Appeal No. UKEAT/0526/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 May 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

FIRST BRISTOL LTD — APPELLANT

MR A BAILES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NICK NEWMAN (Solicitor) Ford & Warren Solicitors Westgate Point Westgate Leeds LS1 2AX
For the Respondent	MS REBECCA TUCK (of Counsel) Instructed by: Thompsons Solicitors 18 Lawford Street Bristol BS2 0DZ

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Claimant was dismissed (unfairly, as the Employment Judge found) following a drugs test which he failed. The Claimant and the Respondent continued, after his dismissal, to seek and obtain evidence as to the significance of the failed drug test. In reaching her **Polkey** assessment the Employment Tribunal proceeded on the basis, and implicitly found, that there was one relevant report on each side. This was plainly and incontrovertibly wrong. There was a second statement obtained by the Respondent which was potentially significant to the **Polkey** question. Matter remitted for the same Employment Judge to reconsider **Polkey** taking into account that statement.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by First Bristol Ltd ("the Respondent") against one aspect of a judgment of Employment Judge Christensen, sitting alone in the Bristol Employment Tribunal, dated 4 April 2013. By her judgment the Employment Judge upheld a claim by Mr Alan Bailes, the Claimant, for unfair dismissal. The particular aspect of the ruling which is under appeal is the Employment Judge's finding that there was to be no **Polkey** reduction to the compensation to which the Claimant is entitled. Underlying the appeal is a single point. It is said the Employment Judge overlooked a document which was significant evidence in the context of the **Polkey** claim.

The background facts

2. The Respondent operates scheduled bus services in the Bristol area. The Claimant was employed as a bus driver from 20 September 1990 until his dismissal on 27 June 2012. Throughout this lengthy service he had a clean disciplinary record.

3. The Respondent operated a drugs and alcohol policy, backed by a system of saliva testing. The policy prohibited employees from reporting to work while unfit due to the use of drugs or alcohol and stated that any employee who tested positive for drugs or alcohol as defined would be considered unfit for work. The policy provided that failure to comply with the rule would be regarded as gross misconduct and the individual would be dealt with in accordance with local disciplinary procedures which might lead to dismissal. As the policy made clear, saliva testing would detect recent rather than historic use of drugs. The policy said that drugs were typically detected within ten minutes of use and for a period of up to 72 hours. Testing might be a consequence of a particular reasonable suspension or it might be random.

The tester wore gloves. The person being tested did not; but the test was designed so that the hand of the person being tested would not touch the swab. Two tests were performed so that a reserve sample was available.

4. On Friday 25 May the Claimant was working in the morning. It was part of his duty to collect money on the bus and to bank his morning's cash when he took a break. This involved the Claimant in hand-feeding banknotes into a machine. After doing this the Claimant ate his sandwiches and drank a cup of tea. He did not wash his hands. He was still drinking the cup of tea when he was called to a meeting and required to take a saliva test. After waiting ten minutes, as required by the procedure, the Claimant duly took the test. It was not a random test. It resulted from a complaint concerning a journey more than 72 hours earlier.

5. On 7 June 2012 the test result was returned. It was positive for cocaine, apparently to the level of 31.6 ng/ml. The Claimant was suspended. A disciplinary hearing took place on 27 June 2012. The Claimant was dismissed. Internal appeals took place on 4 July 2012 and 17 July 2012. They were unsuccessful.

6. The Claimant put forward three main points during this process: (1) He was taking an antibiotic known as amoxicillin. He queried whether this might have produced a false positive. (2) He had been handling banknotes and he might have taken in cocaine without knowing that he had done so. It was known to the Respondent and is of course generally well-known that banknotes are commonly contaminated to some extent by cocaine. He had handled a significant number of banknotes and eaten his sandwiches shortly after doing so. (3) He had his own hair strand test done at his own expense. The results came back on 16 July 2012. They showed a negative result for a 90-day period.

7. The Respondent had looked into the amoxicillin issue and received advice that it could not lead to a false positive result. The Respondent had refused adjournments to wait for the hair strand test, a matter about which the Employment Judge was critical, but it had known of the result at the final appeal and had investigated it, receiving advice that it was "possible that a correctly undertaken hair test result may fail to detect one-off use or very recent use of cocaine" and therefore that it did not prove that cocaine was not in the donor at the time of the saliva test.

8. Even though the appeal process ended on 17 July 2012, there were further enquiries of experts. The Claimant produced a report by Mr Christopher Evans, dated 6 August 2012. The Respondent sought a response from the organisation which undertook saliva testing and obtained a statement by Mr John O'Sullivan, dated 12 September 2012. The Respondent also made further enquiries concerning amoxicillin, receiving a response dated 12 November 2012. Finally the Respondent obtained a report from Dr Philip Kindred, dated 16 January 2013, commenting on several issues. I shall return further to these reports later in this judgment.

The Tribunal hearing and Reasons

9. The Employment Tribunal hearing took place on 19 and 20 February 2013. Judgment was reserved. As regards unfair dismissal, the Employment Judge accepted that at least by the time of the appeal, the Respondent had taken reasonable steps to investigate the amoxicillin issue and the hair test issue. The Employment Judge found that the dismissal was unfair by reason of failure to investigate properly the possibility of accidental contamination of the saliva test from banknotes. The Employment Judge's essential reasoning, although repeated elsewhere, is set out in paragraphs 66-70 of her Reasons:

> **"66. There is no stage in the investigation, disciplinary or appeal process at which the respondent makes any enquiry or investigation into the possibility that the claimant's concern, raised for the first time by Mr Abbott during the investigation and then raised by the claimant at his disciplinary hearing, that it was possible that the saliva test may have been contaminated in some way from cocaine on his hands from the bank notes handled by him. This failure by the respondent is unreasonable and wholly unexplained, particularly given that the possibility of this being an explanation for the positive test result was raised in the first instance by the respondent itself (Mr Abbott – investigating officer) in conversation with the claimant's solicitor. It was accepted by Mr Edwards (dismissing officer) and Ms Macleod (2nd stage appeal) that if there was something to call the positive saliva test into doubt or an innocent explanation for the positive result then this would be highly relevant to the decision of whether that employee should be dismissed.**
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> **67. Given that Mr Abbott knew that the claimant had just eaten something before he gave his saliva test and given that the respondent understood the possibility of bank notes being contaminated by cocaine an investigation might have revealed factors which were relevant to the question of whether it was reasonable to conclude that this was gross misconduct and/or that the claimant be dismissed.**
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> **68. The charge was a very serious one, the claimant was a very long standing and loyal unproblematic employee and it is evident from the enquiries that were made by the respondent to Concateno (Mr Morris at 1st stage appeal) and Keyclear (Ms Macleod at 2nd stage appeal) that there was no problem in seeking advice on whether this was a viable possibility from those that advised them on such matters. Yet no enquiries or investigations were carried out at any point by the respondent to inform itself in that regard.**
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> **69. The respondent seemed in an unseemly rush to process the charge through to a decision to dismiss without taking the steps that any other reasonable employer would have done so. The fact of a positive drugs test result for cocaine seemed to close their minds to the normal principles underlying the investigating and processing of a charge of misconduct.**
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> **70. Although Ms MacLeod remedied the failure to have waited for the hair test result and to have understood its significance, her final appeal continued to do nothing to address the failure to have investigated the possibility or viability of contamination from bank notes providing and innocent explanation for the positive drugs test."**

10. The Employment Judge then turned to the **Polkey** issue, which is the focus of this appeal. She said that both parties commissioned reports from experts in the field of drug test analysis after the Claimant had been dismissed. She summarized the argument of the parties as follows:

> **"72. The respondent submits that even if there are investigatory failings by them they would in any event have been fairly in a position to dismiss the claimant had they performed investigation into the possibility of contamination from bank notes at the time. The claimant argues the opposite."**

11. The Employment Judge then summarized and made reference to two reports. She quoted two key paragraphs of Mr Evans' report, one of which referred to the fact that the Claimant was not invited to wash his hands, "thereby introducing a significant possibility of contamination". She quoted two key passages of Dr Kindred's report. There is, however, no sign in her

written reasons that she appreciated there was an earlier statement by Mr O'Sullivan dated 12 September 2012.

12. The Employment Judge's conclusions were the following:

> **"80. The respondent's report confirms that contamination would not be possible by way of the sample collection as long as the manufacturer collection guidelines were used. It does not in terms state that contamination could not have occurred from cocaine traces on the claimant's hands in some other way. It confirms that the bank notes are contaminated by cocaine. Neither does it address the fact that Mr Abbott and Mr Edwards were told that the cocaine test result showed that the cocaine had been ingested – this meaning that the saliva test showed that it had got into his system orally. It is understood to be accepting that the claimant's hands may have been contaminated by cocaine.**
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> **81. It confirms that the claimant will not have eaten or drunk anything prior to testing and that therefore anything that on his food would have cleared from his mouth. However the respondent did not assist in understanding what proper inference could be drawn from this. It is not easy to conclude that the correct inference is that this should mean that the cocaine could not have been ingested through the sandwich. This is because the respondent's own drug policy confirms that its saliva drug test will detect drugs within 10 minutes of consumption, the saliva test being intended to detect recent drug use. This is understandable and consistent with the safety objective of the policy. If the cocaine had been ingested through contamination on the sandwich from the claimant's hands that cocaine would have been ingested just over 10 minutes prior to the test and would therefore have been detected by the saliva test. Further, it was confirmed to Mr Abbott that the presence of benzoylecgonine confirmed the cocaine had been ingested.**
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> **82. The claimant's report on the one hand is not inferential and is instead equivocal – it expresses the claimant's clear professional view that the case is simply one of sample contamination.**
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> **83. From these reports I conclude that it would be improper and perverse of me to conclude that there is some sort of % chance that the respondent would in any event have dismissed the claimant if this issue had been investigated at the time. Such a conclusion would not be supported by these reports and would therefore by perverse. If one considers both reports side by side this shows one expert saying in clear terms – there is a high probability that the sample was contaminated and cannot be relied upon. The other expert confirms that there could have been cocaine on the claimant's hands, contamination could have been caused by the handling of the saliva sample if it was done properly but seems less clear in his/her basis for inferring that the eating of the sandwich could not provide a source for contamination. The respondent did not investigate the circumstances of the claimant's saliva test to ensure that it was done properly."**
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> **84. Accordingly I conclude that the claimant has been unfairly dismissed and that there is no *Polkey* reduction made to the compensation to which he is now entitled."**

The appeal

13. Mr Newman, on behalf of the Respondent, bases his appeal on the argument that Mr O'Sullivan's statement dated 12 September 2012 has been entirely overlooked by the Employment Judge. He informs me that the report was in the bundle prepared for the hearing

and was specifically referred to in the evidence of one of the Respondent's witnesses. He argues that the Employment Judge was therefore wrong, perverse in the true legal sense, to describe the Respondent as having received an expert report. There were, in effect, two reports, one of which the Employment Judge had evidently overlooked.

14. Further, he argues that the Employment Judge was wrong to have decided the case on the basis that the Respondent's report did not in terms say that contamination could not have occurred from cocaine trace on the Claimant's hands by the process of eating his sandwiches. He argues that the report of Mr O'Sullivan effectively excluded this possibility. He does not accept that the report of Dr Kindred was equivocal on this subject, but he says that if it was, the report of Mr O'Sullivan laid the point to rest.

15. Mr Newman submits that, if the Employment Judge had taken proper account of the statement of Mr O'Sullivan, she would have been found to find that a fair investigation of the contamination issue had been conducted and the Claimant would in any event have been dismissed, at the very latest by 12 September 2012.

16. In answer Ms Tuck, on behalf of the Claimant, submits that the failure by the Employment Judge to mention the report of Mr O'Sullivan does not necessarily mean that she had forgotten it or left it out of account. It is not incumbent on a Tribunal to make express reference to each piece of evidence before it. The Employment Judge was required to give intelligible and coherent reasons for the conclusions she reached (see **English v Emery Reimbold and Strick** [2002] 1 WLR 249), not to mention all the evidence. Further, she submits that the report of Mr O'Sullivan added nothing to that of Dr Kindred.

17. In any event, Ms Tuck submits that the report of Mr O'Sullivan was not in any sense conclusive of the question whether the Respondent would have dismissed the Claimant. The report itself referred to the existence of a B sample. It called for further questions in respect of the hair strand test, and the Claimant would have been entitled to raise these and other matters at a hearing. The Claimant had, for example, asked whether the reading of 31.6 ng/ml was a trace reading or a reading of great significance, a question which was never answered and might have been important.

18. In his Notice of Appeal Mr Newman had a second point, but he argued it today as very much subsidiary to the first. Indeed he told me that he was not running it a separate argument, rather as an adjunct to the first. He argues that the report of Dr Kindred was in any event clear on the question whether cocaine from banknotes could have been possible for the positive test. This, he says, follows from Dr Kindred's point that contamination from food would have cleared the Claimant's mouth during testing. In response Ms Tuck submits that the Employment Judge was fully entitled to the view of Dr Kindred's report which she held.

Discussion and conclusions

19. The principle in **Polkey v AE Dayton Services** [1988] 1 AC 344 derives from a passage in an earlier case, quoted with approval in **Polkey**:

> **"'There is no need for an 'all or nothing' decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."**

20. The many cases on **Polkey** were summarized in **Software 2000 Ltd v Andrews** [2007] ICR 825:

"The following principles emerge from these cases:

(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it 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.

..."

21. Further, in **Hill v Governing Body of Great Tey Primary School** UKEAT/0237/12/SM Langstaff P said:

"24. A '*Polkey* deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

22. Although the Employment Judge did not cite these cases, they summarize what is well-known law. They set out the law which she was required to apply when determining the **Polkey** issues. It follows from these authorities that the Employment Judge was expected to look in the round at all the relevant material before her when assessing whether or not to make a **Polkey** reduction.

23. Against this background it is striking that the Employment Judge did not mention Mr O'Sullivan's statement. It was directly responsive to Mr Evans' report. Mr O'Sullivan stated his position as Head of Analytical Services with 25 years' experience in drug analysis and 12 years' in hair testing. He said that he had extensive experience including experience as a witness. He said:

> **"In my opinion the presence of cocaine and metabolite in the oral fluid sample from Alan Bailes cannot be due to handling bank notes alone. There are slight traces of cocaine on these notes but to suggest that this would produce a positive result above nationally agreed guidelines for legally defensible testing would be in error."**

24. I have reached the conclusion that the Employment Judge, when considering her reserved judgment, must have overlooked this statement. If she had not overlooked it, I am confident that, given the evident care with which her reasons were prepared, and given the importance of considering relevant evidence in the round for the purposes of **Polkey**, she would have mentioned it. I think it is implicit in her reasons that she found there to be a single relevant report on each side and made her assessment on that basis; and this was incontrovertibly wrong. Where an Employment Judge proceeds on a basis of fact on a point of importance which was plainly and incontrovertibly wrong, it amounts to an error of law.

25. I do not accept Ms Tuck's submission that the error would have made no difference. The report was directly responsive to Mr Evans' report. Although Mr O'Sullivan did not actually address specifically the question of eating sandwiches, his opinion is relevant to the question whether and to what extent there is a risk that eating sandwiches after handling banknotes gives rise to a real risk of a false positive. It was a matter for the Employment Judge to take into account.

26. I am, however, very far from accepting Mr Newman's submission that the report of Mr O'Sullivan or, for that matter, the reports of Mr O'Sullivan and Dr Kindred together were conclusive on the **Polkey** issue. The Employment Judge's duty was to consider the evidence on the **Polkey** issue on the round. The question was not whether the Respondent could have dismissed following the receipt of Mr O'Sullivan's statement. The question is what the Respondent, if it had acted fairly, would have done, a question which does not have to be given an all or nothing answer. The Employment Judge is entitled to take into account all relevant factors when deciding what the Respondent would have done. These include, on her findings, an initial disbelief that the Claimant had taken cocaine so that he was not suspended; his very long service; and its knowledge that he had obtained a hair strand test at his own expense, which on any view showed that he was not a regular user of cocaine and which would have been a waste of a significant sum of money if he knew that he had taken the substance. The Employment Judge is entitled to evaluate how far the Respondent, acting fairly, would have gone to investigate the question of contaminated banknotes. Mr O'Sullivan provided no more than a bare statement that there are "slight traces of cocaine on these notes" without any detailed research or consideration of the matter.

27. I would add that a **Polkey** assessment also involves considering when a dismissal might have taken place as well as whether it might have taken place. Even if a report or reports along the lines of Mr O'Sullivan and Dr Kindred or, for that matter, better evidence still had been obtained, there would still have had to be a disciplinary and appeal process. This might have mandated further or more specific investigations into questions raised by the Claimant. It cannot be assumed that the dismissal would have taken place in September 2012. Whether and when any dismissal might have taken place are matters of assessment for the Employment Judge.

28. In the circumstances the matter must be remitted for the **Polkey** question to be considered afresh. The Employment Appeal Tribunal deals only with questions of law. It can substitute its own view only where, on a correct appreciation of the law, the answer is inevitable. This is not such a case.

29. The question arises whether remission should be to the same or a different Employment Judge. I have no doubt, applying guidance in **Sinclair Roche Temperley v Heard** [2004] IRLR 763, that remission should be to the same Employment Judge. I have every confidence, having read her reasons, that she will approach the matter professionally and will reconsider **Polkey**, taking into account Mr O'Sullivan's report and taking into account further submissions from the parties. The parties take the view, and I agree, that written submissions will suffice, although the Employment Judge is entitled to call for oral argument if she wishes to do so. She will no doubt direct herself in accordance with the authorities that I have already set out in this judgment and reconsider the matter.