Appeal No. UKEAT/0272/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 November 2012

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MS V BRANNEY

MR J MALLENDER

ARRIVA LONDON LTD APPELLANT

MR K ELEFTHERIOU RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR I MacCABE (of Counsel) Instructed by: Moorhead James LLP Kildare House 3 Dorset Rise London EC4Y 8EN
For the Respondent	MS N McKINNEY (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW

<u>SUMMARY</u>

UNFAIR DISMISSAL

<u>Polkey</u> deduction

Reinstatement/re-engagement

The Employment Tribunal found that an employee bus driver, dismissed procedurally unfairly for capability reasons (the effects of an accident), would have been 60% likely to have been fairly dismissed given time and proper procedures. The employee having fully recovered as at the date of hearing, it ordered reinstatement but reduced the monetary compensation payable between dismissal and reinstatement by 60%. The parties agreed it was wrong to make any deduction, so subject to the argument that the discretion to order reinstatement was wrongly exercised for failure to take account of the "**<u>Polkey</u>**" determination, a cross-appeal succeeded. <u>Held</u> "**<u>Polkey</u>**" related to compensation, not to the statutorily prior inquiry into whether reinstatement should be ordered, and the employer failed to show the discretion was exercised on any other wrong basis (having gained an alternative job did not disqualify an ET from ordering reinstatement), or was wholly unreasonable. Appeal dismissed: cross-appeal allowed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This appeal and cross-appeal from a decision of an Employment Tribunal at East London whose reasons were given on 21 March 2012 concerns the relationship of **Polkey v AE Dayton Services Ltd** [1988] AC 344 HL ("**Polkey**") to orders of reinstatement.

The facts

2. The Employment Tribunal judged that the Respondent had unfairly dismissed the Claimant. It held that it was 60% likely that the Claimant would have been fairly dismissed by the Respondent following a fair dismissal procedure but that the dismissal which occurred had been unfair.

3. The circumstances were that the Claimant was a bus driver of some year's service with the employer. He suffered an accident at home in January 2010 resulting in what appears to be a rotator cuff lesion. As a result of that he was unable physically to drive. He awaited surgery. His manager decided on 7 May 2010 after this extend period of absence to dismiss him on the basis it was highly unlikely that he would return to work on 28 July as the Claimant himself had expressly hoped.

4. The Respondent had a policy which required the seeking of an appropriate medical opinion and consideration of alternative employment for someone who was sick, such as the Claimant. As the Tribunal noted at paragraph 43 a manager dealing with long-term sickness absence must always conduct a thorough and reasonable investigation and in all cases that would include an appropriate medical opinion. It considered it was unreasonable and unfair for the Respondent in the light of those terms of employment to dismiss the Claimant without

seeking further medical evidence from a specialist, given that one was concerned with his care, and commented at paragraph 49:

> **"The failure to obtain evidence from the Specialist, therefore, prevented the Respondent from considering the Claimant for temporary alternative work under its own procedure."**

5. It had been invited at the outset of the hearing to consider the question whether even if a specialist medical opinion had been received that the Claimant would probably have been dismissed. It's assessment of the chance of that in accordance with **Polkey** was represented by its 60% finding. It set out at paragraph 53 the particular factors that led it to that conclusion. None cast any doubt upon the conduct of the Claimant and indeed the Tribunal was at pains to note that the Claimant had in no sense contributed to his dismissal.

6. By the time of the Tribunal which heard the case in February 2012, the Claimant had fully recovered. His recovery was substantially complete by January 2011 and he was back driving buses shortly after February 2011. The Tribunal also had to consider his request to be reinstated. His job with the Respondent paid significantly better than the job he had obtained elsewhere.

7. The Tribunal set out the law and then said this at paragraph 69:

> **"The Tribunal takes the following matters into account in considering that it is appropriate to reinstate the Claimant. The Claimant wanted to be reinstated. The Tribunal considers that it is practicable for the Respondent to reinstate the Claimant. The Respondent is a large company employing about 3,500 drivers and has a turnover each year of staff of 7-8%. It regularly trains new drivers. The Claimant has worked for the Respondent and has been trained as a driver and worked for them in that position for about four years. There was no contributory fault in this case which might have prevented reinstatement. The Respondent did not seek to argue that reinstatement was not practical."**

8. It went to say that it considered that it was appropriate to order reinstatement in accordance with section 114 of the **Employment Rights Act 1996**. It then set out the loss

which the Claimant has sustained. In doing so it had in mind the law to which we shall now turn.

9. Under section 112(3) a Tribunal is entitled to make an order under section 113 for reinstatement or re-engagement if the Claimant expresses a wish to that effect. Section 113 provides that an order may be one of: (a) reinstatement in accordance with section 114 or (b) an order for re-engagement in accordance with section 115, as the Tribunal may decide. Pausing there, the use of the word, "may" indicates a discretion which is accepted by counsel before us that a Tribunal's discretion is a wide one.

10. Section 114 headed, "Order for Reinstatement" provides materially as follows:

> **"1. An order for reinstatement is an order that the employer should treat the complainant in all respects as if he had not been dismissed.**
>
> **2. On making an order for reinstatement the Tribunal shall specify -**
>
> **(a) Any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement, […]**
>
> **4. In calculating for the purposes of subsection 2(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of -**
>
> **(a) wages in lieu of notice or ex-gratia payments paid by the employer**
>
> **or;**
>
> **(b) remuneration paid in respect of employment with another**
>
> **Employer, and such other benefits at the tribunal thinks appropriate in the**
>
> **circumstances."**

11. Section 116 headed, "Choice of Order and its Terms" provides by subsection 1:

> **"In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement, and in so doing shall take into account -**
>
> **a) whether the complainant wishes to be reinstated;**
>
> **b) whether it is practicable for the employer to comply with an order for reinstatement, and**
>
> **c) where the complainant caused or contributed to some extent to the dismissal, whether it will be just to order his reinstatement."**

12. The Tribunal in doing what it did had in mind no doubt the terms of section 114(2)(a) when it deducted 60% of the sums which the Claimant would otherwise have had. It did so on the basis that the complainant could not reasonably be expected to have had those sums but for the dismissal because it followed from its finding that within three weeks or so there would have been (probably, to the extent of 60%) a fair dismissal.

13. Both counsel before us are agreed that that is to misconstrue section 114 in the light of the authorities, particularly in the light of **City & Hackney Health Authority v Crisp** [1990] ICR 95 a decision of this appeal Tribunal presided over Knox J.

14. Accordingly we do not need to and do not express any view of our own save to say that they are agreed on that basis that the cross-appeal should, subject to one point, succeed if the second ground of appeal, to which we shall come, fails.

The grounds of appeal

15. The Appellant/Respondent argues two grounds; 1) that the Tribunal had no jurisdiction to reduce the sums to be paid to the complainant on an order for reinstatement (that related to the point upon which the Appellant and Claimant are agreed) 2) a fundamental error of jurisdiction, that is a failure to deal with section 114 appropriately, fatally tainted the exercise of the discretion to order reinstatement. It is argued that it was an error of law to order reinstatement where a **Polkey** deduction of any amount was consequently ordered. The finding of the Tribunal in respect of **Polkey** was entirely incompatible and inconsistent with any logical exercise of the discretion to order reinstatement. No authority, we were told, deals precisely with the point that an order for reinstatement should not in principle be made where a substantial **Polkey** deduction is accepted as appropriate by the same Tribunal.

16. Mr MacCabe argues that the man on the Clapham omnibus - perhaps a curious phrase to adopt when his client is a North London bus company - would regard it as unjust for a man to be reinstated in employment where it was likely that he would have been fairly dismissed some months earlier. He maintains that section 116(1) provides for three mandatory matters to be considered by a Tribunal. It does not exclude other matters as relevant to the exercise of discretion. For that principle he relies upon the case of **Port of London Authority v Payne**, a determination of the Court of Appeal reported at [1994] ICR 555 where in the Judgment of Neil LJ, with which Staughton and Nolan LJJ agreed, the argument that the only matters to which a Tribunal could have regard in deciding upon reinstatement were those specifically identified at what is now section 116(1)(a), (b) and (c) was identified. It is plain from the Judgment as a whole, and in particular its endorsement of the approach of the Tribunal which took a wide ranging field of matters into account, that the court rejected that ground. Indeed, Ms McKinney for the Claimant, who had initially sought to argue a restriction to 116(1)(a), (b) and (c), upon reflecting upon the authorities began her submission by acknowledging that a Tribunal is entitled to take other matters into account if it wishes, even if not obliged to do so by statute.

17. Accordingly, the question becomes whether the Tribunal properly exercised its discretion in circumstances in which it failed to take into account its conclusion in respect of **Polkey**. Mr MacCabe would argue in part that the result the Tribunal thought was appropriate was reinstatement from an early date, but with only 40% of the loss payable in the interim. If the Tribunal had appreciated that it could not make an award extending to 40% only but was obliged by the statute to make a full award in respect of all the loss as, see above, counsel are agreed is the legal position, then it would not have or might not have made the order it did. Thus its finding on **Polkey** and its mistake as to the law infected its exercise of discretion so far as reinstatement is concerned.

18. He argued generally in his reply to the cross-appeal that the result of reinstatement in circumstances such as the present worked a manifest injustice which demonstrated that the discretion had been wrongly exercised.

Discussion

19. The statute is prescriptive as to the order in which a Tribunal is obliged to consider remedy. It must consider reinstatement before it considers compensation.

20. As to reinstatement it has a wide discretion. It follows that unless it can be said that the Tribunal failed to take into account any matter which it should have done or took into account matters which it should not have done or reached a conclusion which was wholly unreasonable, effectively perverse, an exercise of its discretion must stand. In present circumstances the issue is whether the finding in respect of **Polkey** is so inconsistent with a decision as to reinstatement as to render the Tribunal's decision wrong or whether the Tribunal required to take into account the fact it had made its decision in respect of **Polkey** when considering reinstatement.

21. As to those issues; first, reinstatement must be decided and determined first before compensation, second **Polkey** is concerned with compensation and not with reinstatement. It is to do with the calculation of loss beyond the point of dismissal. It is indeed a very particular aspect of the calculation of loss, within the more general field that a Tribunal in calculating compensation should award a Claimant only that which he has lost. It must put him in the position in which he would have been if the dismissal had not occurred. In general terms that may involve a Tribunal asking how long it would be that he would have remained in employment in a case where the employer might well have taken steps fairly to dismiss within a short period of time. That represents an obvious date to which to calculate such a loss but it is,

we emphasise, part and parcel of a broader examination of the identification of loss which arises from dismissal.

22. The relevance of **Polkey** is only to the question of a financial award on the hypothesis that the employment would have continued when it is known that by reason of the dismissal it does not. But this is the position and derives from the words which Lord Bridge himself used in his speech in **Polkey**; see page 365, letters (d) to (g):

> **"If the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation the position is quite different. In that situation as Brown-Wilkinson J put it in Sillipant's case at page 96,**
>
> > **'There is no need for an 'all or nothing' decision. If the Industrial Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.'**
>
> **The second consideration is perhaps of particular importance in redundancy cases. An Industrial Tribunal may conclude, […] that the appropriate procedural steps would not have avoided the employees dismissal as redundant. But if, as your Lordships now hold, that conclusion does not defeat his claim of unfair dismissal, the industrial tribunal, apart from any question of compensation, will also have to consider whether to make any order under section 69 of the Act of 1978** [that was the statutory forerunner of the Reinstatement and Re-engagement Provisions in the current statute]**. It is noteworthy that an industrial tribunal may, if it thinks fit, make an order for re-engagement under that section and in doing so exercise a very wide discretion as to the terms of the order. In a case where industrial tribunal held the dismissal on the ground of redundancy would have been inevitable at the time when it took place, even if the appropriate procedural steps have been taken, I do not, as at present advised, think this would necessarily preclude a discretionary order for re-engagement on suitable terms, if the ultimate circumstances considered by the tribunal at the date of the hearing were thought to justify it."**

23. Lord Bridge was there considering a case in which in modern parlance there would have been a 100% **Polkey** deduction. He did not think that that meant there could be no order for re-engagement, and it must follow reinstatement (though reinstatement is perhaps not to be expected in cases of true redundancy). It is plain from that extract from his speech that he saw, as do we, **Polkey** to be concerned with compensation and not with reinstatement. This also demonstrates that the appropriateness of re-engagement or reinstatement may well depend upon the time at which a Tribunal has to consider it.

24. Much of Mr MacCabe's submissions drew attention to the apparent unfairness of a Tribunal concluding that if a Tribunal had heard a case shortly after his actual dismissal occurred, it would have concluded the dismissal would have been fair assuming that the procedural steps had by then been complied with. But in the changed circumstances of his return to fitness and therefore there being no reason why the Claimant could not perform work as a bus driver and no reason advanced as to why it was not practicable to reinstate him as such, it is not difficult to see why the Tribunal concluded as it did. The "injustice" may well depend upon the time at which one seeks to evaluate it.

25. We do not regard a conclusion, as to a percentage deduction, reached in respect of the different exercise which is the assessment of compensation, as having any relevance to the prior decision whether reinstatement should take place or not. This is not to say that we reject taking into account matters which may themselves lead to a conclusion of a **Polkey** deduction. For instance, in a conduct dismissal held to be unfair on procedural grounds it is likely to be highly relevant to know what the conduct was, and indeed it would be likely to be taken into account under section 116(1)(c). In a capability dismissal it may be highly relevant to know the nature of the illness concerned. If the reason were "some other substantial reason" then, again, a Tribunal would no doubt wish to have regard to some of the underlying facts. But in this appeal we have been shown no particular fact which led to the decision in respect of **Polkey** which could legitimately have that effect in these circumstances.

26. Accordingly we conclude that there was no inconsistency between the Tribunal's decision under **Polkey**, which was after all a decision it had been invited by the employer to make though it had in mind a possible award of compensation at the time, and its decision in respect of reinstatement. Nothing it said about reinstatement showed it misdirected itself.

27. The fact it did not take into account **Polkey** as such was entirely right, as follows from our reasoning. Mr MacCabe argued, however, further that it ought to have taken into account the fact that the Claimant had at the time of the Tribunal hearing secured alternative employment. That, he submitted, was potentially relevant to a decision as to reinstatement.

28. We do not suggest that a Tribunal would be disentitled from having regard to such a factor; its discretion is wide. We do note however that section 114(4) specifically recognises that an employee in respect of whom a reinstatement order is made may have other employment. That accords with social reality; someone put out of their job cannot at the price of being returned to it be required to turn down other offers of employment, the money from which is necessary to ensure that he and his family keep their heads above water financially.

29. The fact that the Claimant had a new job could have formed part of the Tribunal's consideration. Here the Tribunal was well aware of the fact of the other employment. It allowed for it in its calculation of compensation. We see no reason to think it dealt in any way inappropriately with that knowledge.

30. In short, a Tribunal's discretion in this field is wide. The decision was within the wide and generous ambit which must be given to Tribunals. No error of law in its approach has been identified. Its failure to take **Polkey** specifically into account as against an order was no error of law: it was not required to do so. The appeal on the second ground therefore must fail.

31. That leaves only the cross-appeal. Mr MacCabe realistically recognises that the reply to the cross-appeal essentially replies upon much the same argument as addressed in respect of ground 2 of the appeal. For the same reasons that falls away. There is no dispute between the parties about the sum due on the cross-appeal. For the reasons given, that succeeds.

32. The order of the Tribunal is therefore varied and an order in respect of the financial elements substituted such that he is to be reinstated as ordered by the Tribunal, and the sum of £17,490.03 representing his loss from dismissal to the date of the Tribunal hearing on 18 January 2012 plus £131.04 per week representing his ongoing weekly loss from 18 January 2012 until reinstatement, substituted. To this extent the cross-appeal is allowed.