Appeal No. UKEATS/0040/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 24 October 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

STONEHOUSE COACHES LIMITED — APPELLANT

MR HUGH SMITH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR A GRAVELLE (Solicitor) Messrs. Beltrami & Co. Ltd, Solicitors 83 Carlton Place Glasgow G5 9TD
For the Respondent	No appearance or representation on behalf of the Respondent

SUMMARY

UNFAIR DISMISSAL – Polkey deduction

The dismissal of a bus driver for using foul language, in front of the schoolchildren he was driving, towards a female passenger was held unfair because the proprietor of the bus undertaking had summarily dismissed the Claimant without an adequate hearing. Four weeks loss of wages was awarded as compensation for future loss, since the Employment Tribunal regarded it as 100% likely there would then have been a fair dismissal. The Employment Judge rejected evidence from other passengers relating to an earlier incident as irrelevant. The Respondent appealed arguing she should not have done so and that the assessment of **Polkey** losses should have taken it into account.

Held: the appeal was misconceived. The focus on a claim of unfair dismissal is on the employer's reasoning and behaviour at the time of dismissal: the complaints from the other passengers first surfaced months later. **Polkey** involves an assessment of the chances of future dismissal, which involves the question whether there may be a fair dismissal and, if so, when. Here the EJ had assessed four weeks: within that period nothing was known of the later complaints, so they could make no difference to the result.

Observations made about the proper approach to "Polkey" assessments.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a Judgment which was made after a hearing on 30 November 2012 by Judge Claire McManus, in Glasgow, Reasons for which were delivered on 8 April 2013 and subsequently confirmed on review on 14 June 2013. She found that the Claimant had been unfairly dismissed. Compensation was awarded. The composition of the award is material to this appeal. The total was £6,069. That included a basic award of £5,085 and a compensatory award of £984. The compensatory award covered a four-week period of loss of earnings. The appeal by the employer against those findings rests upon the refusal of the Judge to admit witness evidence from two witnesses on the basis that the evidence was not relevant to the issues before the Tribunal.

2. The underlying facts were these. The Claimant was driver of a school bus in Lanarkshire, who had had ten years of service with the Respondent when he was dismissed on 14 May 2012. He was dismissed because of an allegation that on 11 May 2012 he had called a female passenger "a fucking stupid bitch". He was challenged with that by his employer, Mr Cutmore on his bus on the day, Mr Cutmore evidently believing that that had occurred. A disciplinary hearing was arranged, but the Claimant developed serious heart symptoms, having previously suffered a heart attack, and was given notice without there being a hearing. Before the Tribunal could consider the fairness of the dismissal, it was asserted that the evidence of a Fiona Murphy and a Claire Falconer would be relevant. Their evidence related to an earlier incident in September 2011. There was an allegation on that occasion that the Claimant had used offensive language and sworn in front of schoolchildren thereby causing offence.

3. The evidence provided by Fiona Murphy in a statement dated 29 October 2012 was that she was waiting at a bus stop when a bus driven by the Claimant arrived. She referred to him

being “the usual bad-tempered and unhelpful Mr Smith”. Her allegation was that because some children had not been moving quickly enough into the bus he forcibly moved one of them into a seat. She, Mrs Murphy, approached him, asking what he was doing, and was told by Mr Smith and another official in the employment of the Respondent to leave the bus because she was not allowed on it. That statement says nothing about the propensity of Mr Smith to use foul language.

4. The statement of Claire Falconer records that she witnessed Mrs Murphy’s account and agreed with it.

5. It is suggested that the Tribunal erred in law in reaching the decision it did in failing or refusing to admit that evidence for consideration. There are three bases for this submission advanced by Mr Gravelle on behalf of the employer. The Claimant did not attend at this appeal. I have, however, to evaluate the reasons advanced by Mr Gravelle.

6. First, he says that the Tribunal was in error of law because the evidence was relevant to the question whether the dismissal on 14 May was fair or unfair. Secondly, he submits that the evidence was relevant to the assessment of compensation in accordance with the **Polkey** principles. Thirdly, he argues that, irrespective of whether the evidence was admitted, the Employment Tribunal misapplied the test in **Polkey.**

The Tribunal’s conclusions

7. Since these submissions argue that the Tribunal, in reaching the conclusions it did, erred in law, one looks to see what those conclusions were and why, briefly, they were reached. The Tribunal concluded that Mr Cutmore had a genuine belief in the guilt of the Claimant. It accepted that he had reasonable grounds for that belief. He had been phoned up by the woman

concerned. Thirdly, the Tribunal concluded that there had been a reasonable extent of investigation. It separated the question of extent of an investigation, amounting to a decision as to its substance, from the process of investigation. It found the process to have been unfair. I shall come to that in a moment. But on the basis that it was looking at the fourfold test arising out of cases such as **Iceland Frozen Foods v Jones** [1983] ICR 17, guiding a Tribunal as to how it should apply the statutory test in section 98 of the **Employment Rights Act 1996**, namely was there a genuine belief on reasonable grounds after reasonable investigation such that the reason to dismiss fell within the range of reasonable responses open to an employer, the Tribunal concluded that swearing in these terms at a passenger was gross misconduct. Prior conduct was irrelevant. The Tribunal concluded, however, that the way in which Mr Cutmore dealt with the matter was unfair. That is because he came on to the bus driven by the Claimant and put the allegations to him. He did not do so in a measured, calm, fair or reasonable way but behaved in a very aggressive manner. He took the complainant's version of events as being the fact. As it happens, the Tribunal concluded that as a matter of fact it was not so. The swear words had not been said. But nonetheless it was thought that Mr Cutmore believed that they had been. He dismissed without there being any disciplinary hearing. There was no fair or reasonable process and accordingly, for that reason, the dismissal was unfair.

8. Because it had decided that the employer could have dismissed for gross misconduct and would have done so if it thought that there had been swearing as described, and since the Tribunal thought that to use such swear words to a member of the public fell within the range of responses, it concluded that if the matter had been approached fairly the Claimant would have been dismissed. It said, at paragraph 49:

> **"The Tribunal accepted that had the decision to dismiss not been made on the basis of cumulative warnings the conduct... which was believed by Mr Cutmore to have occurred would have led to a decision to dismiss for the incident alone, which would have been within the band of reasonable responses for an employer to take. The Tribunal also accepted that the Claimant would probably have never been able to attend a meeting with Mr Cutmore to**

discuss the situation and that it would not have been reasonable for that situation to continue indefinitely. A reasonable timescale for disciplinary matters to have been concluded would have been four weeks from the date when the dismissal actually took effect. The Tribunal considered that Mr Cutmore would then still have made the decision to dismiss had such period been allowed to elapse eg to enable the Claimant to give his written version of events. The Tribunal considered that Mr Cutmore would have continued to believe the version of events as set out by William Smith..."

William Smith being the person who had made a complaint on behalf of Kirsty Smith, the woman concerned.

9. Accordingly, in summary, the Tribunal concluded that if their procedure had been adopted, then after four weeks there would have been a fair dismissal. I comment that these conclusions may be seen as somewhat favourable to the employer. That perhaps is because of the unfortunate separation of what the Judge called the extent of the investigation, which she considered reasonable, from the procedure, which she did not. I would urge Tribunals to regard, as many do, questions of the procedure adopted to investigate as being part and parcel of the question whether an investigation is or is not reasonable within the general approach of cases such as **Iceland Frozen Foods v Jones**. The reason for this is clear. Procedure is not a question of formalism. It may often seem that way, but the form of an investigation is often critical to its purpose in unravelling what has occurred. A fair procedure generally involves hearing from a person accused of misconduct and taking into account such further enquiries as he may suggest. Without listening to his side of the account, enquiries cannot be made to know whether it might be acceptable. This is particularly the case in a situation like this when an issue of disputed fact might lead to enquiries, for instance, amongst other witnesses of the event. The Claimant put forward an alternative case as to what had occurred. There may well have been others who might have been able to speak in support of that. The fairness of procedure is critical to whether or not the facts are properly established. To separate off the substance of the investigation and consider it reasonable is to ignore the influence that a fair procedure has upon the extent of any investigation and its nature. The two run together. They

are not distinct. Procedure is not a matter of form for form's sake, but it is critical to justice. However, these observations are by the way in this case for there is no cross-appeal by the Claimant, as there might have been.

10. I turn to the reasons why the Judge rejected the application to adduce the evidence of Murphy and Falconer. First, the Tribunal found that Mr Cutmore did not have that material before him when he made the decision to dismiss. That is obvious. The letters were dated 29 October 2012. The dismissal was five months' earlier. Second, it took the view that the statements could not, relevantly, affect credibility in any way which was material to its decision. It concluded that it would not have been materially assisted in its assessment of the Claimant's credibility or that of Mr Cutmore, and that credibility of witnesses was in any event not an "appropriate consideration in the application of **Polkey**".

Discussion

11. The appeal is completely misconceived. The Tribunal was plainly right to reject the evidence of Falconer and Murphy as having any relevance to the fairness of the dismissal. The dismissal which falls for consideration under section 98 of the Employment Rights Act is the dismissal which actually occurred, not one which might, in the light of subsequent events, have occurred. The actions which a Tribunal has to consider are those of the employer. The "credibility" of the Claimant is in general irrelevant to the decision of the employer especially where the material arises after the event and plays no actual part in the decision. It is for the employer to explain why it took the decision it took and for the Tribunal, having had that explanation established such that the reason for dismissal is proved, to evaluate the fairness of it. In this case, that cannot conceivably involve any question of the credibility of the Claimant. Nor is it clear how the account of Murphy or Falconer could have affected the credibility of Mr Cutmore. Neither account, as set out on 29 October, deals in any event with swearing. A

subsequent statement was made by Fiona Murphy on 19 April 2013. In this, she gave further unspecific details of the incident but, apart from an unspecific account that the Claimant was "shouting, bawling and swearing", details rough handling by him of a child (in effect an assault), but does not suggest that the Claimant used deliberately offensive language of the type for which he was dismissed. It is capable of showing that the Claimant was rough, aggressive, unpleasant and unco-operative with parents and children. The relevance of that, in a situation in which the Tribunal accepted that Mr Cutmore believed that Mr Smith had used the words attributed to him, is difficult to see.

12. Mr Gravelle accepted that the first ground was perhaps his weakest. Secondly, he argued that the evidence, if admitted, would be relevant to the question of **Polkey**. The Tribunal did not have the benefit of the further statement to which I have just referred, since that was prepared after the hearing. The issue on **Polkey** needs to be properly understood. Once there is a finding of unfair dismissal, a question of compensation under section 123 of the **Employment Rights Act 1996** arises. Subject only to questions of contributory fault (a matter which has conspicuously not been raised before me on this appeal) the question is one of compensating the Claimant for that which he has lost. The award is to be "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

13. "Polkey" awards have perhaps developed a mystique of their own, which they do not entirely justify. It should be remembered that the principle is part of the general principle of assessment of future loss. 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. Here, the Tribunal took the view that the chance was to be placed at 100% on the sliding scale, as it has been called, which runs from 0-100% (see the words of Judge Peter Clark in **Countrywide Freight Group v Hobbs** UKEAT 0582/11, a decision of 9 May 2012, paragraphs 10 and 11). Where a Tribunal is satisfied that there would have been a dismissal if a fair procedure had been adopted, the compensatory award cannot extend further than the date upon which the Tribunal predicts that would have happened. Here, Judge McManus decided that a "reasonable timescale" would have been four weeks. Although the issue was not one of reasonableness but of prediction, that is what I think she meant to say and is entirely appropriate. There is always likely to be a time gap between an actual decision to dismiss, reached unfairly by unfair procedure, and a decision which would or might have been reached following a fair procedure. That gap is a period of time during which the employee would remain in employment and for which the employee is entitled to be compensated. The issue on appeal is the effect of the evidence of Murphy and Falconer upon the assessment, therefore, of that period of time. I reject the argument that the evidence was relevant to that. Mr Gravelle sought to suggest that the *post facto* evidence had relevance. The Employment Tribunal would have been entitled to take it into account in assessing the four-week period. It might have

moved what had taken place from conduct into gross misconduct, and, I think he was submitting, would have justified summary dismissal without further procedure.

14. The reason I reject those submissions is, first, the material from Murphy and Falconer would not have been available during the four-week period. It did not arise until October. Secondly, even if it had been available, the Tribunal was here estimating, as best it could, when a fair procedure would have occurred. It would have been perverse for it to have determined that, because further allegations had been made in respect of an earlier incident of a disturbing but slightly different nature, that would have entitled the employer without more ado, and without any fair procedure of its own, to have dismissed there and then without proceeding to the disciplinary hearing in respect of the events of May 12. To do so would fly completely in the face of any reasonable industrial employment procedure.

15. Accordingly, on the basis upon which the appeal has been put to me, the Tribunal Judge was entirely correct to say that the evidence had no obvious relevance and for that reason should not be admitted. She put the matter on the basis of credibility having no relevance to that decision so far as **Polkey** was concerned. In the circumstances of this case, she was right. I do not rule out the possibility that in another case, if material were available to the employer as a result of further investigations which would suggest that there were additional reasons for dismissal of an employee, that that might affect a decision by a Tribunal whether such a dismissal was more rather than less likely and therefore further towards the 100% end of the range of possibilities to be contemplated under **Polkey**. But it cannot sensibly affect a case in which the issue was not the chance of a fair dismissal because that was already assessed at 100%. The only issue was the date of it.

16. The third argument is that the Tribunal misapplied the test in **Polkey.** It is submitted that the evidence of Murphy and Falconer should have been considered when addressing the question of compensation. Mr Gravelle referred me to the analogy given by Sir John Donaldson in **Earl v Stater and Wheeler (Airlyne) Ltd** [1973] 1 WLR 51 at 57, referred to in the case of **Polkey v AE Dayton Services Ltd** [1998] ICR 142, in which he gave the example of an employer who thought that his accountant might be taking the firm's money but had no real grounds for so thinking and dismissed him for that reason. If so, he would act wholly unreasonably and would have committed the unfair industrial practice of unfair dismissal, notwithstanding that it was later proved that the accountant had in fact been guilty of the embezzlement which the employer had suspected. Sir John Donaldson commented that "proof of the embezzlement affects the amount of compensation but not the issue of fair or unfair dismissal". Mr Gravelle submits that what it is at issue in **Polkey** is the amount of compensation. Material going to prove that an offence has been committed is thus liable to affect the amount to be awarded.

17. I accept that if evidence emerges which shows that a claimant could be fairly dismissed, then an Employment Tribunal assessing compensation would take that into account. It is one of the factors to which I have referred above which inevitably places a limit on the amount of compensation to be awarded. It has no relevance in this case, however, where the Tribunal accepted that there would have been a fair dismissal and where the only issue was when that would occur. I emphasise that no issue has been raised before me, relying on the words in section 122 and 123, which might arguably have justified reduction and which does not appear to have been argued below in any event.

18. For those reasons, this appeal is misconceived and fails.