Appeal No. UKEAT/0169/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 November 2014
Judgment handed down on 19 December 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

LONDON BOROUGH OF HILLINGDON — APPELLANT

1) MS ANNE GORMANLEY
2) MR ROBERT GORMANLEY
3) MR GRAHAM GORMANLEY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARCUS PILGERSTORFER (of Counsel) Instructed by: Legal Services Department London Borough of Hillingdon Civic Centre (3E/04) High Street Uxbridge Middlesex UB8 1UW
For the First and Second Respondents	MR MICHAEL SALTER (of Counsel) Instructed by: Messes Matthew Arnold and Baldwin LLP 21 Station Road Watford Hertfordshire WD17 1HT
For the Third Respondent	No appearance or representation by or on behalf of the Third Respondent

SUMMARY

TRANSFER OF UNDERTAKINGS - Entity

TRANSFER OF UNDERTAKINGS - Transfer

UNFAIR DISMISSAL - Compensation

UNFAIR DISMISSAL - Mitigation of loss

UNFAIR DISMISSAL - Polkey deduction

In deciding whether Claimants have been assigned to an organised grouping of employees within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** the Employment Judge failed to consider the organisational structure of the putative transferor and the role of the claimants, including their contractual obligations, within it (**Botzen v Rotterdamsche Droogdok Maatschappij BV** [1985] ECR 519)

In applying **Polkey** the Employment Judge speculated that the putative transferee would not have terminated its contract with the service provider if they had appreciated that TUPE would apply. This was the wrong approach to **Polkey** and was not based on evidence.

The Employment Judge failed to deal with or, if he considered it, to give reasons for rejecting an argument on causation of loss raised by the Respondent.

Insufficient reasons were given for decisions on mitigation of loss.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. The London Borough of Hillingdon ('Hillingdon') appeals from the decisions of Employment Judge Jack by judgment sent to the parties on 28 January 2014 that Anne Gormanley, Robert Gormanley and Graham Gormanley were within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE') assigned to the organised grouping of employees of RG Gormanley Ltd ('RG Ltd'), the former First Respondent to their claims, which had as its principal purpose the carrying out of activities on behalf of Hillingdon, the remaining Respondent. RG Ltd ceased carrying out those activities which were then carried out by Hillingdon. All employees of RG Ltd presented claims to the Employment Tribunal ('ET'). By a judgment sent to the parties on 1 July 2013 on a Pre-Hearing Review ('PHR'), EJ Heal held that TUPE applied to the service provision change which took place on 21 November 2012. After the judgment of EJ Heal, RG Ltd ceased to be a Respondent to the proceedings and Hillingdon settled the claims of all the claimants save for the Gormanleys who will be referred to as 'the Claimants'. Hillingdon did not employ the Claimants. EJ Jack made consequential awards that Hillingdon pay them compensation for unfair and wrongful dismissal. Hillingdon appeals from those awards. Hillingdon also appeals from awards of compensation under TUPE Regulation 15 for failure to inform and consult the Claimants as employees affected by the transfer.

2. The issues to be determined on this appeal are whether EJ Jack erred in:

> 1) holding that the Claimants were assigned to the organised grouping of employees subject to the transfer from RG Ltd to Hillingdon by reason of the service provision change so that pursuant to TUPE Regulation 4(1) their contracts of employment had effect as if originally made with Hillingdon;

2) failing to apply the decision of the House of Lords in **Polkey v A and E Dayton Services Ltd** [1988] ICR 142 and make a reduction in the awards of compensation for unfair dismissal to all the Claimants;

3) failing to hold that the dismissal of Robert and Graham Gormanley for redundancy from RG Ltd on 9 August 2013 broke the chain of causation of their loss by any act of Hillingdon;

4) failing to make relevant findings of fact and reaching perverse decisions on mitigation of loss by Anne and Robert Gormanley.

Hillingdon contended that the error in approach to whether the Claimants were assigned to the grouping of employees subject to the transfer undermined the decision of the EJ that the Council was in breach of its obligations under TUPE Regulation 13(1) and that the Claimants were entitled to awards under Regulation 15.

Outline relevant facts

3. This outline of facts is taken from the judgment of EJ Jack.

4. Anne Gormanley is the wife of Robert. Graham is their son. Robert is a painter and decorator. All the Claimants originally lived in Newcastle. Robert Gormanley moved to the Watford area and his family followed. He carried out work for Three Rivers District Council as a sole trader. In 1997 Robert Gormanley started working for Hillingdon Homes Ltd who at that time managed Hillingdon's housing stock.

5. On 5 April 1999 Robert Gormanley started working for the newly formed RG Ltd. Anne Gormanley was employed as company secretary.

6. In 2005 RG Ltd stopped doing work for Three Rivers but did a limited amount of work for the Watford Community Housing Trust. At that stage most of the work undertaken by RG Ltd was for Hillingdon.

7. On 6 August 2007 Graham Gormanley joined RG Ltd.

8. In 2008 the Watford Community Housing Trust work came to an end. Robert Gormanley looked for other work for RG Ltd but did not succeed. Hillingdon therefore was the only customer of RG Ltd. RG Ltd carried out repair and maintenance work on their housing stock.

9. On 1 April 2009 Robert Gormanley became a director of RG Ltd.

10. The contracts which RG Ltd had with Hillingdon were extended from time to time. On 1 October 2012 Hillingdon extended their contract with RG Ltd to 31 March 2013.

11. On 21 November 2012 'completely out of the blue' Hillingdon told RG Ltd that they were not going to be given any more work. On 23 November 2012 Hillingdon wrote to RG Ltd to say that TUPE did not apply.

12. EJ Jack held at paragraph 45:

> **"That caused Ltd to obtain further advice and on 4 December 2012 Ltd sent an email to the respondent, which appears at page 171, which attached the purchase order extending the contract to 31 March 2013 and listed all employees. Those consisted of 13 employees plus the four members of the Gormanley family, the three claimants and Emma Gormanley, Graham's wife. So they were asserting that 17 employees would transfer over under TUPE."**

13. On 24 December 2012 some employees went to Hillingdon's premises but were turned away by security guards. The Claimants did not go.

14. On 10 January 2013 Robert and Anne Gormanley went on a world cruise returning on 26 April 2013.

15. On 24 May 2013 Hillingdon carried out an internal redundancy exercise. They were proposing to reduce the number of staff in the department dealing with housing repairs. 14 management posts were going to be reduced to 7.

16. Anne Gormanley did not work for or receive pay from RG Ltd after 20 December 2012.

17. All employees of RG Ltd presented claims to the ET.

18. On 4 June 2013 a pre-hearing review was held before EJ Heal. By a judgment sent to the parties on 1 July 2013 EJ Heal held that TUPE applied:

> **"to the service provision change which took place on 21 November 2012 from the First Respondent [RG Ltd] to the Second Respondent [Hillingdon]"**

Whether and to what extent EJ made any other decision binding on EJ Jack was in issue in this appeal.

19. On 1 July 2013 Robert and Graham Gormanley were made redundant by RG Ltd. The effective date of termination of their employment was 9 August 2013. There were paid up to that date.

20. Hillingdon implemented the planned redundancies in their housing maintenance department. The redundancies took effect in October 2013.

21. On 18 November 2013, the ET proceedings against RG Ltd, the former First Respondent, were dismissed upon withdrawal.

22. All the claims were settled prior the hearing before EJ Jack save for those of the Gormanleys.

23. Other findings of EJ Jack relevant to remedy are set out below.

Issue 1: Assignment of Claimants to the organised grouping of employees

24. *Transfer of Undertakings (Protection of Employment) Regulations 2006*

> **"(1) These Regulations apply to-**
>
> **(b) a service provision change, that is a situation in which-**
>
> **(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,**
>
> **and in which the conditions set out in paragraph (3) are satisfied .**
>
> **(3)The conditions referred to in paragraph (1)(b) are that-**
>
> **(a) immediately before the service provision change-**
>
> **(i)there is an organised grouping of workers situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;**
>
> **Regulation 4.**
>
> **(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."**

25. EJ Jack held at paragraph 64 that EJ Heal had decided not only that there was an organised grouping of workers in RG Ltd which has as its principal purpose the carrying out of housing maintenance for Hillingdon but also that the three Claimants were

> **"part of that organised grouping and were therefore subject to the TUPE transfer".**

The reasoning upon which EJ Jack relied to reach this conclusion was:

> **"The question whether there is an organised grouping of employees is not an abstract question. There can only be an organised grouping if there are flesh and blood men and woman who constitute the organised grouping. The learned employment judge was therefore obliged to determine who constituted the organised grouping because the organised grouping could not exist without employees who were part of it. Judge Heal decided that all the claimants were part of the organised grouping carrying out work for the respondent."**

EJ Jack held that he was bound by EJ Heal's decision to find that the three Claimants were part of the organised grouping of employees and therefore subject to the TUPE transfer.

26. Mr Pilgerstorfer contended that EJ Jack erred in holding that the issue of whether Robert, Anne and Graham Gormanley were assigned to the organised grouping of workers within RG Ltd which had as its principal purpose the carrying out of the activities concerned on behalf of Hillingdon had been decided by EJ Heal and was therefore res judicata. When she set out the issues to be determined at the PHR before her EJ Heal stated:

> **"9.7 There was no dispute about this matter: I am not concerned with whether any particular Claimant was assigned to the organised group but I do have to identify if there was an 'organised grouping.''**

The PHR before EJ Heal was to determine the question whether any undertaking or service provision was transferred from RG Ltd to Hillingdon as directed by Regional EJ Gay on 10 May 2013. EJ Jack failed to refer to the direction of Regional EJ Gay pursuant to which the PHR before EJ Heal was held.

27. Mr Pilgerstorfer relied upon the judgment of Lady Smith in the Employment Appeal Tribunal ('EAT'), in **Edinburgh Home-Link Partnership & others v The City of Edinburgh Council and others** UKEATS/0061/11 to contend that the issues of whether there was an organised grouping of workers satisfying the requirements of TUPE Regulation 3(3)(a)(i) and whether the Claimants were assigned to that grouping within the meaning of Regulation 4(1) were separate questions requiring separate consideration. EJ Heal was only concerned with the first question. EJ Jack erred in holding that he was bound by the judgment of EJ Heal to hold that the three Claimants had been assigned to the organised grouping of employees subject to TUPE.

28. Mr Salter rightly submitted that the question of whether there was an organised grouping of workers whose principal purpose is that of carrying out the activities concerned on behalf of a client is closely related to that of whether the Claimants were assigned to that group. This proposition is supported by the observation of Underhill P (as he then was) in paragraph 16 of **Eddie Stobart Ltd v Moreman** [2012] IRLR 356 that the two points self-evidently overlap to a considerable extent.

29. In support of the proposition that EJ Heal had decided both issues, Mr Salter referred to that fact that witnesses before her had given evidence of the percentage of their time they spent on work for Hillingdon. This was relevant to assignment to the grouping and was put in issue. At paragraph 14 EJ Heal held that

> **"From 2008 the first respondent's [RG Ltd's] entire workforce had been dedicated to the contract with the second respondent [Hillingdon]"**

The three remaining Claimants were part of that workforce. Whilst Mr Salter acknowledged that in paragraphs 49 and 50 of her judgment EJ Heal set out the contentions of the parties and

not her conclusions, at paragraph 24 she found that Robert Gormanley spent between 90 and 100% of his time on the Hillingdon contract. The effect of her judgment was that EJ Heal had decided that the three Claimants had been assigned to the organised grouping of employees to which TUPE applied.

30. I accept the submission of Mr Pilgerstorfer that EJ Jack erred in holding that EJ Heal had decided not only was there an organised grouping of employees in RG Ltd whose principal purpose was the carrying out of work for Hillingdon but also that the three remaining Claimants were assigned to that group. EJ Heal clearly regarded her task as that of determining in accordance with the direction of the Regional EJ whether 'any service provision change was transferred from RG Ltd to Hillingdon'. In paragraph 9.7 the EJ stated that she was not concerned with whether any particular claimant was assigned to the 'organised group'. Paragraph 65 of the judgment of EJ Heal headed 'Conclusion' is confined to her decision that there was a service provision change within the meaning of TUPE Regulation 3. The related but distinct issue under Regulation 4 (1) of whether particular claimants were assigned to that grouping of employees was not determined by EJ Heal.

31. In case he was wrong on res judicata, EJ Jack considered and himself determined whether the three Claimants were assigned to the relevant grouping of employees. He held that the three Claimants were each part of a group who worked almost exclusively for Hillingdon and that Robert and Graham did nothing other than work for them. Their other tasks were negligible. EJ Jack relied on this finding to conclude that **Edinburgh Home-Link** and **Eddie Stobart Ltd** relied upon by Mr Pilgerstorfer did not apply. EJ Jack stated that he found as a fact that the Claimants were attached to 'Team Hillingdon'. The EJ did not accept that there was a separate 'Team Gormanley' as submitted by Mr Pilgerstorfer. Accordingly EJ Jack

concluded that all the Claimants were 'TUPE'd' over to Hillingdon. They were all dismissed and entitled to awards for unfair dismissal.

32. Mr Pilgerstorfer contended that EJ Jack erred in his own consideration of whether the three Claimants were assigned to the organised grouping of employees. The EJ failed to make findings of fact relevant to the assignment issue. He made no findings about the organisational structure of RG Ltd and in particular whether a distinction was to be drawn between managerial staff and the tradesman who were only engaged on work for Hillingdon. Robert and Graham Gormanley had searched for other work after the Hillingdon contract was lost and Anne Gormanley had carried out general tasks for the company, not just the Hillingdon contract. Mr Pilgerstorfer contended that if there was only one client at a particular time it was happenstance that the Claimants were principally engaged on work for that client. He submitted that EJ Jack should have considered how the three Claimants work was organised when RG Ltd had more than one client.

33. Mr Pilgerstorfer contended that insofar as EJ Jack made a finding of fact that the Claimants were part of 'Team Hillingdon' such a finding would be perverse. Amongst other matters Mr Pilgerstorfer pointed to the absence of evidence that any actual organisation of the Claimants to that effect had taken place. Counsel contended that the reasoning of Underhill P (as he then was) in paragraph 18 of **Eddie Stobart Ltd** that the provision in TUPE that the organised grouping of employees should have as its principal purpose the carrying out of certain activities within the meaning of Regulation 3(3)(a)(i) required intent or planning to that effect applied not only to that issue but also to whether certain employees were assigned to that group. EJ Jack made no such finding in relation to the three Claimants.

34. Mr Pilgerstorfer contended that EJ Jack erred in failing to consider contractual duties of the three Claimants. As was pointed out by HH Judge Eady QC in **Costain Ltd v Mr Armitage and ERH Communications Ltd** UKEAT/0048/14/DA at paragraph 37, albeit that it might be relevant to look at the amount of time an employee spends in one part of the business, other factors including the terms of the contract showing what the employee can be required to do may also be relevant. The weight to be given to each factor is for the Employment Tribunal. However EJ Jack made no finding about the contractual duties of the three Claimants.

35. Mr Salter accepted that the terms of the contracts of the three Claimants were relevant to ascertaining their duties and whether they were assigned to the grouping of employees. He acknowledged that the duties under those contracts were not referred to in the judgment of EJ Jack and that it would be better if they had been considered. However that issue of whether a Claimant was assigned to an organised grouping of employees is one of fact for the ET. On the facts before him, EJ Jack had reached a decision which was open to him on the evidence.

36. In my judgment EJ Jack erred in failing to consider the contractual duties of each Claimant and their role in the organisational framework of RG Ltd. The judgment of the CJEU in **Botzen v Rotterdamsche Droogdok Maatschappij BV** [1985] ECR 519 remains the source of European Law guidance on the meaning of 'assigned to' a part of an understanding or now to an organised grouping of employees for the purposes of TUPE. Maatschappij BV claimed that

> **"13 …only employees working full-time or substantially full-time in the transferred part of the understanding are covered by the transfer of employment relationships ….**
>
> **14 On the other hand , the Commission considers that the only decisive criterion regarding the transfer of employees ' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organizational framework within which their employment relationship took effect ."**

The CJEU held that the Commission's view must be upheld. It is therefore material to consider the way in which an organisation is structured and the Claimant's role within it in order to determine whether for the purposes of TUPE he or she is assigned to the organised grouping of employees carrying out relevant activities.

37. An important source of information on an employee's role in an organisation is likely to be their contract of employment. The job description or statement of duties is likely to inform a decision as to whether their duties are confined to certain activities or whether they include more general duties. In the case under appeal, Robert and Graham Gormanley continued to be employed by RG Ltd for more than 6 months after the Hillingdon contract had been lost. Mr Pilgerstorfer contended that the implication is that if they had found work for RG Ltd they would have continued in employment. In my judgment this illustrates the importance of considering what duties the Claimants could be called upon to perform under their contracts as well as those which they were actually performing at a particular moment in time.

38. EJ Jack failed to consider the organisational framework within which the employment relationships of the Claimants took effect. He did not make adequate findings of fact regarding the organisation of RG Ltd and their roles within it. EJ Jack stated at paragraph 38 that the contract of employment of Robert Gormanley was in the bundle of documents. However, he did not refer to its terms. Similarly with Graham Gormanley. At paragraph 69 EJ Jack referred to their tasks other than work for Hillingdon as 'negligible'. This is a reference to the way in which they worked at a particular time and not to their obligations under their contracts. EJ Jack stated that Anne Gormanley was employed as company secretary, that these tasks were extremely limited and that her work was almost exclusively for customers of RG Ltd. He did not consider whether, if there had been more than one customer as there had been in the past,

Anne Gormanley's duties would have included administration for those customers or whether she was principally engaged to work on the Hillingdon contract.

39. EJ Jack erred in holding that he was bound by the decision of EJ Heal to hold that the three Claimants had been assigned to the grouping of employees subject to the transfer to Hillingdon. Further he erred in reaching his own decision on the issue in that he failed to consider and take into account the material factor referred to in **Botzen**, the organisational structure within which the employment relationship took effect. Whilst whether an employee is so assigned is a matter for the ET, all relevant material is to be considered, including, in my judgment in this case, the duties the Claimants could be called upon to perform under their contracts of employment. Accordingly the decision of EJ Jack that each of the remaining three Claimants was assigned to the organised grouping of employees working on the Hillingdon contract is set aside.

Issue 2: Polkey

40. EJ Jack decided not to make a reduction in the awards of compensation for unfair dismissal by applying the principle in **Polkey v A and E Dayton Services Ltd** [1998] AC 344. Mr Pilgerstorfer contended that EJ Jack adopted a fundamentally incorrect approach in paragraph 72 by considering what would have happened if Hillingdon had not decided to terminate their contract with RG Ltd. The correct approach was to consider what would have happened but for the unfair dismissal not but for the termination by Hillingdon of their contract with RG Ltd. EJ Jack should have considered whether a fair dismissal was likely to have occurred in any event on the transfer and whether, if not immediately, the Claimants' employment would have come to an end in due course such as the result of the mid 2013

redundancy process. EJ Jack heard evidence on the issues relevant to the correct approach but not on the approach which he adopted.

41. Mr Pilgerstorfer pointed out that the EJ based his rejection of the **Polkey** arguments on the finding, incorrectly described as a 'finding of fact' that had Hillingdon realised that TUPE applied they would not have terminated the contract with RG Ltd. Applying this approach, no TUPE transfer would have taken place and the Claimants' contracts of employment would not have transferred to Hillingdon. Further, the 'finding of fact' that had Hillingdon realised that TUPE would apply they would not have terminated the contract with RG Ltd was based on pure speculation. No evidence or submissions were made to the EJ on the assumptions he made to reach that conclusion.

42. Mr Pilgerstorfer submitted that whilst the EJ in paragraph 72 embarked upon deciding an alternative basis for rejecting the **Polkey** submission: whether, if the Claimants had transferred to Hillingdon they would have been dismissed in the redundancy exercise in mid 2013, the second **Polkey** argument identified in paragraph 12, he did not decide the issue. Having observed that 'there would obviously be a chance of their being made redundant, that chance may well be quite small' he concluded by saying 'I do not need to determine that issue'. Mr Pilgerstorfer contended that applying **Thornett v Scope** [2007] IRLR 155**, Software 2000 Ltd v Andrews** [2007] 568 and **Eversheds Legal Services Ltd v De Belin** [2011] IRLR 448 the Employment Judge should have decided the issue and assessed what reduction should be made for the chance that the Claimants would have been made redundant in any event. Further, the Employment Judge erred by speculating, without any evidential basis for doing so, that their seniority would be taken into account in the redundancy exercise. The redundancy Business

Proposal document before the Tribunal made it clear that 'Appointments will only be made on merit'. The evidence before him did not support the conclusion that:

> **"Because of the seniority of Robert and Anne it is likely that they would receive some form of advantage to reflect their seniority coming over from Ltd".**

43. Further Mr Pilgerstorfer contended that the EJ failed to consider at all the first **Polkey** argument identified in paragraph 12, that the Claimants would have been fairly made redundant on transfer. The transfer would immediately have created a redundancy situation in the relevant department at Hillingdon. The May 2013 Hillingdon redundancy consultation document shows that management posts were being reduced. If the contracts of the Claimants had been transferred to Hillingdon that would have increased the numbers of management staff who were not required.

44. Mr Salter wisely did not seek to support the rejection of the **Polkey** argument on the basis relied upon by EJ Jack. However he contended that even if EJ Jack adopted the wrong approach, he reached the only conclusion that was open to him.

45. Mr Pilgerstorfer was right to submit that EJ Jack did not adopt the correct approach to the **Polkey** question. In paragraph 72 EJ Jack correctly directed himself to consider what the position would have been if there had been no unfair dismissal. It is at this point EJ Jack went wrong. The correct approach in the normal case is, as explained by Elias P (as he then was) in **Software 2000,** to 'assess for how long the employee would have been employed but for the dismissal'[54(1)]. The EJ did not assess what would have happened if there had been no dismissal by Hillingdon on 24th December 2012, as he had found in paragraph 80. He approached the **Polkey** issue by posing a different, and erroneous question; what would have happened if Hillingdon had not terminated their contract with RG Ltd. Mr Pilgerstorfer rightly

pointed out that if Hillingdon had not terminated their contract with RG Ltd there would have been no service provision change, TUPE would not have applied and the contracts of employment would not have transferred to Hillingdon. Further, the basis upon which the EJ dealt with the **Polkey** argument, that the Claimants would not have been dismissed because they would have continued to be employed by RG Ltd working on the Hillingdon contract, was inconsistent with his finding in paragraph 80 that each Claimant was dismissed by Hillingdon on 24 December 2012.

46. In my respectful judgment, the erroneous approach of the EJ to the **Polkey** question was based on pure speculation. Not uncommonly there is uncertainty of what may have happened if a claimant had not been unfairly dismissed. In **Eversheds Legal Services v. De Belin** [2011] 1RLR 448, Underhill P (as he then was) considered the approach to be taken in such a situation. He observed in paragraph 45 that 'Speculative' is not a dyslogistic term in this field.' and referred to **Thornett v Scope [2007] IRLR 155** in which Pill LJ said:

> **"36. …Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and will inevitably involve a speculative element. Judges and tribunals are very familiar with making predictions on the evidence they have heard."**

Prediction must be based on evidence. Unlike this case, in **Eversheds Legal Services Ltd** there was evidence before the Tribunal on which they were held to be required to make an assessment of the likelihood of employment continuing.

47. The decision of EJ Jack on the **Polkey** issue was based on a 'finding of fact' that if Hillingdon had known that TUPE applied they would not have terminated RG Ltd's contract on 21 November 2012. This was because the financial consequences to Hillingdon would have been disastrous. The EJ speculated that the costs of the proceedings before the ET were 'probably going to be over £2,000,000'. EJ Jack acknowledged that he did not know the

amount of the settlements with the other 14 employees as they were confidential. He did not know the legal costs of the proceedings which he referred to as substantial notwithstanding that the hearing before him had occupied two days and that before EJ Heal one day. EJ Jack referred to a potential claim by RG Ltd for loss of business between 21 November 2012 and 31 March 2013 without any evidence about this or how much such a claim would be worth. Nor did he know the reasons why Hillingdon terminated the contract prematurely or the comparative costs of continuing the contract with RG Ltd and taking the work back in-house. Whilst tribunals frequently have to make predictions about future loss, there has to be some evidential basis for their decisions. Reasonable common sense inferences can be drawn from that evidence. In this case the EJ did not refer to any evidence to found his 'finding of fact' in paragraph 72. In my judgment his decision on the **Polkey** issue was based on pure speculation.

48. The EJ embarked on an alternative basis for rejecting the **Polkey** argument in which he considered whether, if the Claimants were 'TUPE'd' over to Hillingdon they would have been dismissed in the mid-2013 redundancy exercise. He expressly did not determine the issue. I agree with Mr Pilgerstorfer's submission that the EJ erred in failing to do so. If EJ Jack had decided the issue, even on his own findings there was a chance that the Claimants would have been made redundant and some percentage reduction in the award of compensation for future loss should have been made. However, those findings were based on speculation unsupported by evidence that the Claimants' seniority would have been an advantage to them in the redundancy selection process.

49. The EJ further erred in failing to consider, or if he did so, to give reasons for rejecting the first **Polkey** argument advanced on behalf of Hillingdon: that the Claimants would have

been dismissed at the time of the transfer as there were already more management staff in the relevant department than were required.

50. Underhill P in **Eversheds** observed that tribunals sometimes fail to pay or pay insufficient regard to the principle in the final sentence of point (7) in paragraph 54 of **Software.** In my judgment it is not apparent the EJ Jack had regard to the principle that a finding that employment would continue indefinitely should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

51. Mr Salter's bold attempt to preserve the rejection of the **Polkey** argument is rejected. The approach of EJ Jack to the **Polkey** reduction argument was fundamentally flawed. It cannot be said that had the correct approach been taken on the evidence the **Polkey** argument would have been rejected and no reduction made in compensation for loss of future earnings.

Issue 3: Causation of loss: Robert and Graham Gormanley

52. Mr Pilgerstorfer contended that EJ Jack erred by failing to consider and, if he rejected it, to give reasons for rejecting the submission that dismissal by Hillingdon was not the cause of financial loss to Robert and Graham Gormanley after 9 August 2013. EJ Jack had made a finding that all three Claimants had been dismissed on 24 December 2012. This post-dated the TUPE transfer which was found to be on 21 November 2012. EJ Jack found that the two Claimants continued to work for RG Ltd after December 2012. On 1 July 2013 they were made redundant by RG Ltd with effect from 9 August 2013. They had suffered no financial loss until that date. The reason they suffered loss from that date was because they had been made redundant by RG Ltd as that company had been unable to obtain new work. Mr Pilgerstorfer drew attention to the fact that EJ Jack made no reference to this argument in his reasons.

53. Mr Salter submitted that causation was a matter of fact for the EJ. His conclusion that loss until retirement ages in respect of Robert and Anne Gormanley and until May 2014 in the case of Graham Gormanley was open to EJ Jack on the evidence.

54. EJ Jack did not refer to, let alone give reasons for, rejecting the argument that the financial losses of Robert and Graham Gormanley arose from RG Ltd dismissing them for redundancy on 1 July 2013 with effect from 9 August 2013 and not because of any dismissal from Hillingdon on 24 December 2012. It may be that EJ Jack did not accept the causation argument advanced by Mr Pilgerstorfer because of his conclusion on the **Polkey** argument which I have held to be erroneous in law and founded on speculation that Hillingdon would have continued their contract with RG Ltd, presumably for an indefinite period. However it would be wrong for me to speculate on why EJ Jack did not deal with the causation argument. He did not and the judgment in this regard is not **Meek** compliant (**Meek v City of Birmingham District Council** [1987] IRLR 250).

Issue 4: Mitigation of loss – Anne and Robert Gormanley

55. Mr Pilgerstorfer contended that in light of the finding of EJ Jack in paragraph 73 that Anne Gormanley had made no efforts to find work he should have found that she failed to mitigate her loss. Counsel also contended that EJ Jack failed to refer to relevant evidence adduced by Hillingdon on mitigation or give reasons for concluding, if he did so, that it was reasonable for Anne Gormanley not to apply for the jobs referred to by them.

56. Mr Pilgerstorfer submitted that EJ Jack failed to consider adequately or to give reasons for his conclusion that Robert Gormanley could only mitigate his loss to the extent of £15,000 per annum. EJ Jack made no findings of fact as to what efforts Robert Gormanley had made to

mitigate his loss. It was said that the observation in paragraph 75 that 'the jobs which were identified by the respondent show he would not be suitable for any jobs earning more than £25,000' was in itself questionable as being unsupported by findings of fact. In any event EJ Jack gave no explanation for deducting a further £10,000 per annum from that figure.

57. Mr Salter submitted that the decisions on mitigation were open to EJ Jack on the evidence.

58. EJ Jack referred to schedules of losses prepared for Anne and Robert Gormanley. These were before him but not in the Employment Appeal Tribunal Bundle. However, statements from the Claimants, a cover sheet listing the job advertisements which were put before EJ Jack by Hillingdon and some of those advertisements were included. No notes of evidence on mitigation were obtained for the appeal.

59. The finding relied upon by Mr Pilgerstorfer that Anne Gormanley had not made any efforts to find work has to be read in context. In my judgment this is clearly a reference to the period until after the relocation of the Gormanleys to Newcastle. It appears from paragraph 74 that EJ Jack awarded Anne Gormanley compensation in respect of the period from 7 December 2013 to 7 December 2017 on the basis that in that period she should be able to obtain work earning £17,500 per annum. EJ Jack referred to the fact that all the jobs identified by Hillingdon were at very considerably lower salaries than the £36,400 per annum Anne Gormanley was earning with RG Ltd. However, the EJ failed to set out the factual basis for concluding that the likely figure for Anne Gormanley's earnings was about half the amount she had previously earned. Her statement refers to enquiries and applications she made to obtain employment but does not set out the salaries of those posts. The decision that Anne Gormanley

could mitigate her loss but only to the extent of £17,500 per annum is, in my judgment, insufficiently explained. Although EJ Jack referred to the salaries of jobs identified by Hillingdon being considerably lower than Anne Gormanley's earnings with RG Ltd, he made no findings as to what those salaries were.

60. The level of earnings EJ Jack concluded that Robert Gormanley could earn in mitigation of his loss was based on his suspicion that £25,000 was 'hopelessly optimistic' because he 'does not have any particular academic skills or any formal academic skills'. EJ Jack did not set out the factual basis for his judgment that Robert Gormanley was unlikely to find work which would bring him more than £15,000 per annum. There was no finding of fact as to efforts made by Robert Gormanley to find work after the move to Newcastle. None are referred to in his statement which is in the bundle before the Employment Appeal Tribunal.

61. The decision of EJ Jack that Robert Gormanley could only mitigate his loss to the extent of £15,000 is insufficiently reasoned and is not **Meek** compliant.

Disposal

62. The appeal succeeds. The decisions of the EJ on the four issues which are the subject of this appeal were reached in error of law and/or insufficiently reasoned. The decisions that:

1) Anne, Robert and Graham Gormanley were, within the meaning of TUPE Regulation 4(1), assigned to the organised grouping of employees subject to the service provision change from RG Ltd to Hillingdon on 21 November 2012,

2) there should be no reduction under the principle in **Polkey v A and E Dayton Services Ltd** [1998] AC 344 from the awards of compensation for unfair dismissal to each of the three Claimants,

3) inferentially the unfair dismissal of Robert and Graham Gormanley caused loss which extended beyond their dismissal by RG Ltd for redundancy taking effect on 9 August 2013.

4) Anne and Robert Gormanley could only mitigate their loss of earnings to the extent of £17,500 and £15,000 respectively

are set aside. As a consequence of setting aside the decision of the EJ that the Claimants were assigned to the organised grouping of employees, the decision that Hillingdon failed in its duties under TUPE Regulation 13 in respect of them is also set aside.

63. The matter is remitted to an Employment Tribunal, an Employment Judge sitting alone, to determine:

1) whether each of Anne, Robert and Graham Gormanley were, within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** Regulation 4(1) assigned to the organised grouping of employees subject to the service provision change from RG Ltd to Hillingdon on 21 November 2012;

2) whether each of Anne, Robert and Graham Gormanley were 'affected employees' within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** Regulation 13(1);

3) whether there should be a reduction in the compensation awarded to each of the Claimants for unfair dismissal under the principle in **Polkey v AE Dayton Services Ltd** [1998] AC 344;

4) whether the unfair dismissal of Robert and Graham Gormanley on 24 December 2012 caused them loss of earnings after 9 August 2013;

5) whether and to what extent Anne and Robert Gormanley took reasonable steps to mitigate their loss and what sums are to be taken into account to reflect reasonable mitigation.

64. Mr Salter submitted that the matter should be remitted to EJ Jack as he could 'slot in' findings on the organisation of RG Ltd and on the contractual duties of the Claimants into his original findings and 'factor' them into his decision. Such an approach would not, in my judgment, inspire confidence that the next decision will be approached with an open mind. The original Employment Judge has been found to have erred in deciding a number of issues including the determinative issue of whether the Claimants were assigned to the relevant organised grouping of employees. This matter will be remitted to a different Employment Judge for determination of the issues listed above.

65. Mr Pilgerstorfer has applied for an order that the Claimants pay to Hillingdon the sum of £1,600, the fees paid for bringing this appeal. The application is resisted. It is said that the finding that the EJ erred in holding that the Claimants were assigned employees was made on a basis which was not in the Notice of Appeal or the skeleton argument on behalf of Hillingdon but was developed after being raised by the Employment Appeal Tribunal at the hearing.

66. The **Employment Appeal Tribunal Rules 1993 (as amended)** provide:

> **"34A(2A) If the Appeal Tribunal allows an appeal, in full or in part, it may make a costs order against the respondent specifying the respondent pay to the appellant an amount no greater than any fee paid by the appellant under a notice issued by the Lord Chancellor"**

Langstaff P gave guidance on the application of Rule 34A(2A) in **Look Ahead Housing v Chetty** UKEAT/0037/14. At paragraph 53 he held:

> **"For the benefit of other cases which may follow, it seems to me that in a case in which an appeal is brought which is entirely rejected, there is no basis for any payment by the successful party to the Appellant. Where there is an appeal which is partly successful, all will depend upon the particular facts. The Rule does not permit the payment of the actual costs of litigation, apart from fees, from one party to another. What the court centrally has to assess is whether it was necessary to incur the expense in order to bring the appeal – this includes asking whether the appeal, as in the present case, could have been avoided by the Appellant taking reasonable steps, or was made more likely to proceed by the behaviour of the Respondent to it; it should then recognise the fact, if it be the case, that an appeal has largely failed or for that matter largely succeed in deciding, in its discretion, exercised reasonably, whether it should award the full extent of the payment made by way of fees, or whether it should moderate that amount to a reasonable extent. A reasonable extent includes making no award at all, though in circumstances in which an appeal has been partly successful this would have to be carefully justified and is likely to be rare."**

67. Hillingdon succeeded in challenging not only the basis on which the EJ decided that the Claimants' contracts transferred to Hillingdon but also in three respects the compensation awarded to them. **Botzen** was drawn to the attention of counsel during the hearing who then addressed the court on the issues raised. Points derived from that authority formed a part of one ground on which the appeal succeeded. The decision of the EJ was set aside on all the decisions under appeal. In my judgment the decision as to whether the Claimants should pay Hillingdon the sum of £1,600 is unaffected by their not succeeding in obtaining a substituted order dismissing the claims. They succeeded in overturning all the decisions of Employment Judge Jack. In accordance with the guidance in **Look Ahead**, Anne, Robert and Graham Gormanley are to pay Hillingdon the sum of £1,600. They are jointly and severally liable for that sum.