Appeal No. UKEAT/0502/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 April 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

DR B V FITZGERALD MBE LLD FRSA

MRS L S TINSLEY

PRAXIS REAL ESTATE MANAGEMENT LTD — APPELLANT

MR J NICHOLS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR J BOYD (of Counsel) Instructed by: Woodcocks Solicitors 12-14 Manchester Road Bury Lancs BL90DX
For the Respondent	MR B WILLIAMS (of Counsel) Direct Public Access Scheme

SUMMARY

UNFAIR DISMISSAL – mitigation of loss

In awarding compensation for unfair dismissal the Tribunal rejected an argument by the employer that the employee, who had set up in business on his own, had failed to mitigate his loss. The employer argued that the Tribunal's reasons were not **Meek** compliant, or else that they were perverse. Appeal dismissed.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Praxis Real Estate Management Limited against a judgment of the Employment Tribunal sitting in Manchester, Employment Judge Humble presiding, dated 18 May 2012, following a hearing on 10 May 2012.

2. By its judgment the Employment Tribunal awarded Mr James Nichols the sum of £27,577.75 by way of compensation for unfair dismissal. On appeal we are concerned only with the Tribunal's finding on the issue of mitigation. Praxis does not argue that the Tribunal stated the law on this issue incorrectly. It argues, however, that the Tribunal failed in its duty to give adequate reasons or that it reached a perverse conclusion.

Background

3. Praxis carries on business in the management, development and investment of business and development properties. Mr Nichols was employed with effect from 8 September 2009 to manage commercial properties across the United Kingdom. He was dismissed on the ground of incapability with effect from 7 April 2011. Following his dismissal he sought alternative employment in the same field of work and in the same locality; but he found there were very limited opportunities and set up business on his own account as a property investment agent.

4. By an earlier judgement dated 29 February 2012 the Employment Tribunal had already determined that Mr Nichols was unfairly dismissed but that an award should be reduced by 50 per cent under the principle in **Polkey v AE Dayton Services Limited** [1998] 1 AC 344 to reflect the chance that he might, in any event, have been dismissed fairly in due course if Praxis had acted reasonably.

5. The hearing on 10 May was a remedies hearing. Two main issues arose. The one with which we are concerned is whether Mr Nichols had failed to take reasonable steps to mitigate his loss.

Statutory provisions

6. Section 123 governs the approach which the Tribunal should take to the assessment of a compensatory award and, in particular, to the question of mitigation.

> **"123 (1) Subject to the provisions of this section and section 124, 124A and 126, the amount of the compensatory award shall 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.**
>
> **[…]**
>
> **(4) In ascertaining the loss referred to in subsection (1) the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.**
>
> **[…]"**

The reasons

7. The Tribunal set out the relevant law in paragraphs 3 and 4 of its reasons in terms to which no exception can be taken or is taken by Praxis. It is stated that the burden of proof was upon Praxis to show that Mr Nichols had failed to mitigate his loss. It quoted **Wilding v British Telecommunications PLC** [2002] IRLR 524 for the proposition that is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed - he must show that it was unreasonable of the innocent party not to take them.

8. As an Asset Manager, Mr Nichols worked in a specialised field. He gave evidence that he had two interviews for an alternative role but was unsuccessful. Since there were limited opportunities in his field, he resolved to establish his own business. The Tribunal heard and accepted evidence called by the Respondent from Mr Bousfield who had in the past worked in the property investment business and now worked in property asset management. In the whole

of the North of England, only a dozen positions became vacant in property asset management in the 12 months following Mr Nichols' dismissal; given the reference he would have obtained from Praxis, Mr Nichols would have been unlikely to obtain one of those positions, therefore, the Tribunal said his options would have been limited.

9. Since there is a challenge to the sufficiency of the Tribunal's reasons we will set out extensively the passage in which the Tribunal dealt with this issue.

> **"11. The essence of the Respondent's case was that the Claimant had unreasonably attempted to set up a business as an investment agent and it was not realistic, or reasonable, to expect that he would succeed in that business given the very specialised nature of the field and his lack of experience. Mr Bousfield's evidence was that it had taken him two years to develop a viable business in that field and that a large volume of clients was required to generate profitability. The Claimant, however, was operating on a much smaller scale. There was clearly a significant risk involved in establishing a business in a field in which he had only limited familiarity however the Tribunal's view was that it was not an unreasonable risk given his skills and the contacts he had developed in the field in which he was operated. Further, by working alongside his father's property business, the Claimant was able to utilise his father's contacts, experience and resources.**
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> **12. The Claimant gave evidence that his efforts were beginning to bring a return. By the time of the hearing, he was close to securing a deal which would generate fees of approximately £5,170 in June 2012, and there was a second deal which would generate fees of approximately £18,000 by November 2012. The Claimant was optimistic about the development of the business and accepted under questioning that he would in all probability have mitigated his loss by November 2012.**
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> **13. The Respondent was in the unusual position of challenging the Claimant's evidence that he had mitigated his loss by securing those deals. It did not accept the veracity of the deals and maintained its argument that the decision to set up the business was not reasonable mitigation. The Respondent requested some evidence of these deals since the deals were not referred to in evidence until the hearing. The Claimant agreed during the course of the hearing to walk to his office, which was in the vicinity of the Tribunal, to produce that evidence. He was able to produce a document which the Tribunal accepted as persuasive evidence that he was close to securing the deal which he had described to the Tribunal.**
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> **14. There were some points of credibility pursued by the Respondent in cross examination and submissions. These included that the Claimant had incorrectly described his job role on an internet site, and that dates which he had mentioned in evidence in relation to the deal which he was about to conclude did not correspond to the document which he later produced before the Tribunal. The Tribunal was not persuaded by these points and were of the view that the Claimant was generally a credible witness and, on the balance of probabilities, it accepted his evidence that he was close to securing the two deals. The Claimant was able to produce documentary evidence of this at very short notice during the course of the hearing and the Tribunal were not of the view that this evidence was in some way fabricated as the Respondent appeared to contend.**
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> **15. For the reasons outlined above, the Respondent invited the Tribunal to find that the Claimant had failed to mitigate his loss and that any award for loss of earnings should be limited to a few months, or alternatively and at most his losses should end at December 2012.**
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> **16. The Claimant submitted that he had taken reasonable steps to mitigate and sought his losses in full to November 2012. The Tribunal were invited to give credit for the fee of £2,000 which had been received but not for the pending deal which it was said, on behalf of the Claimant, was not yet guaranteed.**

> **17. Having regard to the relevant authorities, and all the circumstances of the case, the Tribunal held that it was not unreasonable for the Claimant to set up his own business. This did represent a reasonable attempt to mitigate his loss. The Tribunal held and the Claimant accepted that he would have mitigated his loss completely by early November 2012. Further, on the balance of probabilities, the Tribunal held that the Claimant would receive income of £5,170 before November 2012 in respect of the deal upon which he gave evidence. The Tribunal gave credit for that sum in full since there was no evidence presented in terms of any costs or expenses incurred in the Claimant's business and the Claimant accepted that the deduction of the earlier fee of £2,000 should be made in full."**

Sufficiency of reasons

10. On behalf of Praxis, Mr James Boyd first argues that the Tribunal's reasons were not "**Meek** compliant", that is to say that the Tribunal did not comply with its legal duty to give sufficient reasons for its decision. He complains that the Tribunal did not explain why it was reasonable for Mr Nichols to act as he did. He argues that there should have been findings as to what skills Mr Nichols held which equipped him to carry out property investment work, what contacts he could rely on to make the business viable, how contacts in the asset management field would assist him in the property investment agency field and why those contacts would be likely to entrust work to him. He criticises the Employment Tribunal's reasons as lacking any real analysis on these points. Further, he argues that the Tribunal should have dealt with the principal authority on which he relied, **Gardner Hill v Roland Burger Technics Limited** [1982] IRLR 498, in particular at paragraph 10.

11. On behalf of Mr Nichols, Mr Ben Williams submits that the Tribunal sufficiently complied with its duty to explain why it preferred the case for Mr Nichols. He points in particular to the Tribunal's uncontroversial starting point that there was limited work in the asset management field. Paragraph 11 dealt with the main thrust of the challenge made by Praxis and the subsequent paragraphs dealt with specific issues of fact. There was no duty upon the Tribunal to address each individual authority so long as it set out the legal basis upon which it proceeded.

12. We prefer the submissions of Mr Williams. In **Meek v City of Birmingham District Council** [1987] IRLR 250, Bingham LJ stated that although Tribunals are not required to create "an elaborate, formalistic product of refined legal draftsmanship" their reasons should:

> **"[…] contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and the statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this Court, to see whether any question of law arises and it is highly desirable that the decision of an Employment Tribunal should give guidance both to employers and Trade Unions as to practices which should or should not be adopted."**

See also **English v Emery Reimbold & Strick Limited** [2002] 1 Weekly Law Report 2409 at paragraphs 16 and 19-21.

13. In our judgment, the Tribunal's reasons meet this test. It was not necessary for the Tribunal to be more detailed. It found that, given Mr Nichols' limited options, it was not an unreasonable risk for him to start a business. It found, in effect, that there was some prospect of crossover between property asset management and property investment. There was at least a chance that clients and skills relative to one would assist in the other. It placed weight upon the fact that Mr Nichols was working alongside his father's property business and was able to utilise his father's contacts, experience and resources. It accepted evidence that his efforts were beginning to bear fruit and found that he would build the business to the point where he would not suffer continuing loss over a total period of 18 months. These are proper and adequate reasons for its conclusions.

14. Nor in our judgment was the Tribunal bound to make specific mention of the **Gardner Hill** case. In truth, this case was no more than illustrative of fundamental principles which the Tribunal had set out in its reasons. There are both similarities and differences between the facts in **Gardner Hill** and the facts in this case. A Tribunal is not required to

address and distinguish cases which a party relies on for essentially illustrative purposes. It is sufficient if the Tribunal correctly identifies the legal principles and demonstrates by its reasoning that it applied them. This, in our judgment, the Tribunal did.

Perversity

15. Mr Boyd also argues that the Tribunal's findings were perverse. He puts the argument in two ways. Firstly he argues that the Tribunal's overall conclusion was perverse. Given Mr Nichols' lack of any track record in property investment, he says it was not open to the Tribunal to find that he had acted reasonably in mitigating his loss by starting such a business.

16. Secondly, he argues that the Tribunal could not permissibly rely on the evidence which Mr Nichols gave, only on the day of the hearing, concerning two anticipated contracts in support of its view that there was a potential commercial return making it reasonable for Mr Nichols to set up the business in the first place.

17. The difficulty of succeeding on a perversity appeal before the Employment Appeal Tribunal is well known. A perversity appeal is essentially a complaint about the Tribunal's findings of fact. Because Parliament has expressly provided that there is to be an appeal to the Appeal Tribunal only on a question of law, there is only the most limited scope for such an appeal, thus in the leading case, **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93, Mummery LJ said:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable Tribunal on a proper appreciation of the evidence and the law would have reached. Even in cases where the Appeal Tribunal has grave doubts about the decision of the Employment Tribunal, it must proceed with great care: *British Telecommunications plc v Sheridan* [1990] IRLR 27 at paragraph 34."**

18. In our judgment, applying this test, the Tribunal's conclusions cannot be characterised as perverse. The reasons which it gave in paragraphs 11 to 17 are tenable reasons for accepting the evidence of Mr Nichols and concluding that it was reasonable for him to set up in business as he did. His options were limited. He had experience in the property world through carrying out property asset management. He had the potential to obtain clients through a contact in the property world and through his father's business and he had begun to have some potential success in obtaining work. These reasons are nowhere close to perversity territory; nor do we think the Tribunal can be criticised on perversity grounds for accepting evidence produced on the day as to recent developments in Mr Nichols' business. For these reasons, the appeal will be dismissed.