

Judgment

1. The Claimant's application for a reconsideration of the judgement of the Tribunal sent to the parties and entered into the register on 19 October 2016 is refused as there are no reasonable prospect that the original decision would be varied or revoked.

Reasons

1. By a letter sent under cover of an email on 1 November 2016 Claimant applied for a reconsideration of the judgement of the employment tribunal's decision as to the appropriate remedy following my finding that she was unfairly dismissed. It appears that the application was not initially accompanied by the appropriate fee. However, it does appear that the fee was paid promptly. Regrettably the fact that the fee had been paid was not immediately acknowledged and the matter was not referred to me until very recently. I apologise for the delay in dealing with this

matter.

2. My understanding of the Claimant's application is that she asked me to reconsider two aspects of my decision. Firstly; whether or not I should have reduced the compensatory award to zero. Secondly; whether or not it was appropriate to make a reduction from the basic award of 60%. I shall deal with each in turn.

3. The Claimant invites me to have regard to her personal circumstances and hardship she has suffered having lost her job with the Respondent. I have no doubt that she has suffered financial loss although, by reason of the decision that I have made, it was unnecessary to calculate the loss.

4. Any compensatory award in a claim of unfair dismissal is made pursuant to section 123 of the Employment Right Act 1996. An award must be the amount that is *"just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal so far as that loss is attributable to action taken by the employer"*. I have summarised the legal principles that should apply in paragraph 61 of the judgment. I refer to ***Software 2000 v Andrews*** **[2007] ICR 825**. In order to further explain the legal principles I applied I set out the guidance from that decision in full:

> *"The following principles emerge from these cases:*
>
> *(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*
>
> *(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).*
>
> *(3) However, 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.*
>
> *(4) 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.*
>
> *(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.*
>
> *(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely*

and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

5. What is quite clear is that, just because an employee has been unfairly dismissed, it does not always follow that they should be compensated on the basis that no dismissal would ever have taken place. In the present case the I have found that there was a procedural error made by the Respondent in believing that they had or alternatively actually issuing a final written warning in breach of the disciplinary procedure they had led the Claimant to believe would be applied. This conclusion is set out at paragraphs 83 and 84 of the judgment. It is the only basis upon which the dismissal was found to be unfair.

6. In my findings in the original judgment I reject any suggestion that the Respondent was acting unreasonably in expecting the Claimant to attend work on time of in refusing to make special allowances for her in circumstances where she was refusing to attend an occupational health appointment. At paragraph 84 of the judgment I concluded that, but for the failing I identified, the Respondent would have been entirely justified in dismissing the Claimant.

7. Applying the law to those facts I concluded that, upon the evidence I had before me, the Respondent, if it had acted fairly, could have dismissed the Claimant even earlier than it did, but certainly no later. In those circumstances it would not have been just and equitable to award any compensation.

8. Essentially the Claimant's present application is an invitation to me to revisit my findings of fact. My findings of fact in the judgement made it clear I reject the suggestion in paragraph s 2 and 3 of the Claimant's application that the disciplinary process was "fast tracked" or was "premature". On the contrary I believe that the process was unnecessarily slow and careful. A reasonable employer could have dismissed far earlier than the Respondent did.

9. I also reject the contention that at paragraph 4 of the Claimant's letter that the "offence did not merit the loss of my job". The test that I applied was set out at paragraph 56 of my judgment. The test is not whether I would have dismissed the Claimant but whether the decision to do so fell within a band of reasonable responses. I have found that a fair dismissal would have been inevitable.

10. At paragraph 1 of her letter the Claimant asks me to reconsider the reduction in her basic award by 60%. The Claimant does not really give any reasons why I was incorrect to reduce the basic award. She simply complains that this is unfair. At paragraph 87 of the judgment I summarised the key matters relevant to my decision. On the one hand there was the procedural error I have identified. That has to be seen against my findings that the Respondent was probably overgenerous in following a lengthy process. Against the procedural error was the conduct of the Claimant who, in the face of repeated warnings, had consistently and repeatedly arrived late for work. I believe that my decision reflects an entirely fair balance between those competing considerations.

11. The test to be applied on any reconsideration is whether it is in the "interests of justice" to reconsider the judgment. The Claimant does not seek to adduce any new evidence or put forward any argument that I have not already expressly considered. She is in effect inviting me to rehear the submissions that I have already considered and rejected. An additional hearing to revisit those conclusions is unnecessary. I see no basis whatsoever upon which the Claimant has any reasonable prospects of persuading me that I have made any factual errors or misapplied the law. I therefore refuse her application on the papers.

Employment Judge E J Crosfill
Date: 5 March 2017