



**St John's  
Buildings**

## **The Rule in Polkey Explained**

A snapshot view of the ruling in Polkey and the approach tribunals take with the percentages for a Polkey reduction

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## The Rule in Polkey Explained

The ruling of the House of Lords in the case *Polkey v AE Dayton Services Ltd [1987] UKHL 8* continues to play a seminal role in the calculation of compensation awards. In brief, an employer who is found to have dismissed an employee unfairly, may seek a deduction of the award on the basis that the employee would have been dismissed even if a fair procedure was followed.

In the case, the Claimant Dennis Polkey was employed as a driver at Dayton Services Ltd. The company was facing a financial downturn in their business and decided to reorganise by reducing their workforce. Mr Polkey was dismissed with immediate effect by reason of redundancy. Mr Polkey brought a claim for unfair dismissal arguing that his employer acted unreasonably in dismissing him without consultation or warning. The employment tribunal, employment appeals tribunal and the Court of Appeal refused the claim on the basis that there was a genuine redundancy situation and the result for the Claimant would not have been any different if the Respondent acted in accordance with the code of practice.

When the matter came before the House of Lords the court upheld the Claimant's appeal stating the following:

- Whether the employee suffered injustice and whether the employer acted unreasonably should not be confused. The former is not a necessary ingredient to examine unfair dismissal and will only be considered when determining compensation. The latter is a necessary ingredient in a claim for unfair dismissal.
- When examining whether the employer acted unreasonably, we must consider the facts known to the employer at the time of the dismissal.
- Should a tribunal conclude that taking the appropriate procedural steps would not have avoided the employee's dismissal, this does not defeat a claim of unfair dismissal but can be reflected by reducing the amount of compensation.

The reduction in compensation became known as a Polkey deduction. The employee's financial compensation is reduced by a percentage which represents the chance that the employee would have lost their employment. Any non-financial compensation is then added to that figure to determine the total award.

Under the Employment Rights Act there is a maximum financial compensation for unfair dismissal which is the lower of either 52 weeks' gross pay or £115,115.00 if the employee was dismissed on or after 6 April 2024.

The prediction of chance for a Polkey deduction must be evidence based. If the employer can show that the employee would have been dismissed by a specific date in the future, then the employee's compensation for unfair dismissal would be limited to the amount the employee would have received up to that date. The aim of compensation is to put the employee in the position they would have been in had the unfair dismissal not occurred. Thus, if an employee would have been dismissed by a specific date, for example if the company closed, then there can be no loss to the employee beyond that date.

If the employer can show a likelihood that the employee would have been dismissed at some point in the future, then the employee's compensation for unfair dismissal would be reduced to a sum that is just and equitable in the tribunal's discretion. Thus a 60% probability that the employee would have been dismissed will result in a reduction of the award by an amount that the tribunal considers appropriate. The tribunal must provide reasons for the reduction applied and the factors taken into account to arrive at their decision. An appeal against the reduction would succeed if the tribunal's decision is manifestly excessive or deficient or the decision is unreasoned.

Claimants and Respondents alike would do well to estimate the value of losses in the claim as early as possible. The employment barristers at St John's Buildings Chambers are available to provide merits assessments of claims being brought or opposed in the employment tribunal.

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