Appeal No. UKEATS/0052/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 21 March 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

ARNOLD CLARK AUTOMOBILES LIMITED — APPELLANT

MS DEBORAH MAK — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MORGAN (Solicitor) Burness Paul LLP 120 Bothwell Street Glasgow G2 7JL
For the Respondent	MS DEBORAH MAK (The Respondent in Person)

SUMMARY

Redundancy. The respondent dismissed the claimant stating that she was redundant. The ET found that the claimant had been unfairly dismissed. The respondent appealed submitting that the ET had not applied the statutory test but had instead sought to define the 'operative reason' for dismissal. Held: appeal allowed. On the facts found, the dismissal was for redundancy as there was a situation in which the requirements of the business of the respondent for employees to carry out the work done by the claimant had diminished or ceased. The case is remitted to the same ET to apply its mind to the provisions of section 98(4) of the Employment Rights Act 1996, and the effect if any of the case of Polkey, if the dismissal is found to be unfair.

THE HONOURABLE LADY STACEY

Introduction

1. This is an appeal against a decision of an Employment Tribunal (Ms Wiseman, sitting alone in Glasgow), which was sent with Reasons to the parties on 13 September 2013. I will refer to Ms Mak as "the Claimant" and to Arnold Clark Automobiles Ltd as "the Respondent".

2. At the Employment Tribunal, the Claimant represented herself, and she has done so again before me. The Respondent was represented at the Employment Tribunal by Mr Gunn (solicitor) and before me by Mr Morgan (solicitor). The decision was to the effect that the Claimant was unfairly dismissed, and an award of £948 was made.

The grounds of appeal

3. The grounds of appeal which passed the sift (that is, all of them) were to the effect that the Employment Tribunal applied the wrong test when considering whether redundancy was the reason for dismissal under section 98(2) of the **Employment Rights Act**. It is stated, at paragraph 98 of the Reasons, the Employment Judge asked herself if that was "the operative reason for the Claimant's dismissal" and it is stated that that is the wrong test. It is argued that the case of **Safeways Stores plc v Burrell** [1997] ICR 523 and **Murray v Foyle Meats Ltd** [1999] ICR 827 show that there are three tests to be considered when deciding whether redundancy was the reason for dismissal under section 98(2) of the Act. The first is to ask whether the employee has been dismissed. The second is to ask whether the requirements of the business for employees to carry out work of a particular kind have diminished. The third is to ask whether the dismissal is attributable, wholly or mainly, to that state of affairs. It is argued in this case that the Employment Tribunal correctly identified the first and second limbs of the test and identified them as satisfied but then fell into error.

4. The next ground of appeal is that the Employment Tribunal made no findings about fairness under section 98(4) of the Act. The grounds of appeal note that, if is to be argued that the circumstances regarding suitable alternative employment might be read as the Employment Tribunal doing what it should do under section 98, then it is alleged that the Employment Tribunal erred in law. The Employment Tribunal correctly rejected any notion that the employer should create a new role for an employee in the situation in which the Claimant found herself. The Tribunal found that no vacant suitable alternative role was identified, and the Claimant did not before the Employment Tribunal plead that that was in any way a sham. At paragraph 94 the Tribunal found that "but for" the Claimant's difficult relationship with one of her colleagues, she would not have been dismissed and would have been retained in suitable alternative employment.

5. The Respondent today argues that the Employment Tribunal heard no evidence and made no findings in fact to sustain that conclusion, as they did not find that there was a suitable available alternative role which she could have been offered to avoid her dismissal. It is also stated that the Employment Tribunal's finding that the employer's attempts to find suitable alternative employment were superficial is inconsistent with the findings of fact at paragraphs 31, 33, 35 and 36.

6. Further, it is argued by the employer that, if he is unsuccessful on the grounds above, and I find that it was permissible to find that the Claimant was unfairly dismissed, then if that was so on the basis that the dismissal should have been avoided by offering suitable alternative employment, then the Employment Tribunal should have considered making a reduction to the compensatory award to take account of the likelihood that any such role would not have been discovered as suitable for both parties, and so the employee would have been dismissed in any

event. In essence, it is argued that reference should be made to the well-known case of **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 and that a reduction should be made.

7. It is, of course, not for me in the EAT to substitute my own view of the case. Rather it is for me to consider whether the Employment Tribunal has erred in law in its decision making. Mr Morgan presented his appeal before me in a clear and helpful way. He produced a skeleton argument, which he supplemented orally. The Claimant represented herself, and she also presented her position clearly and helpfully. She had lodged a written note of the grounds on which she opposed the appeal. From those notes she argued that the Employment Tribunal had not erred in law, and she argued that the Respondent was arguing about a matter of semantics when he argued that the operative reason for dismissal was something different from dismissal attributed wholly or mainly to redundancy. She argued that, in any event, it was for the Tribunal to find the facts and that they were entitled to make the decision that it had made. As part of that argument, she argued that the Tribunal was entitled to decide that the Respondent had only gone through the motions in trying to find a suitable position within the company but had failed to do so.

8. The Claimant's fourth paragraph in her written submissions concerned Mr Hadden and Mr Hutton and what had happened to them after dismissal. She accepted in the course of discussion that that was not relevant to her own dismissal and she did not press this matter any further.

9. From the written Reasons, then, it can be seen that the Employment Judge heard evidence from Ms Henry, who was the Group Personnel Manager, Mr MacAulay, the Group Aftersales Manager, and the Claimant. Following a two-day hearing, she found facts and set them out

clearly in her Judgment. I do not require to narrate all of them, but the ones which are relevant for today's purposes are as follows.

The facts as found by the Tribunal

10. The Respondent is a car retailer, which has more than 160 branches and about 8,600 staff throughout the United Kingdom. The Claimant began to work there on 4 August 2008, and her employment ended on 3 January 2013. Her salary was £36,700. Her role was Training Specialist. She had previously worked for the Respondent between 2004 and 2007, and had been involved in training. On this occasion of employment, she had done some training and was mostly involved in setting up and implementing the employer's contact centres. She trained the staff who worked there. 11 such centres were set up to mid-2012. Mr MacAulay took up his post in July 2012. He decided that there were too many contact centres and that a review was necessary. The Board of the Respondent decided that no more contact centres would be developed. Therefore, as the Claimant had been involved in pushing that project forward and developing the contact centres and the staff who worked in them, the Board decided that there was a potential for her post being redundant as they did not wish to develop that particular part of their business further.

11. Ms Henry met all the members of the training and development team, including the Claimant. At that meeting the Claimant told Ms Henry that she was concerned about Mr Hadden, who was a manager in that team. She said she was concerned about his style of management and also she said he was mistreating her after she had challenged him about having an affair with a team member. Ms Henry said that that would not be acceptable to the board. Ms Henry then did speak to Mr Hadden about this, and he confirmed the fact of the affair. Ms Henry did not do anything more about it. Ms Henry also spoke to Mr Hutton, another manager of the Respondent, about the Claimant's workload as she thought that there

was, as she put it "dotted line management responsibility" between Mr Hutton and the Claimant.

12. Thereafter the Employment Judge found at paragraph 25 that Ms Henry decided, as a result of her discussions, that the Claimant was in a pool of one for redundancy because she was the only person who did the job which she carried out at the Respondent's undertaking and because her skills were not transferable. Ms Henry discussed with the Claimant alternative jobs at a basic salary of £16,600, but the Claimant could not live on that salary, it being less than half of the salary that she was on. She therefore did not regard that as a suitable alternative. The Claimant told Ms Henry that Mr Hadden had said that he would "manage her out of the business by Christmas" and that she told Ms Henry that she felt that was what was happening. Ms Henry asked Mr Hadden about that, and he denied ever having said that.

13. The Claimant was entitled to appeal the decision that Ms Henry gave her, which was that she would be made redundant, and she did so. The appeal was taken by Mr MacAulay. At that appeal, at which the Claimant represented herself, she argued amongst other things that she had been managed out due to having spoken up about her view of Mr Hadden. She also told Mr MacAulay that Mr Hadden had withheld work from her, which she could perfectly well have done and which she should have been doing.

14. In the course of considering the appeal, Mr MacAulay asked for comment from Mr Hadden and Ms Henry by e-mail. The Employment Judge found that he satisfied himself that Mr Hadden had not been instrumental in selecting the Claimant for redundancy. He also satisfied himself that the Claimant's work was almost exclusively on call centres and that she had in the end agreed with Ms Henry on that.

15. The Employment Tribunal found the Claimant to be a credible witness. Ms Henry she found to be superficial and prepared to make sweeping statements without having investigated their truth. She gave an example of that, being that Ms Henry was prepared to say that the Claimant had never sold a car, which was not in fact so, and the Employment Judge found that, if she had asked the Claimant about it, she would have discovered that that was not true. The Employment Judge found Mr MacAulay's investigation, with Mr Hadden and Ms Henry, to be cursory. These findings led the Employment Judge to make the following findings, from paragraph 84 onwards:

> **"I was satisfied, having had regard to the above facts, and the above authorities, that the fact the establishment of contact centres was to cease placed the claimant in a redundancy situation because the work she had been carrying out was to cease. The fact the claimant may not have worked wholly on establishing contact centres harks back to the contradicting 'contract' or 'function' tests which the above authorities both stated is not the correct approach.**
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> **85. The real issue in this case was the third stage: was the redundancy situation the operative reason for the claimant's dismissal. I shall deal with this below.**
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> **86. The claimant had, prior to the Hearing, argued that the pool for selection for redundancy ought to have included all of the Sales Trainers. The claimant did not maintain that argument at the Hearing. I understood the claimant's position was that she regarded herself as a Sales Trainer and although she did not deliver the Sales Academy training, she did after sales training and therefore equated herself to the Sales Trainers. Further the claimant, as an architect of the Sales Academy, considered the position of Sales Trainer was one she could have fulfilled.**
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> **87. I was satisfied that the pool for selection for redundancy was correctly constituted. The claimant's post was affected by the decision of the Operations Board not to establish any more contact centres: no other posts in the training department were affected by that decision. The claimant undertook a unique project in establishing the contact centres and she was the one affected by the decision of the Operations Board."**

16. Thus the Employment Tribunal found that the Claimant was in a redundancy situation because the work she had been carrying out was to cease. She found that the pool of one was correct.

17. She then, however, turned to the test which she applied, being 'what was the operative reason for the dismissal?' She found that Ms Henry said that she had spoken to Mr Hadden and found out that he said there had been an affair, but she did no more about it. She noted that

Mr Hadden denied saying that he would manage the Claimant out and Ms Henry believed him. Therefore she did not believe the Claimant on that subject. Ms Henry gave no reasons for believing Mr Hadden over the Claimant. The Employment Judge found that Mr MacAulay gave an explanation that she described as "very weak" for his declining to investigate the uneasy relationship between the Claimant and Mr Hadden, which he knew about. She found that Mr MacAulay investigated the Claimant's assertions that Mr Hadden had kept her away from allocation of work simply by e-mailing Mr Hadden and asking how work was allocated. She found that he did not investigate the Claimant's assertion that the work ought to have been allocated to her but had been diverted to the Sales Trainers.

18. At paragraphs 94-96 the Employment Judge made the following findings, which I do require to quote in full:

> **"94. I found these points compelling against a background where the claimant was a highly competent, experienced and respected employee whose skills were such that she had been head hunted back to the business and her salary doubled. I accepted the business decision of the respondent to cease establishing contact centres and I accepted this impacted on the claimant's position, however I reached the conclusion that but for the situation with Mr Hadden, the claimant would have been retained within the business in suitable alternative employment.**
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> **95. I accepted Mr Hadden did not influence the decision of the Operations Board to cease establishing contact centres. I concluded Mr Hadden's role in this case was much more subtle.**
>
> **96. I accepted Ms Henry provided the claimant with a vacancy list and made enquiries about a sales executive position and a training position each with a basic salary of £16,000 but I concluded Ms Henry's efforts were superficial. Ms Henry was very quick to reach conclusions about the claimant's roles and her abilities which proved to be erroneous. For example, Ms Henry concluded the claimant's skills were not transferable. Ms Henry did not have reasonable grounds upon which to sustain that belief in circumstances where the claimant was highly skilled and Ms Henry had not made sufficient enquiries with the claimant regarding her skills. Further, Ms Henry concluded that even if there was a vacancy as a Sales Trainer the claimant would not have been suitable because she had never sold a car. This conclusion was erroneous and, had she asked the claimant, she would have learned the claimant did have this experience.**
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> **97. Mr Gunn submitted there was no onus on the respondent to create a post for the claimant and I accepted that submission. The onus on the employer is to take reasonable steps to ameliorate the effects of redundancy including giving detailed consideration to whether suitable alternative employment is available. I considered the respondent's efforts to find the claimant suitable alternative employment were superficial and I concluded the reason for that was because of the difficulties with Mr Hadden."**

The Appellant's submissions

19. Mr Morgan submitted that the Employment Judge had made findings in fact which were inconsistent as well as erring in law by the way in which she had applied the test for deciding the cause of the dismissal. He made reference to the well-known case of **Murray v Foyle Meats** and **Safeway v Burrell**. He submitted that the Employment Judge had set out the law correctly in her Judgment under reference to those cases in paragraph 82. She had, however, gone wrong in paragraph 83, where she stated:

> **"The terms of the contract are only relevant at stage (iii) when determining, as a matter of causation, whether the redundancy situation was the operative reason for the employee's dismissal."**

20. Mr Morgan submitted that the word "operative" was not clear in its meaning, but in any event it was certainly not in the statutory test, as explained in the cases. Mr Morgan submitted that it is always essential to bear in mind the terms of the statute, and it is convenient, in my opinion, to quote at this stage, section 139 of the **Employment Rights Act 1996**, which sets out the definition of redundancy in the following terms:

> **"1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-**
>
> **(a) the fact that his employer has ceased or intends to cease...**
>
> **(b) the fact that the requirements of that business-**
>
> **(i) for employees to carry out work of a particular kind, or... have ceased or diminished or are expected to cease or diminish."**

21. Mr Morgan argued that the Employment Judge must be in error when she had failed to consider whether the dismissal was wholly or mainly attributable to the cessation or diminution of the requirements of the business for employees to carry out the work which was carried out by the Claimant.

22. I agree with him. It seems to me that the Employment Judge was in error, when she used a test which she described as the "operative reason" of the dismissal. She should instead have asked herself if the dismissal was wholly or mainly attributable to the diminution or cessation in the requirement of business for employees to carry out work of the kind carried out by the claimant. Although the Claimant argued that this was a matter of semantics and that the words meant the same thing, I do not agree with her. In my view, Judges, whether sitting in the Employment Tribunal or the Employment Appeal Tribunal, should always be careful to look at the words of the statute. That is because redundancy and unfair dismissal is a statutory construct and exists only in terms of the statute as explained in decided cases. I agree with Mr Morgan's submission that the two cases to which reference has been made set out clearly the way in which the statute should be interpreted. The House of Lords case is of course binding me and is set out clearly. I should say, however, the Employment Appeal Tribunal case, in which Judge Clark gives Judgment, that is **Safeway v Burrell**, is a very fully reasoned case, and he sets out there very clearly the way in which this ought to be approached.

23. The Employment Judge, while she was plainly aware of the law, and plainly saw from her paragraph 82 what the test was and what the relevant cases were, nevertheless went on to develop a gloss and went on to use different words. While there is no need to be slavish in using exact words, which can be formulaic, I cannot agree with the Claimant's submission that this is simply a matter of semantics.

24. Mr Morgan went on to argue that the Employment Judge had not considered the terms of section 98 of the same Act properly. She had not referred to section 98(4) in terms at all. It is convenient to look at the terms of that section also and to quote them at this stage. They are as follows:

"(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 (or if more than one, the principal reason) for dismissal;

(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. ...

(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."

25. Mr Morgan realistically recognised that the Employment Judge may have been considering fairness in all the circumstances when she gave her findings about the management witnesses being superficial and not considering carefully what transferable skills the Claimant had, all of which I have referred to above. All of that could be relevant to section 98(4), but it is not clear from the Reasons that the Employment Judge was considering that section because she does not say so. I agree with Mr Morgan that it cannot properly be held from the written Reasons that the Employment Judge was considering that section. In any event, Mr Morgan argued that, if there were no other suitable alternative posts, then it may not have made any difference: that is, that even if a fair procedure had been gone through there may still have been a dismissal which was fair. Once again, he argues that the Employment Judge did not consider this part of the case or, if she did, she did not give written Reasons for it. This is the exercise which should have been considered under the well-known case of **Polkey**, and Mr Morgan argued that there is no indication that the Employment Judge considered that case. I agree with him that there is no indication in the written Reasons that she did so.

26. In his arguments about disposal, Mr Morgan argued that I should allow the appeal, and he argued that there are sufficient findings for me to do so and then substitute my own finding that the dismissal was fair. I disagree with that part of Mr Morgan's submission.

Conclusion

27. My decision in this case is that is clear that the Employment Judge did apply the wrong test when she referred to the words "operative reason". While I can see that the Employment Judge was well aware of the terms of the legislation and the appropriate cases, she did not, in my opinion, go on to apply the law properly and to set out the way in which she had applied it. That alone means that the appeal must be allowed.

28. I also have to consider whether Mr Morgan is correct to say that the Employment Judge failed to apply the terms of section 98 properly. In my opinion, he is correct to anticipate that it may be argued that the Employment Judge's discussions about the acts or lack of action by Ms Henry were directed towards fairness. But it is certainly not as clear as it should be from the written Reasons that she was properly considering section 98(4). Therefore the appeal would require to be allowed on that basis.

29. In my view, Mr Morgan is also correct to say that the Employment Judge's Reasons contain inconsistencies. He argued that her language showed that she had found that there was a redundancy situation and he noted that she was concerned about lack of thoroughness in looking at alternative posts. He pointed out, correctly, that one would only be looking at alternative posts if there was a redundancy situation and he argued, therefore, that for the Employment Judge to find the dismissal was unfair was inconsistent. I think he is right in that.

30. In my view, Mr Morgan is also correct to say that the Employment Judge does not show that she has considered the case of **Polkey**, and there is nothing in the written Reasons to show that she considered whether or she could say that there was a percentage chance of the Claimant being dismissed even if a fair procedure had been followed.

31. Therefore I allow this appeal.

Disposal

32. I have considered carefully the appropriate disposal in the case. I do not agree with Mr Morgan that the facts have been sufficiently found for me simply to make a decision that the dismissal was fair. It seems to me that the correct disposal is to remit to the same Tribunal, with directions that the Employment Judge hears submissions from parties on the terms of section 98(4) and on **Polkey**, on the facts already found. I emphasise that there is to be no new trial of the facts. Rather the Employment Judge should proceed on the basis that she has made findings in fact already, which show that the Claimant was dismissed by reason of redundancy. This is because the Employment Judge has found that (1) the employee was dismissed; (2) the requirements of the business for employees to carry out work of the kind done by the claimant had ceased. She therefore required to find, absent any reason such as the Claimant being directed to work elsewhere and refusing, that the dismissal was wholly or mainly attributable to the redundancy. The Employment Judge should then have considered the terms of section 98. She should have found that the reason for dismissal was redundancy, thereby finding that the employer had fulfilled the requirements of section 98(1). She should then have gone on to consider section 98(4). As I have said, there is no indication that she did so.

33. I do not consider it would be proper for me, who has not had the advantage of hearing the witnesses, to make any decision about the consequences of the facts that the Employment Judge did find. As a matter of fairness to both parties, I do not make a disposal which would enable any further findings in fact to be made. I do, however, require that the Tribunal considers, in light of the findings already made, what view it has of the requirements of section 98(4). Further, I direct that if the Tribunal makes the decision that the dismissal was unfair, it should

then go on to consider whether or not there should be any reduction made in any award in respect of the case of **Polkey**, that being a decision that it is required to make only if it finds that the dismissal was unfair. I should emphasise that what it should then do is consider, no doubt with a degree of speculation, what would have happened had the dismissal been procedurally fair and it should consider what percentage chance there was of there being a dismissal in any event.

34.I am grateful to the parties for the assistance they have given me today