

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

At the Tribunal
On 2 May 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR B BEYNON

MRS R CHAPMAN

MR S LANGFORD

APPELLANT

BARKING AND DAGENHAM PRIMARY CARE TRUST

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR RAOUL DOWNEY
(of Counsel)
Instructed by:
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For the Respondent

MS JENNIFER EADY
(One of Her Majesty's Counsel)
Instructed by:
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SUMMARY

UNFAIR DISMISSAL

Contributory fault

Polkey deduction

Unfair dismissal remedy. Issues of **Polkey** and contribution remitted to Employment Judge for re-consideration following full argument.

HIS HONOUR JUDGE PETER CLARK

1. This matter has been proceeding in the London (Central) Employment Tribunal. The parties, as we shall describe them, are Mr Langford, Claimant, and at the time of the Tribunal hearing Barking & Dagenham Primary Care Trust, Respondent. Ms Eady QC points out this morning that the Respondent's title has recently changed to Legacy Unit at Department of Health on behalf of the Secretary of State for Health and we amend the name of the Respondent accordingly.

2. This was a claim for unfair dismissal brought by the Claimant against the Respondent, his former employer, which came on for hearing before Employment Judge Goodman sitting alone at London (Central) Tribunal on 17, 18 and 21 to 25 May 2012. Following that lengthy hearing the Judge reserved Judgment and delivered a Judgment with reasons on 6 July 2012. In short, she found that the claim of unfair dismissal was well founded, principally on the basis of a lack of reasonable investigation by the Respondent applying the well-known **Burchell** test (**British Home Stores Ltd v Burchell** [1978] IRLR 379) and also an element of procedural unfairness. There is no appeal or cross appeal before us in relation to that finding on liability.

3. Instead we have listed before us for preliminary hearing today an appeal by the Claimant against the Judge's finding at paragraph 112 of her reasons that applying the principles in **Polkey v AE Dayton Services Limited** [1987] IRLR 503, the **Polkey** principle, it was inappropriate to make any compensatory award in favour of the Claimant. Against that finding the Claimant's appeal is brought.

4. Secondly, at paragraph 113 the Judge went on to consider the basic award to which the **Polkey** principle does not apply and concluded that there should be no reduction in the basic award on the basis of contributory conduct on the part of the Claimant. Against that finding the Respondent cross-appeals.

5. One of the difficulties in the EAT's procedure is that a situation may arise, as in this case, where an appeal is set down for an appellant-only hearing, at which the Respondent will not be heard, and, at the same time, the cross-appeal is set down for a preliminary hearing at which the appellant is not heard. That is the procedural state of play that came before us this morning.

6. Following a tentative suggestion from the bench, both parties, each of whom has the advantage of representation by highly experienced counsel, agreed by consent that the appeal and cross appeal should proceed to a full hearing and that at that full hearing both appeal and cross appeal should be allowed and the issues of **Polkey** and contributory conduct should be remitted back to the same Employment Judge, Employment Judge Goodman, for re-hearing.

7. It is the EAT's practice not simply to allow appeals followed by remission without the Appeal Tribunal endorsing that agreement. That is because these are appeals against reasoned judgments of employment judges. In this case we are entirely content to endorse the agreement between the parties because we are satisfied on the submissions of Mr Downey and Ms Eady that the Judge's reasoning at paragraph 112 and 113 is unclear. Further, it is our impression that it was the understanding of the parties below - we put it no higher - that the hearing before Judge Goodman was limited to the issue of liability: was the Claimant unfairly dismissed or not? True it is that some submissions were made in closing by Ms Eady in relation to the **Polkey** and contributory conduct issues, but we think that that was very much an afterthought

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and, with great respect, the Judge's reasoning at paragraphs 112 and 113 may have suffered as a result of not hearing full argument from counsel.

8. In these circumstances, we shall allow both the appeal and cross appeal. The issue of remedy is remitted to Employment Judge Goodman for re-hearing. As to the issues of **Polkey** and contributory conduct, no further evidence will be admitted. Those matters will proceed on the basis of argument only. Of course, evidence may be received as to the quantum of any award that may result from the remitted hearing.