Appeal No. UKEAT/0100/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 July 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

CONTRACT BOTTLING LTD — APPELLANT

(1) MISS L CAVE
(2) MISS W A MCNAUGHTON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS PHILIPPA JACKSON (of Counsel) Instructed by: Richard C Hall & Partners Red Hill House Hope Street Saltney Chester CH4 8BU
For the Respondents	MR DAVID ROBINSON-YOUNG (of Counsel) Instructed by: Askews Solicitors 4-6 West Terrace Redcar Cleveland TS10 3BX

SUMMARY

UNFAIR DISMISSAL

Compensation

Polkey deduction

An ET held that a dismissal (held subsequently, on appeal, to be by reason of redundancy) was unfair because of wholesale failings in respect of selection of the two claimants for dismissal. A conclusion that there was no evidence on which it could make a Polkey deduction, which was in any event two speculative, was overruled on earlier appeal, and the matter remitted to the ET. This was an appeal against a finding of 20% deduction for which no sufficient reasons had been given.

The appeal was allowed on ground of insufficiency of reasons, with observations made about the calculation of Polkey awards as part of the calculation of future loss.

At the invitation of the parties, the EAT assessed the appropriate deduction, on such evidence as there was, as being 33%.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision of an Employment Tribunal at Middlesbrough, Employment Judge Hesselberth, Mr Dorman-Smith and Mr Wright, which made a Decision on a remitted issue for Reasons given on 23 November 2013.

2. The history began with a Decision of the same Tribunal in Middlesbrough on 8 February 2012. That found that the employer, Contract Bottling, had been insolvent. It was brought out of administration by Mr Thornton and Mr Bell. At that time it had 47 employees. 35 worked on the shop floor, and 12 were administrative staff. Mr Thornton saw an urgent need to reduce costs and, in particular, the staffing costs. He took the view that the company was top heavy and therefore that the burden of staffing reductions to save such costs should fall on the administrative staff. Two voluntarily left. The ten who remained were all placed in the same pool, from which ultimately four were dismissed. That pool was described at paragraph 14 in the Judgment of February 2012. The pool covered a variety of disparate skills. So far as accounts were concerned, the Claimants were the Accounts Manager and the Administration Supervisor respectively. A Ms McCartney was employed on the sales ledger. Others were involved with production and stock control and quality control. There was an Account Engineer, a Warehouse Manager and two employees in the Sales Department.

3. The Tribunal found the dismissal of the Claimants to have been unfair. It condemned the process of their selection for redundancy in unequivocal terms, relying in particular on the nature of the pool, the lack of objective criteria applied to it, a lack of independence of the person charged with the selection and his complete lack of knowledge of the candidates against whom he was judging their skills subjectively, and a failure to consider an offer made by at

least Cave and possibly by McNaughton to accept a lower salary than they had been paid as a quid pro quo for their retention in employment.

4. At paragraph 57 the Tribunal considered, as part of its Liability Judgment, whether there was a proper claim for a **Polkey** reduction. It said:

> **"We have considered whether or not there are any factors in this case which would give rise to consideration as to whether or not had there been a fair procedure that the dismissals would have taken place in any event or any factors which would support a reduction in the compensation which will be due to the claimants. The tribunal finds that there is no evidence to suggest that had there been a fair and proper process that there was a percentage chance that either of these claimants would still have been dismissed."**

5. That Judgment was understandably appealed to the Appeal Tribunal, Judge Richardson presiding, which on 23 April 2013 held that, contrary to the Tribunal's finding that there had been no reason within section 98 for the dismissal, this was plainly a redundancy, and that there was, on the facts, plainly evidence to suggest a chance of dismissal. That was obvious, it might be thought, because of the need to effect staff reductions from the administrative staff, of whom the Claimants were two, and from the evidence before the Tribunal that in fact four out of ten staff were actually dismissed for that reason. The EAT also regarded the reasoning in paragraph 57 as insufficient, as plainly it was.

6. In the judgement of the Appeal Tribunal, Judge Richardson summarised the evidence available in this way:

> **"...there was, in our judgment, evidence upon which a *Polkey* reduction might have been made. There was an established need to reduce manpower among a relatively small workforce. There was evidence about the introduction of a computer package that would require a reduction in staff in the accounting department. It was, in our judgment, not sufficient for the Tribunal to say that there was 'no evidence' which could justify a reduction. It was required to grapple with the evidence there was and give reasons for its decision. If the Tribunal felt that despite the evidence of overmanning and redundancies the position was so speculative that no award should be made (see the third principle in *Andrews* [that being a reference to the case of *Software 2000 Ltd v Andrews* [2007] IRLR 568]), it was required to explain in its reasons why this was. If on the other hand there was some evidence, the mere fact that there was an element of speculation was not a reason for refusing to have regard to it."**

7. It remitted the matter to the same Tribunal, indicating that there was no need for any fresh evidence, though the Tribunal should consider fresh submissions. And it should consider afresh whether there were grounds for making a **Polkey** reduction:

> **"If it considers that there are no grounds for making a Polkey reduction, it should explain carefully in its reasons why this is. If it considers that some Polkey reduction should be made, and how much, it should also give reasons for those conclusions."**

8. The Tribunal considered the further submissions made to it by Counsel who have appeared before me, as they did below, and as both did before the Employment Appeal Tribunal on the previous occasion. It set out, as a particular feature of those submissions, those of Miss Jackson for the employer, who had reminded the Tribunal of the impact of the software package of Sage accounts, that the duties of the Claimants were being carried out by either Mr Thornton or a Mr Ward, who was described as a Financial Director, and that the Claimants had both said, effectively, that there was not enough work for them to do. She was arguing for a 100% deduction, but if that was not thought appropriate, on a mathematical basis, that four redundancies were sought from amongst ten candidates. There could not have been less than a 40% chance in any case, viewed broadly. Mr Robinson argued that there was insufficient evidence and that no **Polkey** reduction should be made.

9. The Tribunal dealt with its conclusions between paragraphs 14 and 16. In paragraph 14 it said:

> **"The Tribunal felt it appropriate to briefly review its findings of fact and those facts which it feels are relevant to this issue are as follows..."**

10. It has to be remembered that the issue it was addressing was the question of **Polkey**. A **Polkey** decision, which I hope to place in broader context later in this Judgment, is a finding as to the chances that some event might take place in the future. Of the nine factors to which the Tribunal made reference in paragraph 14, eight do not on the face of it appear to have any

obvious relationship to the chance that a future dismissal might occur fairly. All were reasons why the dismissal which had in fact taken place had been unfair.

11. At paragraph 15 the Tribunal said this:

> **"15. Factually and on the respondent's evidence Mr Ward was brought in and apparently saw the introduction of a Sage financial package (there was already a Sage wages system in place). Although described as undertaking a role of 'financial director' the Tribunal had no evidence whatsoever as to what he actually did as compared with the roles of either of the claimants. What the Tribunal does not [I think this should be 'know'] is that he installed the Sage package and oversaw its initial implementation. We also know however that certainly one of the claimants was brought in during his absence to undertake that work. What the Tribunal does not know is whether one or both of the claimants could have undertaken the role that he was brought in to do. On the admission of Mr Thornton he was a friend. What the Tribunal does know is he was paid £150.00 per day for his services. Marginally more than the higher of the pay of the two applicants, that of Miss Cave. That said Miss Cave's services were provided by the respondent to outside organisations one of which was paying 20% of her salary.**
>
> **16. The Tribunal is engaging with the spirit of the case of Andrews but has to say that it is stretching its speculation due to the inadequacy of the respondent's evidence but also in many instances its contradictory evidence. What the Tribunal has to recognise is that there was a need on the part of the respondent to reduce its financial overheads and that that was among the administrative staff which would inevitably lead to redundancies. In all the circumstances and in this highly speculative exercise the Tribunal has determined in all the circumstances that it is appropriate to reduce the compensatory awards of each of the claimant by 20%."**

It went on to explain the financial results of that.

12. The figures it thought subject to the 20% reduction were those it had established at a separate, earlier decision on remedy. On that occasion, it had calculated the loss up until the date of the hearing, which was a period of just over 39 weeks, and future loss it had assessed as represented by 13 weeks' anticipated loss. In each case, therefore, the award spanned one year after the date of dismissal.

General Principles

13. To resolve this appeal it is appropriate to place the decision of **Software 2000 v Andrews** [2007] IRLR 568 in a broader context even than is apparent from that decision. A **Polkey** decision is part, but part only, of a complex assessment of the losses

which arise as a result of dismissal. Prima facie, what a dismissal causes an employee to suffer is the loss of their job and their income which comes from that job. On the face of it, this loss is open-ended and at the full amount of the pay which that employee was receiving. This prima facie position is, however, almost always moderated in practice by two major assumptions. The first is that at some stage in the future after dismissal the employee has a chance of obtaining another job. Indeed, if it is shown that the employee has acted unreasonably in failing to obtain such a job by the time of the Tribunal hearing by the Respondent's evidence, they may be said to have failed to mitigate their loss. The second assumption, implicit in the calculation, is they would have remained in receipt of the same income from the same job.

14. As to the first of those assumptions, the questions which arise are whether any new and substitute job would be at the same rate in real terms, and secondly, when, if ever, the new substitute job would be obtained.

15. As to the second question, whether the employee would have kept their existing job at its existing rate of pay, there are two principal matters which are likely to affect that. It is impossible to be prescriptive of all the circumstances, but it may be said that the first factor are the general circumstances. These arise without the choice of either employer or employee. They are such as ill-health; retirement; in the case of a migrant worker the expiry of their leave to remain; in the case of workers in some industries regulatory restrictions which might affect their continued employment. It is plain that the list can be a considerable one, in respect of which a Tribunal is always likely to need special evidence produced by one party or the other.

16. The second broad range of factors telling upon the question whether an individual would have kept the same job at the same rate is that of choice. This again can be subdivided. The employee's own choice should not be forgotten. The employee may be someone who would seek and gain promotion to another job elsewhere. They may be someone who would follow a partner if that partner was likely to obtain a job elsewhere or was likely to have a peripatetic lifestyle, as for instance someone in military service.

17. There are lifestyle choices which will heavily influence whether someone remains in the same work. In many cases which come before this Tribunal, it might be thought that the lack of having a congenial environment in which to work might affect the choice of an individual to remain at that particular workplace with those particular work colleagues. Once again, the circumstances are many and various, and I have indicated only a few to show what I have in mind. If not the employee's choice, the choice might be that of the employer. This is likely to arise either because of the circumstances with which the employer is faced, or by reason of the decision of the employer to restructure, or to cease to use the services of the individual concerned for good reason. The question here is the prospect of there being a fair dismissal. The question of whether a deduction should be made, conventionally called a **Polkey** deduction, is limited to this last category. It is important to see its context as part, but part only, of the overall decision as to compensation.

18. As I have indicated, the position in most cases will necessarily involve a number of imponderables. They will vary heavily from case to case and from employee to employee. But the fact that many matters are imponderable does not mean to say that a Tribunal should not grapple with them insofar as it can. Conventionally, awards tend to have been made by assessing the chance of getting another job at the same rate, by setting a period of weeks for which the Tribunal assesses in the future there will need to be compensation. It is not an

accurate science. No-one knows when, if ever, an employee will obtain fresh employment and, if so, whether that will be at a rate below or above that which they had had with the dismissing officer and indeed, if below, whether that would be only for a short period time before a higher rate might supervene. No objection is usually, not can it be properly, taken to assessing these factors without necessarily mentioning them individually, by awarding a number of weeks loss. In the present case, as I have indicated, the Tribunal thought a year in each case was the appropriate number of weeks for which compensation should last.

19. As to the second, the chances of a job not continuing (whether by the employee's choice or the employer's choice or decision, it has become conventional to express this in terms of a percentage. This is not the only way of doing it. It too may be represented, taking it together with the chances of obtaining fresh employment, by assessing a period of weeks as being the appropriate amount of compensation. As the words "just and equitable" in section 123 of the **Employment Rights Act** suggest, the award may necessarily have an element of broad-brush about it. **O'Donoghue v Redcar and Cleveland BC** [2001] EWCA Civ 701 demonstrates that a period of time may be as appropriate in some cases as it is to express a result in terms of a percentage deduction from what would otherwise be the full period of loss assessed by the Tribunal. A percentage does, however, have the advantage of transparency in identifying a particular factor in respect of which arguments may then be addressed. In assessing this percentage, it must be remembered that a Tribunal is not looking to decide the probability of a past event having happened. It is seeking to determine the likelihood in percentage terms of a future event occurring.

20. Whether the word "chance" is used or "risk" is used is, in my view, largely immaterial. They express the same concept, though from different perspectives. The aim of the assessment

is to produce a figure that as accurately as possible represents the point of balance between the chance of employment continuing and the risks it will not, expressed in terms of weeks, months or years or as an overall percentage. If a percentage, it will inevitably take account not only of the risk that, at some time during a period of weeks, months or years which would otherwise pass before a fresh job was obtained, the Claimant would have lost her employment by fair dismissal, but also take account of when that would have occurred. For instance, a 50% risk that an employee would lose her job at some stage during a 12-month period following dismissal does not justify a 50% reduction from the whole year's salary if it is thought that it is a risk expressed in respect of an event which might happen, if at all, only after six months. There would fist be 6 months full salary. In the case of this example, the risk mathematically would be expressed as 25%.

21. I draw attention to these factors to place the assessment of a **Polkey** contribution in context, but also to demonstrate that it is inevitably an exercise about which there can be no absolute and scientific certainty. It is a predictive exercise. Evidence is needed to inform the prediction. It is important that a Tribunal should spell out, as best it can, what factors it takes into account in determining why it adopts a particular percentage. However, there can be no legitimate ground for criticising a particular percentage unless it is manifestly less than or more than the percentage which might have seemed proper or unless it is simply unreasoned. This is because, of its very nature, justifying 20% rather than 25% (as the case may be, or some slightly higher or some slightly lower percentage) is not susceptible of detailed reasoning. It is, and has to be a process of assessment. Part of my reasoning in setting out all the various factors which can intersect is to show how much a matter of art, as Mr Robinson-Young put it, this is rather than a matter of science.

22. It was this exercise which the Tribunal here attempted. I have considerable sympathy for its complaint that it did not have sufficient evidence to allow it to be more precise than it was. The question, however, is that posed in particular by two of the five main grounds of appeal. Those grounds are that the Tribunal failed to provide any explanation for its conclusion that there was a 20% likelihood of the Claimant being dismissed. Secondly, that in its Reasons at paragraph 16 it referred to the contradictory evidence of the Respondent without giving any clue here or, for that matter, in its earlier Decision as to what it meant. That is of particular importance given that, at paragraph 14, it had identified as eight out of the nine factors it mentioned, matters which had no obvious relevance to an assessment of future chance, whereas they had every relevance to an assessment of past probability. I view paragraph 14 as the Tribunal emphasising, by setting out the deficiencies of the system which the Respondent had used, the point that it simply could not rely upon anything about the exercise which the employer had done as indicating any chance or risk, in particular to the Claimant, because the system was simply so flawed. Mr Robinson-Young is inclined to accept that analysis. It is the only way I can make sense of the factors set out at paragraph 14, but I am troubled by the fact that the Tribunal did not say that was what it was doing, nor summarise its conclusions in that light.

23. As to the two specific grounds I have identified, Mr Robinson-Young realistically and frankly accepted that there was no clear reasoning which showed why this Tribunal had adopted the figure of 20%. It should, he accepted, have spelled out what the contradictory evidence was. He acknowledged that it had not dealt with the submissions which it had identified from Miss Jackson at paragraph 10.

24. It follows that I am bound to accept that this appeal must succeed. The Decision is yet again insufficiently reasoned. There is, sadly, some justification for the view which HHJ Shanks expressed on the sift, when he stated that:

> **"Although the ET say they are 'engaging with the spirit of the *Andrews* case', one cannot help feeling they are taking little satisfaction in doing so and have rather plucked a figure in the air for the sake of form."**

25. The consequence of such a decision would normally be that the case would be remitted to the same Employment Tribunal for decision. If it were to be remitted to a fresh Tribunal, it would have to hear the evidence again. Neither party viewed this consequence with equanimity. Both have invited me to exercise the power of this Tribunal as if this Tribunal were in the shoes of the Employment Tribunal. If this were the first time this matter had come before the Appeal Tribunal, I would not have acceded to that invitation, even though jointly offered. The Tribunal is the best place, to determine issues such as this since it will have heard the evidence and be aware of local employment conditions. It is the fact-finding Tribunal. But given the particular history of this case, and acknowledging something of the costs which must be incurred by both sides were I not to accede to the invitation and to certainty which must benefit both the Claimants and the Respondent, I am prepared to accept that invitation.

26. I invited both parties to set out essentially the facts upon which they would wish me to rely in making the assessment, necessarily broad-brush as it is and necessarily being of an imponderable.

27. I take into account this background. First, the employer needed to make savings. It chose to do so by redundancies which, by a finding of this Tribunal, were genuine redundancies. It had an administrative staff from whom those redundancies were largely to come. Four out of ten in fact lost their jobs.

28. There was particular reason for thinking that those employees who had worked dealing with the financial arrangements might be more at risk because of the introduction of a Sage accounting package. Mr Robinson-Young points out that there already was a wages package. In any event, a system requires someone to input data to it. Accordingly, and acknowledging that the Tribunal itself moderated its view of the consequence of the introduction of the Sage accounting package, I treat it as a factor which was particularly present in the case of the Claimants and the one other person who had a particular financial responsibility, of some weight, though rather less than the Respondents contended below.

29. The unchallenged evidence of Mr Thornton was that Miss Cave was employed as an Office Adminstrator Manager. Her main duties were preparing reports. Miss McNaughton was an Administration Supervisor, with her main duties being payroll, purchase ledger, and daily cashflow. Those duties, said Mr Thornton, were in the majority now completed with the assistance of a Sage accounts package. Mr Thornton had referred to the administration and accounts system as having been archaic before the introduction of that package. He recorded, paragraph 11, that two out of three of the Accounts team were dismissed on the grounds of redundancy.

30. The Claimant gave evidence that, in the Second Claimant's case, she was prevented from performing her usual banking and payment duties and it was argued by Miss Jackson that this was rather a reflection that there was no longer sufficient work for them to do because of the accounting system and the work done by Mr Ward. Mr Robinson-Young emphasised the role of Mr Ward. He was someone who, despite the problems of the company, was brought in only

shortly before the redundancies took effect. That was common ground. He was more expensive than either.

31. The Tribunal's Judgment showed that he remained in employment. Implicitly, Mr Robinson-Young was saying that there would, on any case of dismissal, inevitably have been an issue whether the dismissal of the Claimant was a fair one given the introduction of Mr Ward to do an unspecified and imprecisely identified role as Finance Director when previously there appears to have been no particular person occupying that specific role if it were to be identified. There were particular reasons, submitted Mr Robinson-Young, for supposing that of those within the pool of talents to be dismissed the two Claimants would not have been selected if a fair process were to be undertaken at some stage in the future. Miss Cave had offered to accept less. In her case too, one day out of every five of the working week was paid for by an outside organisation. The effect was that her salary was subsidised in a way that others were not.

32. The evidence for her having offered to accept a reduced salary is stronger than it was in the case of Miss McNaughton, because it contained documentary proof and was referred in terms of acceptance by the Tribunal in its Liability Judgment. But, in referring to the offer to accept less, the Tribunal, in its last Decision at 14(h), talked about the "Claimants'" offers to accept reductions. If the apostrophe was not misplaced, then it appears that the Tribunal there, though having referred to one Claimant previously, were giving some some indication that they might have accepted that there was the evidence in respect of Miss McNaughton too.

33. Miss McNaughton was the less well paid of the two and, on the evidence, was the person more at risk from the introduction of the Sage financial package. Miss Cave had deputised for

Mr Ward, on the findings of the Tribunal, when he was absent. This might suggest that there was a greater need continuing for the employer to have her services.

34. I acknowledge that it would be possible, if one were to ignore all the other evidential material, to resolve the question of the percentage deduction and the chance of fair dismissal within the 12 months following the actual dismissal by taking a mathematical approach to those who were at risk in the administration: four out of ten, 40% each. The percentage needs to be adjusted upward, in my view, because of the particular risk to the jobs of those who were dealing with finance, in respect of which there was some evidence of the accounting package. I have already indicated that I place some weight, even if not as great a weight as the Respondent would wish, upon that for the reasons I have given. It has to be reduced, as it seems to me, to take account of the possibility that the offers made, certainly by Miss Cave and probably by Miss McNaughton, would have been effective in saving their jobs. The employer also had to make a choice, if acting fairly, as between the services of Mr Ward, introduced at high cost, and those of Miss Cave, in particular, but also Miss McNaughton.

35. There is a basis for supposing that Miss McNaughton's chance of dismissal was, on these facts, rather greater than was Miss Cave's. But that too has to be moderated by the fact that she earned less and so the savings from her dismissal would have been less.

36. The percentage approach is not, in my view, entirely appropriate. I accept, from Mr Robinson-Young's submissions, that mathematical formulae are the last resort where there is at least some evidential material available. It may be a starting point, but it is rarely going to be the whole answer. Here, I simply do not know, nor did the Tribunal, what were the rival qualities of the others in the administrative department and the extent to which the particular

talents of Miss Cave and Miss McNaughton would have argued for their retention in some other role even if they sacrificed their role in Accounts at the expense of one of the other employees; in other words whether "bumping" might have taken place. The absence of evidence here is something which probably should be held against the Respondent rather than the Claimants, since it is for the Respondent to show that the risk of **Polkey** is a real one and produce sufficient and satisfactory evidence to that effect. That is why, if there is no sufficient evidence, it is recognised that there can be no **Polkey** deduction at all.

37. In my view, the effects of both the offers, the possible impact of Mr Ward's involvement and the matter to which I have just referred is that the percentage I should adopt is less than 40%. I am satisfied, however, that it should be more than the Tribunal itself adopted. In the end, I have concluded that the best way of resolving the chances, and taking into account that if there had been a fair dismissal it would not have taken place immediately but would have taken place over a longer timescale than this inadequate dismissal did, is best reflected by making a deduction of 33% in each case. I have reflected on whether there should be a difference of approach between Miss Cave and Miss McNaughton. In the end I have thought, for the reasons I have given, that the two are in such a similar position overall, on an overall assessment, that I not should make any such distinction, though recognising theoretically they are separate cases.

37. Accordingly, the appeal is allowed. A deduction of 33% is substituted for the Tribunal's assessment of 20%. The parties can work out the appropriate sums payable on that basis, and revert to this Tribunal in the event of any difficulty doing so.