Appeal No. UKEAT/0416/14/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 3 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

HOWARD & PALMER LIMITED — APPELLANT

(1) MR C J COLEBROOK
(2) MR J EVERETT — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER RACEY (Representative)
For the Respondents	MR R KEMBER (of Counsel) Instructed by: Charles Crookes with George Tudor & De Winton 51 The Parade Cardiff CF24 3AB

SUMMARY

UNFAIR DISMISSAL

UNFAIR DISMISSAL - Polkey deduction

The two Claimants were dismissed unfairly because their employer thought that whilst directors, and later (after they had resigned as directors) they had colluded with a third party to help set up a company trading in meaningful competition to the employer. 15% contribution from one employee ("E") was awarded, but none from the other ("C"). On appeal, a contention that the Employment Tribunal had wrongly failed to consider evidence that when directors E & C had failed to tell their employer that a competitor was about to be established (in breach of the fiduciary duty derived from the **Companies Act 2006** and from caselaw which obliged this) was rejected: on a careful reading of the Judgment as a whole, the Employment Tribunal had considered that the Claimants did not know that the rival business would in fact be in meaningful competition with the employer, and on this finding there was no breach of duty such as to affect contributory fault. In any event, the case-law was relied on for one sentence, which had to be taken both in context and with a recognition that every case turned on its own particular facts.

A second ground was that the Employment Tribunal thought it did not have enough material to decide whether there should be a deduction from damages for the chance that E would have been fairly dismissed within his period of notice (which he had already given), but went on to find as a fact that he was guilty of misconduct, and could have been summarily dismissed for that. These two findings were on the face of them inconsistent and irreconcilable. It was almost inevitable that there would be at least some risk of a fair dismissal if E's employment had continued long enough. The case would be remitted to the Employment Tribunal to determine the question of whether a **Polkey** deduction was appropriate, and if so to what extent,

on the footing it did have enough evidence to think that E could have been summarily dismissed and that at the date of actual (unfair) dismissal his employer probably knew enough of the relevant facts to take steps to do so.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal on two grounds, both narrow points, against a decision by an Employment Tribunal consisting of Employment Judge Beard sitting on his own in Cardiff, whose Reasons for Decision were delivered to the parties on 14 July 2014. By that Decision the Tribunal considered the cases of two former directors of the Respondent employer. Mr Colebrook had been the Finance Director of the Respondent, which traded as South Wales Specials, from 1998, having served six years beforehand as the Company Accountant. The Second Claimant, Mr Everett, became the Pharmaceutical Manager and also a director rather later.

2. During the course of their directorship, both Mr Colebrook and Mr Everett became friendly with a Mr Overy, who was a leading light in Kent Pharmaceuticals ("Kent"). They played golf with him. Some time in the summer of 2012 Mr Kent let it be known to them that there was a possibility that Kent might be sold and there was a possibility that he might wish to set up a pharmaceutical company of his own and, if so, wondered if the Claimants might wish to join him. That was described by the Tribunal at paragraph 10 as a contingent possibility. It is clear from the Tribunal's Judgment, read as a whole, that nothing detailed and precise was said at the time. So the Tribunal accepted and found. Nonetheless the Claimants were sufficiently convinced that the proposal was serious to seek legal advice about their own position as directors of the Respondent.

3. In paragraph 10.3 the Tribunal said:

> **"The claimants were made aware that Mr Overy was intent on setting up a new company at the end of 2012."**

This, therefore, was a step further from it merely being a possibility. At paragraph 10.4 it said:

> **"In March 2013 Kent was sold. Soon after Mr Overy began the process of setting up a new company."**

The Claimants resigned as directors on 31 May 2013. I take it from the Tribunal's Judgment that they also gave notice to terminate their own employments with the company at that time. Their resignation (paragraph 11.1) was immediately preceded by their agreement to be involved with a new company which was to be set up by Mr Overy.

4. As directors the Claimants owed fiduciary duties. The duties at common law are reflected in Chapter 2 of the **Companies Act 2006** from paragraphs 170 to 177. Those of relevance to the current appeal are found in section 172, "Duty to promote the success of the company", which reads:

> **"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to -**
>
> > **(a) the likely consequences of any decision in the long term,**
> >
> > **(b) the interests of the company's employees,**
> >
> > **(c) the need to foster the company's business relationships with suppliers, customers and others,**
> >
> > **(d) the impact of the company's operations on the community and the environment,**
> >
> > **(e) the desirability of the company maintaining a reputation for high standards of business conduct, and**
> >
> > **(f) the need to act fairly as between members of the company.**
>
> **(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes."**

5. At paragraph 175, headed "Duty to avoid conflicts of interest", the statute, so far as material, reads:

> **"(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.**

> **(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).”**

6. The Tribunal expressly considered in the light of these duties whether, whilst directors, in the period from summer 2012 to 31 May 2013, they had been aware that the business which Mr Overy was to set up was to be a business which would specifically compete with South Wales Specials Ltd. The business of South Wales (as I shall call it) was wholly directed towards the production of unlicensed medicines, a niche market. As it happened, part of Mr Overy's intended business was to be the production of unlicensed medicines. Neither Claimants accepted that he knew details of the nature of Mr Overy's business beyond the fact, very generally, that it was to be involved with pharmaceuticals. At paragraph 11.4.4:

> **“Mr Colebrook stated that he was not aware of the nature of the business, except as a general pharmaceutical business until after he had given in his resignation.”**

11.4.5:

> **“Mr Everett was not specifically asked about his state of knowledge. Both accepted that they had made financial investments in the new company; however no evidence was provided to me as to when that investment was agreed to or actually invested.”**

7. The Judge was plainly inclined at first to be sceptical as to this denial of any detailed knowledge. He expressed that at the start of paragraph 11.5:

> **“I was concerned as to whether the claimants' accounts that they only had generalised knowledge of the nature of the new business before their resignation as directors was credible. Further I had some doubts as to whether they had not engaged in preparatory work for a business in which they were investing so much personally. It seemed, at first blush, inherently unlikely that the claimants would make a significant commitment to a new company without examining the details involved or taking part in ensuring it was properly established. …”**

I shall come back to his conclusion in dealing with the Grounds of Appeal.

8. Having resigned as directors and tendered their resignations as employees, the Claimants plainly fell under detailed and close scrutiny, in particular by Mr Racey, the Managing Director

of the Respondent. He considered what he had found out during June and, in the light of that, organised a disciplinary hearing in respect of Mr Colebrook for 26 July 2013 and for Mr Everett on 31 July 2013.

9. The essence of the charges, though not particularised to the Claimants in advance, a matter for which the Tribunal was justly critical, was that Mr Racey, who had investigated the complaints and then himself decided to hear the disciplinary hearing, again a matter of which the Tribunal were justly critical, were that (see paragraph 15.8) Mr Colebrook had disclosed confidential business information, had stolen confidential business information and had used company time for his own purposes causing him to fall behind on deadlines and targets. It is unnecessary for present purposes to set out the corresponding conclusions reached in respect of Mr Everett save to say that they were similar and in both cases plainly related to what was thought to be their close involvement in the setting up of a direct rival by Mr Overy, in whose plans they had been involved for some time.

10. The Tribunal concluded that the dismissal was totally flawed. The procedure adopted had Mr Racey taking too many roles at too many stages. The disclosure of evidence was totally inadequate. There was no proper opportunity for the Claimants to consider what was to be said against them and to respond, and an adjournment for that purpose was refused.

11. The Claimants appealed. Their appeal was dismissed.

The Tribunal Decision

12. In considering those facts the Tribunal concluded that a number of claims were made out. It concluded that Mr Colebrook's claims for unlawful deduction of wages, that being in respect

of his work during July immediately prior to his dismissal, his claim of unfair dismissal, and his claim for breach of contract consisting of notice pay for the duration of his notice, was well founded. So far as Mr Everett was concerned, he too was entitled to compensation for the failure to pay him for his work during July and his claim of unfair dismissal also was upheld. But in his case his claim for breach of contract consisting of entitlement to notice pay was not well-founded, and was dismissed. That was on the basis, relevantly for what follows, that he had, whilst an employee, after he ceased to be a director, broken his duty of loyalty, which at common law is an incident of the contract between employer and employee, by taking some steps to recruit other employees from the Respondent's business to that which was being set up by Mr Overy. That, thought the Tribunal (paragraph 43), was in its judgment "sufficient to amount to a fundamental breach allowing the respondent to summarily dismiss the claimant". There is no appeal against that conclusion.

13. In its directions of law, in order to reach those conclusions, the Tribunal at paragraphs 21 to 25 considered what duties the Claimants would have owed as a matter of law whilst directors. It set out section 170, which is not directly material to the issues before me, and section 175. It made reference to some of the central cases.

14. At paragraph 25.6 and 25.7 it directed itself in these terms:

> **"25.6. In the absence of some special circumstance a director commits no breach of his fiduciary duty to the company of which he is a director merely because, while a director, he takes steps so that, on ceasing to be a director, he can immediately set up in business in competition with that company or join a competitor of it see *Balston Limited & Anr v Headline Filters & Anr* [1990] FSR 385. Nor is he obliged to disclose to that company that he is taking those steps. Again no greater duty can be placed on a former director.**
>
> **25.7. However, if a director becomes aware of activity, actual or threatened, which damages the interests of the company, and that activity involves himself and others, he comes under a duty to inform the company see *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch). Mr Racey urges me to conclude that this duty arising whilst the claimants were directors continues by virtue of section 170(2). I cannot accede to that submission it seems clear to me that such matters as the acquisition of knowledge of his own activities or that of others falls within the akin to property [sic]."**

15. In applying those principles, the Tribunal considered (paragraph 38.7.5) that what happened between Mr Overy and the Claimants was a typical early discussion of a business idea, which later on developed into information about a real business plan:

> **"38.7.5. … However at no stage prior to their resignation as directors was there any evidence that something gained from the respondent (other than their general experience) was taken by them to exploit in a new business.**
>
> **38.7.6. Given my findings of fact there was no basis for a conclusion that the Mr Colebrook [sic] was in breach of his general duty of loyalty as [an employee assisting] a fellow employee to find a means of conveying his resignation is not sufficient to support such a breach.**
>
> **38.7.7. The position in respect of Mr Everett appears different. On his account, when he was "at work" with the respondent Mr Everett engaged in activities which supported a potential competitor in recruiting employees of the respondent."**

That was evidence which Mr Racey had (paragraph 38.8.4) of what (paragraph 38.11.2) could be considered to amount to gross misconduct in all the circumstances.

16. The Tribunal was then asked to consider the impact of those findings as part of its conclusion, given the findings to which it was invited to come in respect of unfair dismissal. It concluded, in a respect which is not challenged before me, that the dismissals were unfair, the procedure had failed and the conclusions drawn from the evidence were unsustainable. As to whether there should be a **Polkey** deduction, the Tribunal said:

> **"40.1. Given my findings in respect of Mr Colebrook I am confident that if a fair process had been followed no dismissal would have occurred had the respondent acted reasonably.**
>
> **40.2. I do not consider I am in a position, given the extent of the procedural failings, to draw any conclusions as to what would have happened if a fair process had been followed in respect of Mr Everett."**

It then, however, went on to make a deduction of 15% in his case. It did so because it had found as a fact, on the balance of probability, that Mr Everett was engaging in blameworthy conduct by carrying out work for the new business. That conduct was causative of his dismissal in part, though only in small part.

17. The Tribunal dealt at paragraph 43 with the claim in respect of wrongful dismissal. This has the same theoretical basis as that in respect of the claim for pay during the notice period. In respect of that, I have already quoted its finding that it was satisfied, on balance of probabilities, that Mr Everett had been guilty of a fundamental breach of his duty of loyalty as an employee to the company.

The Appeal

18. In appeal against those decisions Mr Racey appears before me as he did before the Tribunal below. Mr Kember of counsel appears to respond; he too appeared below.

19. There are two essential grounds. The first is that the Tribunal was in legal error in its approach to the question whether the Claimants were in breach of their duty as directors by reason of their overall conduct. There are two aspects, as I see it, to this. Mr Racey in his submissions to me stressed that he was complaining that the Tribunal, in its Decision, had focussed wrongly, and only, upon the conduct of the two Claimants after the date of their resignation as directors and before their dismissal. The Tribunal had divided the period of time into three tranches: the first from summer 2012 until 31 May 2013, the second from then until dismissal and the third thereafter. The duties owed as directors were owed during the first period and not thereafter when the Claimants had ceased to be directors.

20. The second aspect was the question of the right approach to be taken. The case of **British Midland Tool Ltd v Midland International Tooling Ltd and Others** [2003] EWHC 466 (Ch), a decision of Hart J, was relied upon. This was the case which, as I have noted, the Tribunal had specifically mentioned. At the start of paragraph 89, Hart J described a director's duty in these terms:

> **"… A director's duty to act so as to promote the best interests of his company prima facie includes a duty to inform the company of any activity, actual or threatened, which damages those interests. …"**

21. Taking that principle at face value, Mr Racey complains that, on the findings of fact made by the Tribunal in respect of the earlier period, the Claimants knew that Mr Overy was intending to set up a company in competition with the Claimant. This therefore would be an activity, albeit by another, which was actual or threatened, which was capable of damaging the interest of the Respondent. It was therefore the duty of the Claimants to reveal what they knew about that to the Board of the Respondent. They did not do so. The Tribunal did not deal with that particular argument.

22. To this, Mr Kember gives effectively two responses. First, on the findings of fact as made by the Tribunal, which were thorough and careful, the Tribunal read as a whole came to the conclusion that the Claimants did not know that Mr Overy's company would be a direct competitor of the Claimant until after they had resigned as directors. Accordingly, even applying the principle expressed in **British Midland Tool** at its widest, the Tribunal's finding of fact could not be shown to be in error of law. There would have been no error of approach. The decision was purely factual. Second, though, he argued that a court had to be careful not to overstate the width of the principle, relying upon one sentence taken in isolation from paragraph 89 of **British Midland Tool**. He pointed out in that in paragraph 90, immediately following, the Judge directed attention to the particular facts of the case before him. It was one in which there had been a group of directors who had been conspiring together to leave their employer and set up in competition. Once one had resigned. Then, as the last sentence of paragraph 90 showed, in the Judge's view the three who continued in office were bound to disclose to their fellow directors what was afoot, and to fail to do so necessarily involved them in a breach of their duties.

23. In doing so, he reconciled the principle he was expressing with cases such as **Balston Ltd & Anr v Headline Filters & Anr** [1990] FSR 385 which had suggested that an employee who was a director who proposes himself to set up in competition is not under an obligation to tell his employer that that is the case (see paragraph 94). Moreover he went on in paragraph 91 to describe it an important lesson which could be learnt from the case-law that "the extent of the duty to inform will depend on the circumstances of each case."

24. If, then, there was a spectrum, argued Mr Kember, at one end of which there was no breach of duty and at the other end of which there obviously was, the facts of the case before me would sit well down at the bottom end furthest away from the duty to reveal.

Discussion

25. The resolution of the first argument turns upon a close reading of the Tribunal Judgment. It is trite law that a Tribunal Judgment must be read as a whole. At first, I was impressed with the points that Mr Racey made by reference to paragraphs 10.3 and 10.4. Viewing the Judgment as a whole, however, I note that they are careful not to say that the Claimants at that stage knew sufficient about the details of what the company would do to suppose that it would be in direct trading competition with their then employer and of which they were then directors.

26. The Judge did, as I have noted, express scepticism about their claims not to have known sufficient. But, having done so, he decided, for reasons which are set out at paragraphs 11.51 down to 11.5.12 that he was persuaded on balance that they did not in fact know. This is summed up by those last three paragraphs:

> **"11.5.10. … I accept the claimants account that they had deliberately kept the new business at arms length and were therefore not fully aware of the details of the nature of the business.**
>
> **11.5.11. However I am of the view they knew of the advertisements and would therefore have concluded that there was to be competition to the respondent.**

11.5.12. I have heard no evidence to allow me to conclude they became aware of the advertisements before their resignations."

27. From this it is apparent that the Judge thought that until advertisements were placed by the new company, the Claimants did not know that it was to be in meaningful competition with the Respondent. He had no evidence to think that the Claimants actually saw those advertisements before they resigned. Therefore he concluded that there was no proof that they had broken their duties of loyalty. Despite his initial scepticism, therefore, he took the view that they did not know enough. His reference to "arms length" was a reference to them keeping themselves out of the scope of any knowledge which might have placed them in such an embarrassing position. That is plain from viewing paragraph 11 as a whole.

28. Accordingly I am satisfied that the Tribunal, as a matter of fact, came to the conclusion that, for the first period, the Claimants did not have the knowledge which would place them in breach of the principle expressed in **Midland Tool** taken at its widest. It follows that the first ground insofar as it rests upon that (and it rests, it seems to me, upon nothing else) must fail.

29. There is no complaint about the Tribunal's approach in respect of the second period, nor is the third relevant. The second aspect of this point, therefore, is therefore unnecessary for me to determine. If it had been necessary to determine, I would have come to the view, echoing that which is said at paragraph 91 in the Judgment of Hart J, that the extent of the duty to inform as a director will depend upon the circumstances of each case.

30. The duty to inform the company of any activity, actual or threatened, which might damage their interests cannot be taken so far as, for instance, to oblige a director who may read of some gossip in the newspaper as to a potential competitor's plans to tell the board that which

he has picked up. All must depend upon the particular circumstances. Here the duty, if it existed, was plainly higher than merely reading the press, for both the Claimants were involved even if they did not fully know of the details, in plans to set up a business, which could, though they did not know, possibly have come into a position of conflict with South Wales.

31. It seems to me that the Tribunal directed itself appropriately in respect of the law. It thought that was the law it was applying. Its findings of fact do not suggest it did otherwise. If it had been necessary for me to do so, I would have accepted Mr Kember's legal argument as well as his factual one in response to this ground of appeal.

Polkey

32. Mr Racey makes the separate and distinct point that the Tribunal, on the one hand, was suggesting Mr Everett was guilty of a fundamental breach of contract for which he could have been summarily dismissed, but on the other saying that it simply did not have enough information to decide whether there was a risk of dismissal at all had the Respondent acted fairly. Though he did not submit it to me, it is consistent with his submissions to note that the Tribunal itself had found that, at the relevant time, Mr Racey himself knew sufficient to suppose that Mr Everett was involved in recruiting others for another company.

33. It is tempting sometimes to determine the exercise of establishing whether the prospects of a fair dismissal are such that there should be a reduction from compensation, where there has already been an unfair one, by saying that there is insufficient evidence. It may be, for instance, that to require a Tribunal to revisit the facts would be to require it to rewrite the world as it never was. But the Tribunal here did not give any detail of why it felt that, on the one hand, there was sufficient evidence for it to be clear that Mr Everett, though not Mr Colebrook, was in

breach of his duties of loyalty as an employee and that that would justify summary dismissal (i.e. it would be a fair dismissal if conducted summarily) and on the other hand say that there was no evidence from which it could conclude that he might be fairly dismissed. The two are, in my view, inconsistent and irreconcilable.

34. Elias J, in **Software 2000 Ltd and Andrews** [2007] ICR 825, observed that, even if there were limits to the extent to which it could be confidently predicted as to what might have been:

> **"54.4. … [a Tribunal] 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."**

The Tribunal set out that law. It should, in my view, have followed it. The necessary consequence of holding that Mr Everett had committed gross misconduct and could summarily and fairly be dismissed for it was that there must have been a risk, at the very least, that within the relevant period the employer, having attempted a dismissal which was unfair, might nonetheless have effected a dismissal which was fair. The principal matter in this regard which might limit the impact of any deduction on the damages awarded would be that the Tribunal was not in a position to rewrite history. **Polkey** does not consist of asking: what if the Tribunal had approached the dismissal which actually occurred in the right way? The fact is it did not. The question is as to compensation for the period after the actual dismissal. Thus, in a situation like this, the question is likely to be when the employer, acting fairly, would have produced sufficient information in a sufficiently clear manner to enable it to proceed to discipline Mr Everett.

35. It has to be assumed, given South Wales findings, that the employer could very well and probably would have dismissed Mr Everett, but it must be borne in mind that such a decision would have to be fair when applying the terms of section 98 of the **Employment Rights Act**

1996. That is not a contractual question. It is a question purely posed by the statute. In most cases it may be that gross misconduct is likely to justify a dismissal and probably lead to a dismissal within the terms of section 98, but this need not always be the case, as this Tribunal drew attention to in the case of **Brito-Babapulle v Ealing Council** [2013] IRLR 854.

36. However the one thing which seems to me clear is that subject only to the issue of timing it would simply be wrong, indeed perverse, for the Tribunal to conclude that there would be no risk of dismissal. Here timing is important, for Mr Everett had handed in his notice. The question, therefore, for a Tribunal to resolve is whether, within the notice period, the employer could fairly have dismissed Mr Everett. What were the chances of that? Compensation after that date would fall to be reduced, and any compensation beforehand to the extent that it was just and equitable, applying the usual terms of section 123 of the **Employment Rights Act 1996**.

37. When it became apparent that this might be a conclusion which this Appeal Tribunal might reach during the course of the argument, I floated what the consequence would be. Though Mr Kember might prefer to leave it to this Tribunal, he did not press the point, while although Mr Racey for his part would think that the right conclusion would be that the matter should be remitted to the same Tribunal, he would rather prefer a different Tribunal but did not for his part press that point. Therefore I have concluded that remission on this particular point is the appropriate course. I have not seen the parties. I do not have the full nuances of the evidence at my fingertips. The proper decision making body is the Employment Tribunal. It is plainly in accordance with the overriding objective (seeking to save costs and to be efficient) to have the same Judge hear the matter. The chance that he might not accede to the submissions made by Mr Racey, having declared a view, would be to deny his professionalism, and in any

event the basis for his decision was not that he had reached a view from which it might be difficult to retract but that the evidence did not permit him to do so.

38. The decision of this Tribunal is that if (and he will know) the evidence was sufficient for him to conclude that Mr Everett was in repudiatory breach of his contract of employment during his period of notice, then there plainly was sufficient evidence for him at least to assess as a matter of prediction what the risks would have been within the period of notice which he still remained to serve that he might have been dismissed, and fairly so.

39. As I have noted, in the particular circumstances of this case, this argument may not have a very great financial consequence as between the parties. I therefore recommend to them, though I cannot oblige them, to discuss, negotiate and mediate if they can to see if they can settle their differences to avoid the inevitable costs and dislocation of business which a return to the Tribunal, even for a short issue such as this, will involve. In order for the Tribunal to resolve the matter, it will consider the evidence it had before. It will consider the submissions of the parties. It will consider but, in my view, should not easily accede to any submission that further evidence should be received. To do so would be to assume that the parties did not produce full evidence upon an issue which was before it at the outset and therefore it would seem to me in principle, subject only to something exceptional, to be wrong for further evidence to be received. But that finally I leave to the Tribunal's good judgment in accordance with the law.

Conclusion

40. The appeal on the first ground is dismissed. The appeal on the second ground is allowed with remission to the Employment Tribunal to determine the question of whether there should be a **Polkey** deduction in respect of which period and of what amount, if any.

41. Can I make it clear - I hoped it was clear, but thank you for raising it - my decision only applies to the case of Mr Everett. The appeal in respect of Mr Colebrook fails completely.