Appeal No. UKEAT/0045/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 July 2014

Before

MR RECORDER LUBA QC

(SITTING ALONE)

GM PACKAGING (UK) LIMITED — APPELLANT

MISS L OTTEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS KIRTI JERAM (of Counsel) Instructed by: Sintons LLP The Cube Barrack Road Newcastle Upon Tyne NE4 6DB
For the Respondent	MR JONATHAN BARKER (Solicitor) Richmond Anderson Goudie Solicitors 1-2 Flake Cottages Cone Terrace Chester le Street County Durham DH3 3QH

SUMMARY

PRACTICE AND PROCEDURE – Review

The claimant recovered over £23,000 compensation at a remedies hearing based primarily on loss of earnings for more than 70 weeks. The employer sought a review of that award.

The application for review was put on the basis that a pending appeal to the Employment Appeal Tribunal in relation to another employee (involved in the same incident and dismissed just a few weeks after it) may result in a finding that that employee had not been unfairly dismissed. If the Employment Appeal Tribunal reached that result it may have some significant bearing on whether the claimant would have been similarly dismissed fairly and without discrimination within a matter of a few weeks of the incident. Accordingly, there could potentially be a case for a significant **Polkey** reduction in this claimant's award. The employer asked for a stay of the review application pending the outcome of the pending Employment Appeal Tribunal appeal in the other employee's case.

The employment judge did not stay the review application but gave it preliminary consideration under Rule 35(3). He found the application had no real prospect of success because the circumstances of the two employees were, in his judgment, materially different.

Appeal allowed. The Employment Judge had, in the particular circumstances of this case, erred in rejecting the review application on the basis that it had no reasonable prospect of success. It is passed that threshold and ought either to have been stayed pending the Employment Appeal Tribunal decision in the related appeal or put through for consideration on its merits. Review application remitted for substantive consideration.

MR RECORDER LUBA QC

Introduction

1. This is an employer's appeal from the refusal by an Employment Judge of an application to review a remedy award made in favour of one of its former employees, a Miss Ottey, on her sex discrimination and unfair dismissal claims.

2. The factual background is simple, but the procedural history of the litigation is tortuous.

The Facts

3. The employers operate from premises in North Shields. It is a small business with only some nine or so staff. Miss Ottey and a more senior staff member, a Mr Haslem, were both employees at the North Shields premises. After close of business on 13 April 2011 they were discovered by the Managing Director and founder of the business, a Mr Montague, to be engaging in activity of a sexual nature in the office premises. The activity was accidentally tape recorded on an office dictaphone machine. The recording made by that machine also included a private discussion between the two in which derogatory remarks were made by them about Mr Montague in abusive language. Both the employees were dismissed. Miss Ottey was summarily dismissed on the day following the incident, and Mr Haslem, was dismissed some weeks later, after a disciplinary process. Their appeals under the employer's internal appeals procedures were both unsuccessful.

The Employment Tribunal Decisions

4. The employees each then brought claims to the Employment Tribunal Service. The claims were heard in February and March 2012 by an Employment Tribunal in Newcastle

constituted by Employment Judge Buchanan and two lay members. The claims, having been heard together, were determined in a single Judgment produced by the Employment Tribunal. On Mr Haslem's claim, he was found to have been unfairly dismissed. The Tribunal decided that the sanction of dismissal was outwith the range of reasonable responses open to a reasonable employer in the circumstances of the case. On Miss Ottey's claims, the Employment Tribunal found that her dismissal had been an act of direct sex discrimination contrary to the terms of the **Equality Act 2010** because she had been treated less favourably than Mr Haslem in relation to the process of dismissal. The Tribunal further found that she had been a victim of sex discrimination by harassment related to the particular manner of her dismissal. Had it not found sex discrimination, the Employment Tribunal made it clear that it would have found the dismissal unfair, applying ordinary unfair dismissal principles, because there had not been a fair procedure leading up to the dismissal. As I have indicated, that combined Judgment, dealing with both cases, was delivered by the Employment Tribunal and Written Reasons were sent to the parties in August 2012 on those claims.

5. The Judgment delivered dealt in Mr Haslem's case with both liability and remedy, but in Miss Ottey's case with liability only. Miss Ottey's case in relation to remedy was considered later by an Employment Tribunal of the same constitution on 17 September 2012. For the reasons given in a Judgment sent to the parties on 21 November 2012, Miss Ottey was awarded the total sum by way of compensation of £23,557.32. The bulk of that award represented compensation for her loss of earnings from the date of dismissal in April 2011 down to early September 2012 when Miss Ottey had taken up a university course. The Employment Tribunal, in reaching those figures, had reduced by 40% the compensatory award in respect of loss of earnings to reflect an element of contribution by Miss Ottey to her own dismissal. The employer had pressed for a reduction in the award to a much greater extent to reflect the

possibility that Miss Ottey might well have been lawfully dismissed much earlier in that 18-month period. The Employment Tribunal, having heard that contention, rejected it. Their reasons were as follows.

> **"...We were urged to make a further deduction to reflect the possibility that a non discriminatory and fair dismissal would have followed in any event. We do not consider that the dismissal of the claimant in April 2011 can be used as any guidance to us in considering that matter. That dismissal was tainted with sex discrimination and was unlawful and is no guide to us in considering whether the claimant would have faced dismissal fairly at a future point in time... The claimant stated that she enjoyed her job and we accept that she did and we see nothing to persuade us that she would have left it by dismissal or resignation. We do not consider that we can make any such assessment."**

The Appeal to the EAT

6. In due course, the employer pursued an appeal to this Employment Appeal Tribunal in respect of the liability findings in relation to both employees. In respect of Mr Haslem the employer succeeded in this Appeal Tribunal in overturning the liability finding in his case. The Employment Appeal Tribunal found that the Employment Tribunal had erred in law in concluding that he had been unfairly dismissed. The Employment Appeal Tribunal, on that occasion in a constitution presided over by HHJ Peter Clark sitting with lay members, decided not to remit the unfair dismissal claim for re-hearing. Rather, it simply reversed the decision of the Employment Tribunal. In its Judgment the Appeal Tribunal said this at paragraph 33:

> **"The conduct in question involved a senior manager engaging in sexual activity with a member of his staff on the company's premises after hours, accompanied by a conversation which revealed, at the least, a complete lack of respect for his boss. Plainly, dismissal for that conduct fell within the range of reasonable responses open to the employer."**

7. The employer now likewise seeks to re-open the award obtained by Miss Ottey. It cannot re-open the earlier liability finding in her favour because its appeal in respect of that finding was dismissed by this Appeal Tribunal in an order of HHJ Richardson, given on 14 May 2013. Instead, in June 2013, the employer invited the Employment Tribunal to entertain a review of its own earlier decision on remedy in Miss Ottey's case. The thrust of its application was that the Employment Tribunal should revisit the compensatory element of the award made to

Miss Ottey on the basis that there were good grounds for believing that she would have been dismissed in any event if a non-discriminatory process and fair procedures had been followed. On that basis, it once again invited the making of a substantial **Polkey** reduction from the compensation award.

8. As I have already indicated, the Employment Tribunal had earlier considered and determined whether to make such a **Polkey** award. What was being said in the review application was that success for the employer in the then extant appeal in Mr Haslem's case might enable it to say, on a fresh consideration of the **Polkey** question, and in particular, if the Appeal Tribunal found that Mr Haslem was fairly dismissed, that Miss Ottey might well similarly have been dismissed fairly within just a few weeks of the incident in question. That would be well within the period of 18 months for which compensation had been awarded.

The Application for Review

9. The application for review was considered on the papers by Employment Judge Buchanan. In a Judgment sent to the parties in July 2013 he granted an extension of time for the making of the application for review. The application had contained a request that its substantive merits be considered at a later stage after the determination of the Haslem appeal to the EAT. It accordingly invited a stay.

10. Employment Judge Buchanan did not grant a stay, but instead considered the application for review on its merits, as they then stood, that is to say at a stage at which the EAT had not substantively determined the appeal relating to Mr Haslem.

11. Having decided to proceed in that way, Employment Judge Buchanan had to ask himself the threshold question of whether the application for a review showed that there was a reasonable prospect of the earlier decision on remedy being varied or revoked. That threshold question arises from a consideration of Rule 35(3) of the Employment Tribunal Rules. In the event, Employment Judge Buchanan, for the reasons given in his Judgment, decided that the threshold had not been crossed and the review application did not disclose a reasonable prospect that the earlier Judgment might be varied or revoked. It is from that Judgment that the employer appeals. The appeal lies within a very narrow compass.

12. The employer contends that the Employment Judge erred in law, most specifically when he underestimated the significance, in relation to the **Polkey** question, of possible success for the employer in the EAT on the then extant appeal relating to Mr Haslem.

The Appellant's Case

13. In advancing the appeal before me, Miss Jeram stressed two points. First, she reminded me that it was a strong thing for an Employment Judge to identify a carefully crafted application for review as disclosing no reasonable prospect of success. She reminded me of what had been said by this Employment Appeal Tribunal in the case of **Balls v Downham Market High School and College** [2011] IRLR 217 at paragraph 6. The Employment Appeal Tribunal had said this:

> **"...the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."**

14. Applying that dictum to the present context, Miss Jeram submits that there is a high test here which an Employment Judge must apply in describing an application for review as having no reasonable prospects at all. Her submission was that, in the context of this case, taking account of all the material, that is to say both the application for review and the terms of the extant appeal to the EAT in the Haslem case, this was not a case in which the Employment Judge could properly shut the matter out at the threshold stage under Rule 35(3).

15. Miss Jeram's second submission, regarding that the potential relevance of a successful outcome in the Haslem appeal, was that it would enable the Employment Tribunal, in considering a **Polkey** reduction, to move from an inability to speculate to a potentially real situation of comparison: that is to say, that if the EAT were to find (as we now know it eventually did) that Mr Haslem had been lawfully dismissed within a few weeks of the relevant incident, then that was at least some evidence that Miss Ottey might similarly have been dismissed within just a few weeks.

16. As to the potential relevance of that material, Miss Jeram, in the course of her submissions, took me to two sources of authority. First, she reminded me, as she had done in her Skeleton Argument, of what was said by Elias P, in the Employment Appeal Tribunal's decision in **Software 2000 Ltd v Andrews & Ors** [2007] IRLR 568. In that case the Employment Appeal Tribunal, having reviewed the authorities, set out seven numbered propositions as to matters which might bear on the correct approach to a **Polkey** deduction. The second of those specifically indicates that, in considering such a deduction, a Tribunal must have regard to all the evidence, and at principle six identifies that, although the evidence may not be of a high order, the Employment Tribunal considering a **Polkey** deduction must take into account "any evidence on which it considers it can properly rely".

17. To like effect, she relied on the more recent Judgment delivered by Langstaff P in the case of **Hill v Governing Body of Great Tey Primary School**, it being an unreported case UKEAT/0237/12/SM, in which again the President at paragraph 24, distilled the basic principles in a **Polkey** deduction case and, in particular, had directed Tribunals not to assess what a reasonable employer would or might have done when faced with the relevant facts but to ask itself what the actual employer would or might have done in relation to the circumstances of the particular case.

18. On this second aspect of her submissions, Miss Jeram developed the proposition that, in the light of those authorities, this Employment Judge had misdirected himself and ought to have found that potential success for the employer in the Haslem appeal would mean that a new dimension of the **Polkey** question was opening up.

19. In the light of those submissions, it is appropriate now to turn to the relevant parts of the Judgment of the Employment Judge in rejecting the review application. At paragraph 12 the Employment Judge said as follows:

> **"I have considered the Application on the basis that the Polkey point now being advanced is not one previously canvassed at the EAT and on the basis that it arises out of the possibility that the EAT may strike down the Liability Judgment in respect of the Haslem case on any one or more of the four grounds which now proceed to full hearing but in particular ground 4 namely that the Tribunal erred in deciding that the Haslem dismissal fell outwith the band of reasonable responses open to the respondent. I am asked to consider that such a finding by the EAT would 'inevitably impact on the likelihood of Ms Ottey being dismissed fairly on a date after 14 April 2011.' It is contended in the Application that such a finding would mean that it would be appropriate then for the Tribunal to consider a Polkey deduction in respect of the Ottey case and that it would not then be too speculative for the Tribunal so to do (as it decided it was in the Judgment at paragraph 10.6)."**

20. Note that the terms of that paragraph put paid to a submission tentatively advanced by Miss Jeram that the Employment Judge had gone wrong here because he had failed to address

at all the potential weight or significance of the outcome of the extant appeal in the Haslem case.

21. I turn now to the material parts of the Judge's conclusion. He said this at paragraph 13:

> **"I conclude that there is no reasonable prospect of the Judgment being varied in the way advanced for the following reasons.**
>
> **13.1 The cases of Ottey and Haslem were different. The Tribunal decided that the dismissal of the claimant Ottey was unfair because it was tainted with sex discrimination: that was not so in the case of Haslem. Given the obvious differences between these two cases, there is no reasonable prospect that the Tribunal would consider an adverse finding by the EAT in respect of its judgment in the Haslem case to have any bearing on the narrow Polkey point being advanced in respect of the Ottey case.**
>
> **13.2 The circumstances of the two claimants are different. The position of the claimant Haslem in the respondent company was a senior one: that of the claimant Ottey was not. The Tribunal reflected that difference in the different levels of reduction for contributory conduct which it imposed on the claimant Ottey notwithstanding it decided it was appropriate to assess compensation due to her under the relevant provisions of the Equality Act 2010 rather than the provisions of the Employment Rights Act 1996."**

22. In my judgment it is plain that the Employment Judge is there directing himself that, even if Mr Haslem's liability finding was overturned by the employer on the appeal to the EAT, that could make no difference to how the Employment Tribunal would have assessed the **Polkey** deduction question. His justification was that, in his mind, and indeed perhaps in the mind of his Tribunal, the cases were very different. Miss Jeram submits that he was there misdirecting himself. The correct question was whether the particular employer would likely have dismissed Miss Ottey fairly and earlier, given that the premise necessarily was that it had fairly dismissed Mr Haslem within just a few weeks of the incident in question. That, she submits, is a misdirection which vitiates the Employment Judge's entire Judgment and shows that he was wrong not to let the application for review through for substantive consideration.

Conclusions

23. Despite Mr Barker's admirable and helpful attempts to sustain the Judgment of the Employment Judge, I find that I must set aside the Judge's Decision, essentially for the reasons

advanced by Miss Jeram. Given the relatively low threshold that must be surmounted in order for a review application to be considered on its merits, I am satisfied that this case for review must, had it been properly considered, have passed that threshold. That is most particularly because of the potential materiality of the finding that Mr Haslem had not been unfairly dismissed and the impact that might have had on the **Polkey** reduction argument. I am satisfied that the Employment Judge erred in law in not permitting the matter to go through for consideration, based entirely on his assessment on the factual differences between the two cases when authority shows that the real question on a **Polkey** deduction consideration is what the particular employer's assessment would likely have been in the circumstances of the case.

24. This, in my judgment, is an application for review, which ought either have been the subject of a stay or have been permitted to be considered on its merits. In my judgment, it was erroneous in law for the Employment Judge to have rejected it at the threshold stage under Rule 35(3).

Disposal

25. I received helpful submissions from both Miss Jeram and Mr Barker as to what should happen in the event that I found the Judgment below was erroneous in law. Plainly the first possibility is that I should remit the matter to the same Employment Judge for a reconsideration of the threshold question. Indeed, the parties helpfully made submissions as to whether it should be the same Employment Judge. In the light, however, of the terms of the Judgment I have given, it is quite plain that I consider that, on any view, the threshold would have been passed. Therefore the question is simply one of the application for review proceeding for a determination on its merits.

26. Miss Jeram submitted that I ought to redirect the application for review to myself and determine it. Indeed, she would go even further and suggest that I should deal with the entire question of a **Polkey** deduction in the circumstances of the case.

27. I reject the notion that this is a suitable class of case in which a Judge of this Appeal Tribunal should make for himself the assessment which the statute has confirmed on first-tier Tribunal. I bear in mind the two recent decisions of the Court of Appeal, the first of which is the decision in **Jafri v Lincoln College** [2014] IRLR 544. Those two decisions speak forcefully in favour of decisions being remitted in the conventional way in the absence of some exceptional feature.

28. The remission of the current review application is, in the events which have happened, entirely academic. Both parties sensibly recognise that if what is to be done is that the matter is to be considered substantively on review, then that review should be considered with the benefit of the full Judgment of the EAT in the Haslem case. I agree, but it is not for me to achieve that outcome. The burden is on the employer to amend or reconstruct its application for review, so as to take into account that development. So remitting, as I do, the application for review for consideration on its merits, I am in reality remitting for consideration what will be a substituted or amended application for review.

29. The final matter for my determination is whether to remit the review application to the same Tribunal or to a differently constituted Tribunal. Miss Jeram strongly argued, both in writing and in oral submissions, that this is a fit case for a fresh Tribunal. She contends, in the circumstances which have occurred, that this Tribunal has shown itself in this particular case to have reached an erroneous conclusion in law on liability in relation to Mr Haslem, and the

Employment Judge himself, as my Judgment indicates, has reached an erroneous view in law in determining an application for review at the threshold stage. That, she submits, demonstrates that it would be inappropriate to remit this case to the same Tribunal because there is a risk of prejudgment or partiality. Moreover, she submits, this is the sort of case in which it might be fairly be said by an objective bystander that the Tribunal has already made up its mind.

30. I have carefully weighed those submissions, together with submissions in opposition to them advanced by Mr Barker. I am satisfied that this is a case in which it can be safely entrusted to the same Tribunal to fairly and properly determine the application for review. The context has entirely changed. The Employment Tribunal will now recognise that its earlier decision in relation to Mr Haslem was incorrect and that therefore he had been fairly dismissed within a few weeks of the incident in question. It will now be for it to properly and carefully determine whether it should review its own approach to the **Polkey** question in relation to Miss Ottey's case. I see no reason, notwithstanding two adverse findings on appeal having emerged from the same proceedings, to think otherwise than that the Tribunal will give proper and careful judicial consideration to the remitted review application.

31. For all of those reasons, my order will be: (1) that this appeal will be allowed; (2) that the application for review made by the employer and dated 13 June 2013 should be considered on its merits; (3) that the merits consideration of the application for review should be conducted by the same Employment Tribunal as that in respect of whose decision the review is sought.