Appeal No. UKEAT/0281/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 February 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR C EDWARDS

MR T M HAYWOOD

MR K DEV — APPELLANT

LLOYDS TSB ASSET FINANCE DIVISION LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MR DANIEL CLARKE (of Counsel) Instructed by: Pinsent Masons LLP 3 Colmore Circus Birmingham B4 6BH

SUMMARY

UNFAIR DISMISSAL – Polkey deduction

An Employment Tribunal approached **Polkey** by determining what the course of future events would be, rather than asking what the chances were. It had not set out the approach, nor had it asked what might have happened if unfair treatment in a number of respects identified in an earlier liability judgment had been remedied. A decision of 100% certainty that there would have been a fair dismissal, on the grounds of the employer's belief as to the Claimant's immigration status, when the evidence was both the employer and employee wished to continue the latter's employment, and that only a matter of days after dismissal his entitlement in immigration law to work was recognised by the Home Office, was a surprising one since it allowed for no chance the result might have been otherwise.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision made by Employment Judge Beard and members in Cardiff, Reasons for which were given in November 2012. This was a remedies hearing after an earlier hearing in September 2011 when the Tribunal found that Mr Dev had been unfairly dismissed. He was unfairly dismissed, having been employed from 25 June 2007, under what became a fixed-term contract due to end on 4 October 2010. What led to his dismissal was his employer's belief about his immigration status. The reason why the Tribunal thought that the dismissal was unfair was that, at the time of the dismissal, the Respondent had done insufficient to check what the position actually was, particularly in the light of information that they had by 29 September, five days prior to dismissal, from the Claimant that he had made an application for indefinite leave to remain to the Home Office. If so, that would have given him the status to continue to work legitimately until his application was determined, and the employer might well have discovered that that was the case.

2. The issue for this hearing was defined before its judicial member at a hearing under rule 3(10) of 22 May 2013. The only matter which was permitted to proceed was whether the Tribunal had adopted the correct approach at the remedies hearing when, in applying the principles derived from **Polkey v A E Dayton Services Limited** [1987] IRLR 503, it came to the conclusion that there should be a 100% deduction from his compensation.

3. At the outset of this hearing the Respondent appeared, through Mr Clarke of counsel, but the Claimant did not appear to progress his appeal. He had suffered, he says, from some illness. The appeal had been listed for November last year, but did not then occur because it was adjourned because he said he was unwell. Having been reminded of the need to put in documentation, which he did not do, and most recently of the impending hearing, he sent an e-

mail, which was received at this Tribunal shortly after midnight this morning. It does not specifically ask to adjourn this hearing, though he had earlier asked and had been refused. He has sought permission to appeal that refusal to the Court of Appeal. However, his e-mail shows that he claims to be indisposed. He gives no particulars of the nature of that indisposition. No medical certificate is volunteered. There is nothing else to support it. He has submitted, together with that e-mail, a skeleton argument of some length and dealing with many issues which go beyond the sole issue for our determination. We thought it right to treat the e-mail as a further application to adjourn. Mr Clarke resisted it.

4. In our view, it would not be right, given the issues in the case, the amount at stake, the length of time for which the matter has been outstanding, and the fact that the appeal point is one which is encapsulated, we think, by the Judgment on the rule 3(10) hearing, to adjourn. Coupled with the absence of any medical material, these lead us to conclude that it would be right to proceed to hear the case. Not to do so would expose the Respondent to some prejudice, Mr Clarke having come here today knowing that an earlier application for adjournment had been refused.

5. We have considered what Mr Dev has had to say in his skeleton argument.

The approach to Polkey

6. A Tribunal asked to consider a **Polkey** question must ask not what would have happened, but rather what might have happened. To ask what would have happened asks for a decision, effectively, on the balance of probability, with a straight yes or no answer. The second looks at the matter as one of assessment of chances, within a range running from 0-100%. It is well-established that the latter is the correct approach. If authority were needed, the authorities to which Mr Clarke helpfully refers us in his skeleton argument, provide it. Thus, in the **Ministry**

of Justice v Parry [2013] ICR 311, between paragraphs 41 and 46; in **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691 at paragraph 24; and in **Stonehouse Coaches Limited v Smith** (unreported) UKEATS/0040/13, a decision of 24 October 2013. In paragraph 13, in that latter case, the Appeal Tribunal said this:

> **"Where a person has suffered a loss, in consequence of dismissal, a Tribunal has to determine the extent of that loss. That involves comparing what would have occurred had there been no dismissal when the dismissal took place with what did in fact occur. The first question, what would have occurred, depends on a very great number of factors. They may include factors such as the Tribunal being aware of the illness of the Claimant which would have put him off work. They include the possibility that he would have chosen to leave that employment for any one of a variety of reasons. They include the possibility that the job might no longer have existed, again for a number of reasons. They also, and obviously, include the possibility, where the employer has taken steps to, and has, dismissed the employee for reasons which in substance are good but procedurally are bad, whether if the procedure had been fair there would have been a dismissal. This involves looking at the chance that would have occurred. Thus the chance of a fair dismissal, which is the subject matter of *Polkey*, is one of a number of factors which are likely to limit the extent of any compensatory award."**

7. The way in which the matter was put in **Hill**, at paragraph 24, was this:

> **"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. ... 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."**

The Tribunal decision

8. The Tribunal decision on remedy followed its decision on liability. In the course of that decision, the Tribunal criticised the Respondent for failing to explore in detail information about the effect of county court orders upon the Claimant's immigration status; for failing to deal with a grievance which the Claimant raised about the way his immigration status was treated at the start of September 2010; it had simply failed to deal with it in the light of its own policies. What it described as the real crux of the unfairness was that, on 28 September, the Claimant had told the Respondent that he had made an application for "residency" and that one

of the documents which the Respondent had requested could or was not likely to be provided to the Respondent before 4 October 2010, but it would be forthcoming at some point. The Tribunal did not consider it reasonable that the Respondent should "completely ignore" that letter. As it happened, and as the Tribunal went on to record, on 6 October the Claimant had confirmation of his application for indefinite leave to remain. As it happened, the Respondent made an approach to the Employers Checking Service operated in respect of immigration control by the Borders Agency on 20 October 2010. The Tribunal thought that was easy to do and should have been just as easy at an earlier stage.

9. It concluded that (paragraph 57.5) the relevant manager should have considered obtaining further information from the Claimant and (57.6) that no reasonable employer, knowing that the alternative was dismissal, would have avoided attempts at discussions with the Claimant to obtain relevant information. He could have been approached, said the Tribunal, to obtain some form of reference from his solicitors in order to obtain information from the Employers Checking Service. As it happens we know that, in October, his status as entitled to remain and to work until his application was recognised by the Home Office.

10. What is curious about the case, standing back from it, is that the employer wished, it said, to continue employing the employee and the employee, he said, wished to continue in employment with the employer. The available information to permit that to occur, by removing any doubt there might be about the Claimant's immigration status, which had been the only barrier to his remaining in employment was in fact removed in October. Shortly after, the fixed-term contract upon which he had been employed expired. Yet the employee did not take the steps that he might have done to contact the employer to secure further work, just as the employer did not take the steps it might have done to find out his position before the inevitability of sacking, as it otherwise would have been.

11. That makes the assessment of fact in this case a little curious. One might have thought, against that background, that a conclusion that there was no chance that the Claimant would, absent unfairness, have remained in employment, was a surprising finding. It might, viewed broadly, have been expected that there would have been at least some chance of both possibilities: continuing or not continuing.

12. When it turned, against that background, to look at **Polkey**, the Tribunal posed the test in these terms, "In term of **Polkey** therefore, the reasonableness question is answered by what would have happened". The Tribunal did not set out the law to guide it. It did not state any of the principles, such as to be found in **Parry**, **Hill** or **Stonehouse**. The way in which the question is posed looks as though it is asking for a yes/no answer. It is the language of probability rather than the language of chance.

13. Mr Clarke argues that what the Tribunal was doing there was no more than recognising that **Polkey** is a predictive exercise, one of the features to which the passage in **Hill** drew attention. We find that difficult to accept, because, at paragraph 17.2, having rejected what it describes as a framework based on a counsel of perfection, it said that the question was instead "what would actually have occurred". That looks as though the Tribunal was seeking only one answer rather than examining the potential chance of one of a number of possibilities occurring. It was perhaps understandable that the Tribunal should take that approach. The solicitor acting for the Claimant had constructed a hypothetical scenario, which is outlined at paragraph 9.8. A rival scenario had been adopted by counsel for the Respondent. The Tribunal, presented with two alternative views of the future, may have been seduced into thinking that it had, effectively, to choose one of them. It did not. Its task was to assess the chance of a fair dismissal limiting the amount of compensation to which the Claimant would be entitled. Mr Clarke argues that

the Tribunal here did recognise the chance aspect. It referred to possibility in paragraph 9.2. Its conclusion was that there was a "100% prospect that the Claimant would have been dismissed". Those words are both, appropriately, the language of chance.

14. In the case of **CEX v Lewis Ltd** UKEAT/0013/07, a Judgment of the Appeal Tribunal of 10 August 2007, the Appeal Tribunal presided over by HHJ Burke QC, examined the decision of a Tribunal to hold that there was a 100% chance that, in that case, the employee would have retained his job if he had been treated fairly. As it happened, it came to the conclusion that there were a number of uncertainties which meant that that conclusion could not be sustained. But in dealing with the language "We believe there is a 100% chance", which the Tribunal in that case had adopted, it said this, at paragraph 27:

> **"We agree with Mr Woodhouse [he being Counsel for the Respondent] that, in that sentence, the Tribunal, expressing their conclusions as based on the circumstances they had described, were using *Polkey* language i.e. they were setting out that they had approached the *Polkey* question by considering what was the chance that Mr Lewis would have been retained absent unfairness. The earlier passage on which Ms Stone founded her argument is not, in our judgment, inconsistent with that entirely correct approach. If the Tribunal had not considered the effect of *Polkey* by considering and determining on the evidence the appropriate percentage chance that Mr Lewis would have been retained, there is no reason for their expressing themselves as they did in terms of a 100% chance."**

15. If one were to take the same approach to the reference to 100% here, at paragraph 21, the conclusion would be that the Tribunal was approaching the **Polkey** question properly. Mr Clarke accepted, as he had to, that there were a number of references in paragraph 19 and 20 and, again, in 22 and 23, where the words "would" or "would have" were used. On no occasion was that qualified by the word "chance". On no occasion, save the one to which we have already referred, was there a reference to possibility. But he points out that, in the citation which we have already referred to from **Stonehouse**, the language the judicial member of this Tribunal used then was "would", albeit in a context which made it entirely clear that what was

to be considered was the "chance". Thus the use of the word "would", is dependent on context: it does not necessarily indicate probability as a test to the exclusion of possibility.

16. We have concluded that we must view the Judgment of the Tribunal as a whole. We recognise that Tribunal Judgments may not be finely crafted pieces of legal opinion writing. There may be infelicities of expression. We must resist any inclination to be pernickety and demand too much of individual phrases whilst losing sight of the eloquence of the whole. That said, however, we all initially thought that the language was suggestive of an approach which attempted to decide what would be the one view of the future which would be most likely and did not approach the question of compensation by asking what the chances were of different outcomes.

17. We have listened to what Mr Clarke has said. In conclusion, we have reviewed our initial instincts but they have not changed. In particular, we note the frequent use of the words "would have", unqualified as they are. As Mr Edwards pointed out in the course of argument, the very first reference to **Polkey** is at the start of paragraph 17 in just those terms. As Mr Haywood pointed out in the course of argument, the Tribunal did not, in reviewing **Polkey**, ask what might have happened if all the deficiencies of the employer's approach, which it had identified in its liability decision, had been rectified. That was, surely, the appropriate starting point if the chances of other outcomes were to be considered.

18. We recognise that the factual position here was not an easy one for this Tribunal to resolve. There could be grounds for thinking that the Claimant was not serving himself well. The approach of both parties, following 4 October, is not easy to understand. But, taking into account all that Mr Clarke has urged upon us, we have come to the conclusion that the Tribunal

here did not approach **Polkey** properly but fell into the error of trying to identify with precision what would have happened rather than asking what were the chances that it might.

19. It follows that, on the sole ground which we are asked to consider, we allow the appeal.

Consequence

20. As we have indicated, the Tribunal is to be forgiven, in the circumstances, for adopting the approach it did. Nothing about its Judgment suggests that it had in any sense a closed mind. It may been simply an infelicity of expression which made it appear that it was not properly applying the **Polkey** test. We have only its language to determine whether that is so, but the Tribunal itself will know. We think that, with the reminders through this Judgment of what is the appropriate approach to questions of **Polkey**, this Tribunal will be in the best position, if it can be reassembled, to determine the issue of **Polkey** deduction upon remission. We do not consider it is necessary for the Tribunal to hear further evidence, though the Tribunal should feel free to do so, if it takes a different view, to abide by that view. It is largely a matter of assessment and conclusion and it means that remission to the same Tribunal is not only appropriate but proportional to the sums likely to be involved.

21. Accordingly we allow the appeal and direct that the issue of **Polkey** be remitted to the same Tribunal for further consideration.