Appeal No. UKEAT/0105/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 January 2014

Before

HER HONOUR JUDGE EADY QC

MR M CLANCY

MR T HAYWOOD

RIVERSIDE INDUSTRIAL EQUIPMENT LTD — APPELLANT

MR MICHAEL AUDSLEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JUDY STONE (of Counsel) Instructed by: Gaskell & Walker Solicitors 12 Park Street Bridgend CF31 4HZ
For the Respondent	MR MICHAEL AUDSLEY (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL

(1) Whether the Employment Tribunal misapplied the **Polkey** principle.
Applying **Software 2000 Ltd v Andrews & Ors** [2007] ICR 825, concluded Employment Tribunal's use of the language of probability rather than chance disclosed a possible error of approach. Moreover, the failure to make any **Polkey** reduction was puzzling given the ET's finding of 50% contributory fault on the Claimant's part and the reasons failed to address this and the fact of the final written warning to which the Claimant remained subject at the time of the dismissal

Appeal allowed on this point and the **Polkey** issue remitted to the same ET.

(2) Whether the Employment Tribunal erred in failing to apply the 50% reduction in respect of the Claimant's contributory conduct to all elements of the award made.

Allowing the appeal on this ground also:
The Tribunal approach to the notice pay award and the compensation for the employer's recoupment of training costs disclosed an error in that these were treated as breaches of contract, when no such claim was before the ET. There was simply no explanation for the failure to apply the reduction to the award for loss of statutory rights.

In any event, agreeing with the Respondent, the operation of section 123(6) ERA did not permit the differential treatment of different elements of the compensatory award in this regard: the Tribunal's discretion went to the decision to make any reduction for contributory fault and to the percentage of that reduction, not to its subsequent application.

The Tribunal's Judgment set aside and the appropriate reduction made to each of these elements of the award.

HER HONOUR JUDGE EADY QC

Introduction

1. This is an appeal which went forward to full hearing after a preliminary hearing in front of HHJ Peter Clark (sitting with lay members), on two bases:

(1) Did the Employment Tribunal misapply the **Polkey** principle?

(2) Should the 50% contribution deduction made by the Employment Tribunal have been applied to (a) a pay in lieu of notice award; (b) loss of statutory rights; and (c) the recoupment of training costs award.

I refer to the parties as "the Claimant" and "the Respondent" as they were before the Employment Tribunal below.

2. The appeal is by the Respondent proceedings against the Judgment of the Employment Tribunal under the chairmanship of Employment Judge McEmery, sitting with members, on 19 September 2012; sent with reasons to the parties on 13 November 2012. This was the Employment Tribunal's Judgment on remedy, it having previously held at the liability stage that the Claimant had been unfairly dismissed but had contributed to his dismissal by 50%.

3. The Respondent was represented by its solicitor, Mr Daniel, before the Employment Tribunal, but today appears through Ms Stone of counsel. The Claimant has represented himself throughout and does so today.

4. On the Employment Tribunal's Judgment on remedy, as indicated above, two issues arise on this appeal. First, the Tribunal's decision that there should be no **Polkey** reduction. Second, that, in respect of three elements of the Tribunal's award of compensation, it did not apply the

50% contribution it had found: that is in relation to notice pay, loss of statutory rights, and the recoupment of training costs.

The background facts

5. The Respondent is a company which provides air conditioning to the public and private sector throughout Wales. The Claimant was employed as one of its air conditioning engineers under a contract of employment, which commenced on 2 August 1993 until his dismissal - for what the Respondent contended was gross misconduct - on 12 August 2011.

6. On 3 August 2011 the Claimant had been suspended pending an investigation into five potential acts of misconduct of varying levels of seriousness: (1) unauthorised absence from work that day and on 11 July and 10 May; (2) unauthorised interference with a tracker device fitted to the company vehicle he had used; (3) failure to keep that vehicle clean; (4) smoking in the vehicle; and (5) excessive speeding. On 11 August, there was a disciplinary hearing, at which the Claimant had denied interfering with the tracker device, albeit that he had accepted that the vehicle was dirty and that he had been speeding. On the smoking allegation, he said he thought he could smoke in the vehicle when using it privately, and he also contended that other employees regularly drove too fast. He was found guilty on all five charges and summarily dismissed for gross misconduct, account having been taken of an earlier - still live - final written warning. He appealed against his dismissal. That was rejected.

7. The Employment Tribunal found the dismissal was procedurally unfair. The Claimant had not been supplied with sufficient evidence of the allegations against him. He had not been provided with the vehicle trip reports, which the Tribunal found would have enabled him to show he had not tampered with the tracker device. Moreover, on the Respondent's witnesses' evidence the unauthorised absences charge was not made out. Although the remaining charges

were made out, the Tribunal found that the Respondent would not have dismissed other employees on those charges alone. In those circumstances, the dismissal was both procedurally and substantively unfair, albeit that the Claimant had contributed to his dismissal in relation to the remaining three charges. The Tribunal rejected his evidence about the Respondent's smoking policy and assessed the level of contribution as 50%.

8. At the end of its Judgment on liability the Tribunal, having made the 50% contribution finding, further observed as follows:

> **"64. We were unable to reach a conclusion on whether the claimant would have been dismissed under a fair process. Given the respondent's active desire to discipline and dismiss the claimant because of issues he was raising at work, and given our serious reservations on the manner in which this disciplinary was conducted and in the way the evidence was collated and used, we concluded that it would be speculative for us to assess whether the claimant would have been dismissed under a fair process by a reasonable similar employer. This leaves open the question whether the claimant would have been fairly dismissed at some point in the future, a point which we will consider at remedy."**

The Tribunal's reasons at the remedy stage

9. At the remedy hearing the Employment Tribunal reached the following conclusion:

> **"We had been unable to conclude at Liability whether the Claimant would have been fairly dismissed under a reasonable process. We had concluded that the respondent treated the claimant differently from other members of staff in relation to specific disciplinary allegations – speeding, smoking in the car and car cleanliness; that the disciplinary process had been procedurally unfair and at least partly motivated by the claimant raising concerns about changes to his terms and conditions. We had also concluded that the evidence on the sat-nav tampering allegation was inconsistent, in particular that the print-outs appeared to show that the sat-nav was working, also the lack of photographic evidence of extensive internal damage as alleged by the respondent when the car was retained on his suspension from work. We had been unable to conclude that the claimant would have been fairly dismissed in a reasonable process. We noted that no new evidence was adduced during this hearing, and that the issues raised by Mr Daniel on this issue were unsupported by witness evidence.**
>
> **22. We concluded that it was wholly speculative to determine what would have occurred under a reasonable process as the process followed by the respondent was so flawed. The respondent had not challenged the factual findings at the liability hearing and adduced no new evidence or argument at this Hearing."**

10. As already noted, the Employment Tribunal had previously found that the Claimant had contributed to his dismissal by 50%. It took that finding into account at the remedy stage, holding (para. 3) that it considered it just and equitable to reduce both the basic and

compensatory awards by 50%. It did not apply that reduction, however, to the compensatory award insofar as it related to notice pay, loss of statutory rights, and recoupment of training costs. In the respect of the notice pay and the employer's recoupment of training costs, it appears that the Employment Tribunal approached its task as one of awarding damages for breach of contract, in which case a different approach would indeed have applied. Thus, at para. 4, in relation to notice, the Tribunal says this:

> **"The unchallenged net wage of the claimant was £417.30 (page 56). On his length of service he is entitled to 12 weeks' notice pay, for the period 12th August to 3rd November 2011."**

11. And then, in relation to the recoupment of training costs compensation, at para. 26, it says this:

> **"We also concluded that the claimant should have had to repay the training costs of the course he had attended over 11 months before his dismissal. He had been unfairly dismissed and as found above we did not accept that he would have been dismissed fairly thereafter on these allegations. Any contractual claim that the respondent had to recoup this money was breached by its own actions in dismissing Mr Audsley unfairly. We concluded that the claimant's contract was breached when this sum was recouped from him."**

12. Its reasoning in respect of the treatment of the loss of statutory rights part of the award is, so far as we can see, not provided.

Legal principles

13. The relevant statutory provisions are contained at sections 122 and 123 of the **Employment Rights Act 1996.** In particular, at section 123(6) ERA 1996, it is provided as follows:

> **"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

14. In respect of the **Polkey** part of this ground of appeal, guidance has been laid down by the Employment Appeal Tribunal (Elias J, as he then was, presiding) in the case of **Software 2000 Ltd v Andrews & Ors** [2007] ICR 825, see paras 53 and 54 of that Judgment:

> **"53. The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a Tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the Tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.**
>
> ***Summary.***
>
> **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.**
>
> **(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.**
>
> **(6) ….**
>
> **(7) Having considered the evidence, the Tribunal may determine**
>
> > **(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. …**
> >
> > **(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.**
> >
> > **(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the *O'Donoghue* case.**

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

15. We have also had regard to the subsequent case of **Ministry of Justice v Parry** [2013] ICR 311, Langstaff J presiding, noting, in particular:

(1) It would have been perverse for a tribunal in that case to find that there was no chance that an employer acting fairly would have dismissed when the Claimant had been given a final written warning for broadly similar conduct only 7 months earlier (see para. 44); and

(2) It would be puzzling for someone to be significantly at fault in causing their own dismissal and yet it to be thought that there was no risk of a fair dismissal for that conduct (see para.45).

Legal principles

16. For the Respondent, Ms Stone put forward two arguments on the **Polkey** ground of appeal. First, that the Employment Tribunal had erred by taking the view that it had to reach a simple yes or no decision as to whether the Claimant would have been dismissed in any event. That was a failure to apply **Software 2000** and **Parry**. The Tribunal had failed to reflect on whether there was a possibility that the Claimant would have been dismissed in any event. Secondly, and in the alternative, the Tribunal simply reached a perverse conclusion.

17. On the first argument, she submitted that the Tribunal's focus was on what would have happened not on what was possible. The language of possibility or chance was nowhere to be found. Alternatively, the Tribunal had erred in refusing to make an assessment as to what would have happened on the basis that it was too speculative. She stressed the observation in

Parry to the effect that it would be puzzling if no deduction was made in a case where there was a finding of 50% contribution.

18. On the second argument, she submitted that, by refusing to make any **Polkey** reduction, the Tribunal reached a perverse conclusion. It erred by failing to take into account significant reliable evidence that the dismissal would have been likely to have occurred in any event. In particular: (1) that the Claimant was subject to an earlier final written warning; whether or not the Tribunal had concerns about that warning, the fact was that it existed; and (2) that the Claimant had, on the Tribunal's findings, substantially contributed to his dismissal by 50%. She also set out (see para. 20 her skeleton argument before us) a number of other factors which she said the Tribunal erred in failing to take into account.

19. On the second ground of appeal, the contribution point, Ms Stone noted there was no reduction of 50% contributory fault from the notice pay element, the loss of statutory rights, and the reimbursement of the Employer's recoupment of training costs. On the first and third items, it would seem that the Tribunal had wrongly treated those elements as damages for breach of contract. That was not a claim the ET was dealing with and not a finding it had made on liability. On the loss of statutory rights point, there was just no reasoning provided. She submitted that, as a matter of law, there was no scope for a differential treatment of the different elements of a compensatory award under section 123(3). Having decided the proportion – here, at 50% - the Tribunal was bound to apply that proportion. It was the proportion that was subject to the just and equitable discretion, not the application of it.

20. The Claimant contended that, on the **Polkey** point, the Respondent had had the chance to put in further evidence, having expressly been warned of the Tribunal's concerns at the end of its liability judgment. It had failed to do so. On the evidence, he submitted to us that the

Respondent would never have been able to show that it would have fairly dismissed anyone for those charges, and he pointed to a number of other examples of colleagues who had been treated inconsistently. On this point, the Claimant specifically relied on the Tribunal's finding, at para. 60 of its liability judgment, where it said:

> **"...given the evidence we heard relating to speeding and other behaviour, we felt that double standards were at play. We did not accept that the respondent would have dismissed other employees for speeding, smoking or a dirty car, separately or together."**

21. The Claimant did not feel able to address us substantially on the section 123(6) reduction point, but with some help from the EAT, made the general submission that this provision gives the Employment Tribunal a wide discretion to do what it considers just and equitable and here it was plain that the Employment Tribunal did see these elements – or, at least, the notice pay and recoupment of training costs elements - as different to the other matters and effectively as akin to breaches of contract. Thus, its reasoning was apparent and its decision fell within the proper parameters of its exercise of its discretion.

Discussion and conclusions

22. On the first ground of appeal, the **Polkey** point, we note and take account of the Employment Tribunal's reasoning at paras. 21 and 22 of its remedies judgment, which we have already set out. The difficulty that it plainly faced was that, notwithstanding the concern it had expressed at para. 64 of its Judgment on liability, the Respondent had failed to adduce evidence to address the inconsistent treatment points.

23. On the Employment Tribunal's finding, the Respondent had treated the Claimant differently from other members of staff in respect of specific disciplinary allegations relied on: speeding, smoking in the car and car cleanliness. The Employment Tribunal's concern is apparent: if the Respondent had not acted unfairly - if it had not treated the Claimant

inconsistently with how it had treated other employees - the Tribunal did not feel able to conclude that he would not have kept his employment.

24. At first we were of the view that this was a case falling within the category envisaged at para. 54(3) of the Judgment in the **Software 2000** case. That is, that it was a case where the nature of the evidence on which the employer relies was so unreliable that it was open to the Tribunal to take the view that the whole exercise of seeking to reconstruct what might have been was so riddled with uncertainty that no sensible prediction based on that evidence could properly be made.

25. Moreover, in considering the Respondent's arguments, we reminded ourselves that this is a Judgment of an Employment Tribunal, which cannot expect to be drafted to the highest standards of legal draftmanship but might – particularly given the pressures under which Employment Tribunals operate - contain infelicities, awkwardnesses of expression and apparent inconsistencies. In this regard, we expressly noted the observation made by the President in **Parry,** as follows:

> **"Proper latitude must be given for the infelicity of expression to which all judgments may be subject, but perhaps particularly Tribunal decisions: an over pernickety approach should not be taken to any isolated shortcoming." (para 43)**

26. It is, moreover, trite that an Employment Tribunal's Judgment must be taken overall and viewed as a whole. That said, we were persuaded that in this case, the Employment Tribunal either applied the wrong test or reached a perverse decision in refusing to consider any **Polkey** reduction at all.

27. The language used - what would have happened - is that of probability and not chance. **Polkey** is all about chance.

28. We might have been minded to ignore that, particularly given the Employment Tribunal's findings on liability (e.g. at para. 60 of the liability judgment concerning the inconsistent treatment of other employees), but for the fact that the Employment Tribunal simply failed to address some of the crucial findings of fact in its conclusions on the **Polkey** part of its judgment on remedy. Thus it does not address its finding that there was extant a final written warning (notwithstanding its concerns about the nature and fairness of that warning). Perhaps even more significantly, it fails to consider the impact of its finding of fact that the Claimant was 50% at fault and that a 50% finding of contribution should be made, see in particular, its findings at paragraph 63 of the liability judgment:

> **"...it was also clear to us that the claimant had extensively contributed to his dismissal by continuing to speed when he had received a specific warning against speeding, in failing to keep his car clean and in continuing to smoke in the company vehicle after a specific warning not to. We found his evidence that he believed he could smoke during private use to be unconvincing. We also noted that it was quite possible Mr Audsley had tampered with the tracker in 2010, that this would have caused suspicion in the eyes of the respondent and led to the allegation being raised, albeit unfairly, against him in August 2011. We concluded that the claimant had contributed to his dismissal to the extent of 50%."**

29. We are persuaded that this conclusion just does not sit alongside the Employment Tribunal's refusal to consider any **Polkey** reduction at all. Whether the problem arises from an error in approach or not, it is perverse on its face and we are not assisted by the Tribunal's reasoning.

30. In our judgment, this finding cannot stand and we allow the appeal on this point.

31. On the second ground of appeal, the failing to apply the 50% contribution reduction to notice pay, loss of statutory rights and reimbursement of training costs elements of the award, we agree with Ms Stone. As regards the first and third of those elements, the Employment Tribunal appears to have made a fundamental error in thinking that it was dealing with a breach

of contract claim rather than an unfair dismissal compensatory award. Breach of contract claims were not before it; it had not made findings of breach of contract in its liability judgment, and it should not have treated these elements as if it had.

32. To the extent it was treating them as elements of unfair dismissal compensation, then its differential treatment of these elements is simply unexplained. More substantively, however, we think Ms Stone is right as to the operation of section 123(6). That provision would not give the Employment Tribunal scope for such differentiation in any event. Its discretion under that provision lies in assessing the proportion of the reduction; that is for the Employment Tribunal to decide as to what it considers just and equitable. Once it has made that decision, however, it is bound to apply that reduction to the compensatory award as a whole. The section does not talk in terms of proportions or elements of the award, but envisages one reduction being applied to the whole award. We do not consider that this part of the decision can stand, and also allow the second ground of appeal.

Disposal

33. Having given our judgment in this matter, we then invited further representations from the parties on the question of disposal. On the second ground of appeal, the failure to apply the 50% finding of contribution to the three specific elements of the compensatory award, there was no argument. Both parties considered that this was something which we could and should do ourselves and we accordingly do. We set aside the Tribunal's judgment to the extent it fails to make those reductions and we make those reductions and vary the Tribunal's judgment accordingly.

34. On the first ground of appeal, the **Polkey** point, Ms Stone argued that, whilst accepting that this was not a matter in which the Employment Appeal Tribunal should try to form its own

assessment, the matter should return to a differently constituted Employment Tribunal. This was a case, she submitted, where the Tribunal had shown its hand, where it had failed to apply the right test previously, but where it had made extensive findings of fact which could be relied upon by a differently constituted Employment Tribunal in carrying out the **Polkey** assessment. Mr Audsley did not feel able to make arguments to us on this point.

35. We have reminded ourselves of the guidance given by the Employment Appeal Tribunal in **Sinclair Roche Temperley &Ors v Heard&Anr** [2004] IRLR 763. In particular, we have taken into account questions of proportionality, passage of time, whether there is a real risk the Tribunal have forgotten about the case, whether there is a real risk of bias or partiality and whether there was a risk of pre-judgment or whether the Tribunal's decision was wholly flawed. In our view, this was not a case where the Employment Tribunal's approach was wholly flawed or showed a complete pre-judgment of these issues. We think this is a Tribunal that carried outs its responsibilities diligently and carefully and its findings on the whole reflect that. We have given a clear view as to the approach to be taken on the **Polkey** award, and we have every confidence that this Employment Tribunal can carry that out correctly. Not so much time has passed that the Tribunal would not retain its memory of this case and, given its extensive role in making findings of fact on liability, we think that it is most appropriate and indeed proportionate for this matter to go back to the same Tribunal. So the order will be that, on the **Polkey** point, this matter will go back to the same Employment Tribunal for its re-hearing of that point.