Appeal No. UKEAT/0080/15/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 July 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR P BEAUMONT — APPELLANT

COSTCO WHOLESALE UK LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL BROWN (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS DANIELLE INGHAM (Solicitor) Shoosmiths LLP 3 Hardman Street Spinningfields Manchester M3 3HF

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

The Employment Tribunal had found that the dismissal of the Claimant had been for a reason related to his conduct. Its findings as to the facts operative on the Respondent's mind (at each stage of the disciplinary process), however, did not include those matters which the Employment Tribunal itself considered significant and which it found would render the dismissal fair. It did not make that finding in respect of the matters it had found had been relied on by the Respondent. In those circumstances, the Employment Tribunal had substituted its view of the (fair) reason for the dismissal for that it found operative on the Respondent's mind. That inevitably tainted its conclusion as to the question of the fairness of the dismissal more generally and rendered its Judgment unsafe.

Alternatively, the Employment Tribunal had not fully considered all matters relating to the question of fairness in the light of the matters it had found would constitute a fair reason for the dismissal.

These criticisms of the Employment Tribunal's conclusions further undermined its alternative findings on contributory fault and **Polkey**.

The appeal would be allowed on all bases; the Employment Tribunal's Judgment could not stand and the case would need to be considered afresh. In the circumstances, this should be before a different Employment Tribunal.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. The appeal is that of the Claimant against a Judgment of the Watford Employment Tribunal, (Employment Judge Smail sitting alone on 5 and 6 May 2014; "the ET"), sent to the parties on 26 June 2014. The Claimant was then represented by Ms Omar, counsel; today by Mr Brown, counsel, acting pro bono. The Respondent was represented before the ET by Ms Bell, counsel, but today appears by its solicitor, Ms Ingham. The Claimant appeals against the ET's rejection of his claim of unfair dismissal. The proposed appeal was considered at a hearing pursuant to Rule 3(10) of the **EAT Rules 1993** before Slade J. It was permitted to proceed to a Full Hearing on amended grounds. The Respondent resists the appeal, relying on the reasons given by the ET.

The Background Facts

2. The Claimant was employed by the Respondent as a baker between 27 May 1998 and 24 July 2013. On 21 June 2013, he was convicted of an assault on another employee of the Respondent - there being a dispute between the two relating to an issue at work some four months previously. The assault itself took place outside work. On 12 July 2013, the conviction was reported in the local press, which came to the Respondent's attention and the Claimant was suspended pending an investigation. The Claimant neither attended the investigation meeting nor volunteered any additional information about his conviction, although he had previously spoken with the Assistant Warehouse Manager, who was carrying out the investigation, mentioning an assault charge (that being pre-conviction).

3. On the basis of the newspaper report, the decision was taken that the matter should proceed to a disciplinary hearing. That hearing was conducted by the Respondent's Assistant Warehouse Manager, Mr McManamon, on 24 July 2013. The Claimant attended, stating the assault had been a slap; the charge was of common assault, the lowest possible level of assault. He did not volunteer that the incident involved another employee of the Respondent and related to a work-related disagreement. In any event, however, Mr McManamon considered this impinged upon the Claimant's suitability for his employment with the Respondent or brought the company into disrepute and the Claimant should therefore be summarily dismissed.

4. The Claimant appealed. He did not attend the appeal hearing, which took place before Mr Wishart, the Respondent's Warehouse Manager. By this stage Mr Wishart knew that the assault had been on another employee and that employee had resigned because he did not wish to risk being exposed to the Claimant (that being recorded in a file note, dated 4 March 2013, referencing the other employee's resignation). The decision was taken to uphold the dismissal. The ET records the basis of the appeal decision as being:

> **"15. … the conviction of assault was enough to impinge on suitability for employment or bringing the company into disrepute."**

5. There was a subsequent review of the appeal decision carried out by Ms Knowles, the Respondent's Marketing and Administration Director. Mr Wishart had not stated in his decision letter that he knew the assault had been on another employee but apparently did tell Ms Knowles of that fact. Certainly her evidence before the ET - although not clear from the ET's findings - was that she was aware of this, albeit that her letter informing the Claimant of her decision on the review only indirectly made reference to this fact. That letter also introduced what the ET found to be a number of irrelevant matters.

The ET's Reasoning

6. The ET first had to determine the reason for the dismissal and whether it was capable of being fair for the purpose of section 98 of the **Employment Rights Act 1996**, on which questions the Respondent bore the burden of proof. It stated:

> **"22. The Respondent establishes that conduct was the reason for the dismissal. …"**

7. As for the facts that the Respondent had in mind in this regard, the Respondent says I should take the ET's finding on those from paragraph 1 of the Reasons as follows:

> **"1. … the claimant's conviction in the reasonable opinion of the company impinged on his suitability for employment with the company or brought the company into disrepute."**

8. As for the fairness of the dismissal for that reason, the ET concluded as follows:

> **"23. Once the full facts are known: that the claimant took a dispute with a work colleague that had first been aired four months previously about waste disposal at work into a public place in Watford and ending up in a confrontation whereby he ends up pleading guilty for slapping, described by the magistrates as a brazen attack in a public place in the middle of the day, it is plain that the Claimant's behaviour is entirely unacceptable and is reasonably regarded as being unsuitable for continued employment at this place of work.**
>
> **24. The dismissal that took place was not unfair if not ideal. There were reasonable grounds for belief in misconduct. There had been a reasonable investigation following a fair procedure. Dismissal was within the range of reasonable responses. Had all the facts been known, no sensible challenge could have been made to the dismissal."**

9. Moreover the ET considered that, in any event, the Claimant would receive no award as:

> **"25. … even if the dismissal that took place could be challenged to the extent that it was unfair in some way, both a *Polkey* reduction and reduction for contributory fault would be 100%. A fuller investigation (i.e one in which the Claimant engaged) would have established all the facts. The 'brazen attack in a public place in the middle of the day' on a work colleague in respect of a 4 month old dispute, justifies, indeed essentially compels, a finding of 100% contributory fault."**

The Appeal

10. The appeal was permitted to proceed on amended grounds, as follows (in summary):

    (1) The ET failed to properly identify the reason for the dismissal.

(2) Alternatively it erred by substituting what it considered to be "the more direct issue" - the fact that the assault was on a colleague arising from a dispute at work - for the matters relied on by the Respondent.

(3) Further, the ET failed to properly consider whether the dismissal of the Claimant for the reason it had found was unfair:

(a) on disparity of penalty, it failed to take proper account of its finding that the Respondent had thought the fact of a conviction necessarily meant "*the employee is unsuitable for employment and the company is brought into disrepute*" (paragraph 22); and

(b) it failed to take into account the Claimant's evidence that he informed management of the criminal proceedings prior to conviction and that there had been a incident involving another employee.

(4) Separately, the ET failed to find whether the Respondent took into account the file note relating to the other employee's resignation.

(5) Finally, on the question of **Polkey** and contributory fault, the ET wrongly substituted its view that the Claimant's actions justified dismissal (paragraphs 23 and 25), rather than considering whether the Respondent would have dismissed the Claimant (particularly in the light of his long service, the facts that he had disclosed and given that it had not dismissed others convicted of criminal offences); alternatively, these conclusions were inadequately explained.

Submissions

The Claimant's Case

11. On behalf of the Claimant it is submitted that the ET's Judgment contained numerous errors and could not stand. The first error was in the ET's failure to identify the specific reason

for the dismissal. That was fatal. Section 98(4) of the **Employment Rights Act** required the ET to consider whether the dismissal was fair by reference to the reason found. Failing to identify the specific reason operating on the Respondent's mind at the time of the dismissal meant it could not have done that. Second, the ET fell into the error of substituting its view of what was relevant for that actually in the mind of the Respondent at the relevant time. To the extent the ET concluded that the more direct issue was the fact that the assault was on a colleague arising from a dispute at work, and that was "extremely relevant" (paragraph 19), that was not a permissible finding; it substituted the ET's view for that found to have been in the Respondent's mind. Similarly at paragraph 23 the reference to the "full facts" suggested that the ET was having regard to the complete facts as to the basis of the Claimant's conviction, which had been made available to the ET but was never in fact before the Respondent.

12. Further, the ET failed to consider whether the dismissal of the Claimant for the reason it had found was unfair. It found the Respondent had dismissed the Claimant because the conviction impinged on his suitability for his employment or brought the Respondent into disrepute. It had specifically found those facts to be without evidential foundation (paragraphs 14, 18 and 22). It failed, however, to take proper account of that finding when determining the dismissal was not unfair. It further failed to take into account the fact that the Claimant had not been given the opportunity to be heard on the question of the relevance of the fact (if any) that the assault had involved another employee.

13. The ET separately failed to take account of the Claimant's evidence as to having informed the Respondent's management of the criminal proceedings and that there was an incident involving another employee and also failed to make a specific finding as to whether the Respondent took into account the file note relating to the other employee's resignation.

14. On the question of **Polkey** and contributory fault, if the Claimant was correct on the liability appeal (specifically, the ET's failure to make a proper finding as to the reason for the dismissal), those conclusions equally could not stand. More specifically, the ET wrongly substituted its view that the Claimant's actions justified dismissal (paragraphs 23 and 25) rather than considering whether the Respondent would have dismissed the Claimant (particularly in the light of his long service; the facts he had disclosed; given that it had not dismissed others convicted of criminal offences; and given it had apparently known of the fact that the assault involved another employee by the time of the appeal but did not consider it sufficiently relevant to refer to). Alternatively the ET's conclusions in this regard were inadequately explained.

15. On disposal the Claimant submitted that the flaws in the ET's approach and reasoning were fundamental and meant this was a case that should more appropriately be remitted to a differently constituted ET. The Employment Judge had expressed his own views in a forthright manner and it would be better for the matter to be considered afresh by a different ET.

The Respondent's Case

16. On behalf of the Respondent it was contended that the ET made plain its finding as to the reason for the dismissal. It was not for the EAT to be overly pernickety in its analysis of an ET's Judgment; it should not assume that the ET has failed to take something into account just because it does not specifically mention it (**Hollister v NFU** [1979] ICR 542, paragraph 17; **Fuller v London Borough of Brent** [2011] IRLR 414 CA, paragraph 31).

17. The reason for the dismissal put forward by the Respondent - conduct - was accepted by the Claimant at the ET hearing; it was not a point in dispute between the parties. It was sufficient that the ET had set out the reason given by the Respondent at paragraph 1 of its

Judgment. That said, when moving on to the question of fairness, Ms Ingham sought to resile from that submission to some extent, seeking to bring in Mr Wishart's knowledge (on the appeal) and Ms Knowles' understanding (on the review) that the assault had involved another employee (paragraphs 19 and 22). In this regard she relied on the evidence Ms Knowles gave before the ET (both in her witness statement and in her oral testimony), which would suggest that she did take that matter into account as a relevant factor.

18. As for the suggestion of substitution, paragraph 23 had to be read alongside paragraphs 22 and 25; it really went to the ET's finding on **Polkey**. If the ET had been making findings on the basis of all the information before it rather than that before the Respondent, not all would have been relevant to its decision on liability. The information regarding the fact of the assault being on another employee was, however, known by the Respondent at the appeal stage and the additional facts could only have buttressed the Respondent's reasons for dismissal.

19. As for the points on fairness, the ET had referenced these in the Judgment but clearly did not see them as sufficient to render the decision unfair. Specifically, it was not accepted that the ET found it was the Respondent's position that a conviction necessarily meant an employee was unsuitable for employment or the company was brought into disrepute. The highest the ET put it (paragraph 22) was that the Respondent's reasoning in this regard was "*at times*" unsuitable. That was not enough to amount to a clear finding that this was the Respondent's reasoning. As for the Respondent's position in other cases involving criminal convictions, these had been raised with the Claimant by Ms Knowles and the ET expressly found her conclusion to have been reasonable in this respect (paragraph 21). Apart from the ET's reference in the findings of fact to the file note referring to the resignation of the other employee, that played no further part in the ET's conclusions, either on liability or remedy.

20. Paragraphs 23 and 24 should be taken to buttress the ET's conclusions and reasoning on **Polkey** and contributory fault. Although the explanation for this could have been better worded, it was sufficiently clear that the ET was really referring to what the Respondent would have done if it had all this information before it. Although the reasoning at paragraph 25 was brief, it was plain that a finding of 100% reduction on **Polkey** and/or contributory fault grounds was a permissible assessment on the facts.

21. Should the appeal be allowed, then the right order was for the matter to be remitted to the same ET. This had been a two-day listing. It would be disproportionate to remit for a fresh hearing given the findings of the ET and the likely conclusion on **Polkey** and contributory fault. Although the Employment Judge's views were starkly stated in places, there was no reason to think he could not approach the matter professionally and objectively on any remission.

The Claimant in Reply

22. Responding to the Respondent's submissions, Mr Brown objected that its position had shifted in terms of the reason for the dismissal. Whatever the Respondent's (or, more specifically, Ms Knowles') evidence before ET, the conclusions did not include the finding that the fact the assault was on another employee was seen as relevant factor either in the mind of Mr Wishart or Ms Knowles. The EAT certainly could not assume or infer that the ET accepted the Respondent's case as it was now being suggested as came across on the evidence. In any event, the objection remained that this matter had not been put to the Claimant.

The relevant legal principles

23. The starting point has to be section 98 **Employment Rights Act 1996**, which (relevantly) provides:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (of, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -

…

(b) relates to the conduct of the employee,

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on 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 a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

24. These are matters for the ET; the EAT should be slow to interfere with any legitimate assessment by the ET under section 98, see **Hollister v NFU** [1979] IRLR 238:

"17. … In these cases Parliament has expressly left the determination of all questions of fact to the Industrial Tribunals themselves. An appeal to the Employment Appeal Tribunal lies only on a point of law: and from that Tribunal to this Court only on a point of law. It is not right that points of fact should be dressed up as points of law so as to encourage appeals. It is not right to go through the reasoning of these Tribunals with a toothcomb to see if some error can be found here or there - to see if one can find some little cryptic sentence. I would only repeat what Lord Russell of Killowen said in *Retarded Children's Aid Society Ltd v Day* [1978] IRLR 128, at page 130(19): 'I think care must be taken to avoid concluding that an experienced Industrial Tribunal by not expressly mentioning some point or breach has overlooked it, and care must also be taken to avoid, in a case where the Employment Appeal Tribunal members would on the basis of the merits and the oral evidence have taken a different view from that of the Industrial Tribunal, searching around with a fine toothcomb for some point of law'."

And **Fuller v LB Brent** [2011] IRLR 414 CA:

"29. The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing an error of law or reaching a perverse decision on that point.

30. Other danger zones are present in most appeals against ET decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.

31. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."

Discussion and conclusions

25. I started my consideration of the arguments on this appeal by reminding myself of the wording of the statute. The question of the reason for the dismissal is a subjective matter: the set of facts in the employer's mind at the relevant time. Having made a finding of that subjective fact, the ET then has to assess the fairness of the dismissal *for that* reason, a question that is to be answered objectively by applying the range of reasonable responses test. The employer's reason for the dismissal thus has to be the starting point for the determination of any section 98 claim of unfair dismissal; it is fundamental to the question of fairness.

26. What was the reason found in this case? On one level it is simple: it was conduct (and so the ET found at paragraph 22 of its conclusions). That, however, is simply the label; it does not explain the ET's finding as to the set of facts actually operative on the minds of the relevant decision makers within the Respondent. To understand what the ET found to be the actual reason for the dismissal - the relevant set of facts - one has to look elsewhere, in the ET's earlier findings of fact.

27. At paragraph 1, the ET has set out the reason given by the dismissing manager; that was that the conviction itself rendered the Claimant unsuitable for his employment or brought the Respondent into disrepute. The ET does not find that was not the reason and, indeed, the Respondent has relied on that recitation at paragraph 1 as constituting the relevant finding of the ET in this regard.

28. Even if one has regard to the ET's findings at the appeal stage, the basis for that decision was found to be that:

> **"15. … the conviction of assault was enough to impinge on suitability for employment or bringing the company into disrepute."**

29. As for Ms Knowles's reasoning at the review stage, whatever her evidence, the ET apparently found that she relied on a number of matters (many irrelevant) for her decision but only mentioned very indirectly the fact that the assault had involved another employee.

30. So, if the ET made a finding as to the Respondent's reason for the dismissal, can I infer that it found that reason included the fact that the assault had arisen from a four-month-old workplace dispute and involved another employee? I do not see how I can. None of the findings of fact that I have referred to would support such an inference; quite the opposite. If the ET meant to include that matter within the set of facts constituting the Respondent's reason for the dismissal, then it is certainly not stated.

31. Does this point matter? Is it not enough for the ET to have found (as it apparently did) that the Respondent relied on the Claimant's conviction for assault? Does that not, of itself, support a conclusion that the Claimant was dismissed for a reason relating to his conduct?

32. The problem for the Respondent in this respect is that, when considering what might be called the substantive fairness of the dismissal, the ET was strongly critical of the Respondent's conclusion that the conviction impinged on the Claimant's suitability for his employment or brought the company into disrepute (see, in particular, paragraphs 14, 18 and 22). The ET plainly did not consider there to have been reasonable grounds for that conclusion.

33. Moreover, the ET made plain what it considered to be the relevant factor in the assault. That was the fact (see paragraph 19) that it "*was on a colleague arising from a dispute in the bakery that went back some four months*", something the ET described as the "*direct issue*" and "*extremely relevant*" and which it plainly considered would entirely justify the dismissal (see paragraph 23). Unhappily, however, that was not a factor it had found had operated on the Respondent's mind.

34. Allowing that I should not take a fine-toothed comb to the ET's Judgment but should stand back and read the reasoning as a whole rather than dissecting each strand, I can only conclude that the fact that the assault was on a work colleague and arose from a work-related dispute was a factor that the ET itself found to be crucial, but which it did not find had been the reason (or principal reason) operative on the Respondent's mind. To the extent that it then relied on that factor as justifying the dismissal, that was pure substitution of the ET's view for that it had found to be the Respondent's.

35. As Mr Brown says, the finding as to reason is fundamental to the assessment of a claim of unfair dismissal. In my Judgment, the ET's exercise in substitution in this case wholly undermines its conclusion that the dismissal was fair. That being so, I take the view that the ET's decision on liability cannot stand: the reason the ET considered would render the dismissal fair was not a reason it had found had been operative in the Respondent's reasoning. The reason it had found to be so operative was not something the ET considered to be fair.

36. Even if I were wrong on this, the reason the ET considered would render the dismissal fair - the fact that the assault arose from a workplace dispute and involved another employee - was not a matter that was put to the Claimant as potentially relevant. Whilst the Claimant may

not have assisted his case greatly in failing to volunteer this information earlier on, there was no particular reason to think that he would not have engaged with the point had the matter been raised with him subsequently; as the ET found, he was honest about matters before it.

37. There are further matters that would also undermine the ET's conclusion on fairness: in particular, whether it took account of the fuller factual matrix before it but not before the Respondent, something that is certainly suggested by paragraph 23.

38. For all those reasons, I am satisfied that the ET's conclusion on liability cannot stand.

39. I have reflected further as to whether the ET's alternative findings on **Polkey** and/or contributory fault might nevertheless still stand. I think, however, that Mr Brown is again right; they cannot. First, because one needs to know clearly the reasoning operative on the Respondent's mind in order to be able to assess whether the Claimant's conduct caused or contributed to the dismissal for the purposes of any reduction of the compensatory award for contributory fault. Although the reduction for contributory conduct can be assessed more broadly for the purposes of the basic award, there is no separating out of the different tests by the ET in this case and I consider it would be unsatisfactory for me to try to do so at this stage. As for **Polkey**, the ET would need to assess what would have happened within this employer, not what the ET or some other employer might have done. As this employer - on the ET's findings - apparently knew that the assault had involved another employee but did not consider that to be sufficiently relevant to refer to that fact in its decision letter on the appeal, it is unclear as to the basis of the ET's finding under this head. I therefore consider the ET's conclusions in the alternative also unsafe. Alternatively they are inadequately explained.

40. That being so, the appeal must be allowed on all bases. I then turn to the question of disposal. There is no real dispute but that I must remit this case to the ET. The question for me is whether it should be to the same or a different ET. The hearing below was relatively short. I take into account the Respondent's submission that it might be disproportionate to require there to be a second Full Hearing given the various arguments that might arise, which might mean that there is ultimately little monetary value in the case. That is not something I express any opinion about at this stage but in any event I recognise that an unfair dismissal claim has more than a merely pecuniary value to the parties in many cases; proportionality has to take into account the non-pecuniary aspects and value of a case. Applying the criteria set out in **Sinclair Roche and Temperley v Heard and Fellows** [2004] IRLR 763, I consider that the more satisfactory course is that this matter should be heard afresh by a differently constituted ET. In saying that, I do not doubt the professionalism of this experienced Employment Judge. There is, however, no particular reason why it needs to go back to the same ET. Moreover, this Employment Judge did express his views on the matter quite strongly and there is a question of confidence that inevitably arises if a case goes back to the same ET in these circumstances. A new ET would be clearly seen to be approaching the matter entirely afresh.

41. I therefore remit this matter to a differently constituted ET for an entirely fresh hearing of this case.