Appeal No. UKEAT/0600/11/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 November 2012

Before

LORD JUSTICE SULLIVAN

MR D BLEIMAN

MR B WARMAN

---

(1) MR D BUDGE (WAS KNOWN AS BAKER) APPELLANTS
(2) MR J MARTIN

(1) McGINLEY SUPPORT SERVICES LTD
(2) MR M J HOWARD RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MS LYNSEY MARTIN (Representative)
For the First Respondent	MR RICHARD REES (Representative) Peninsula Business Services Ltd Legal Services The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Second Respondent	Debarred

SUMMARY

UNFAIR DISMISSAL

Constructive dismissal

Polkey deduction

Having concluded in its first Judgment that the Appellants had been unfairly dismissed, the Employment Tribunal erred in its law in failing to have regard to its reasons for reaching that conclusion when deciding, in its second Judgment, that the likelihood of the Appellants being made redundant if a fair redundancy procedure had been adopted was 100% applying the principle in **Polkey v A E Dayton Services Ltd** [1998] AC 344.

LORD JUSTICE SULLIVAN

Introduction

1. In a Judgment dated 7 October 2010 the Employment Tribunal found by a majority that the Appellants had been unfairly dismissed. In a Judgment dated 16 June 2011 the Tribunal unanimously concluded that applying the principle in **Polkey v A E Dayton Services Ltd** [1988] AC 344 ('**Polkey**') the likelihood of the Appellants being made redundant if a fair redundancy procedure had been adopted was 100% and reduced their compensatory awards accordingly. The Appellants appeal against the Tribunal's 100% **Polkey** finding.

2. In a nutshell the Appellants contend that the Tribunal's **Polkey** reasoning did not take proper account of the conclusions of the majority in the first Judgment. On behalf of the Appellants, Ms Martin did not contend that there would have been no likelihood whatsoever of any redundancy, she realistically accepted that there was some chance of redundancy but she submitted that prospect was fairly modest. We made it clear to the parties that the question for us was not whether we would have made 100% **Polkey** finding but whether the Tribunal erred in law in making its 100% **Polkey** finding.

Background

3. The background is set out in some detail in the Tribunal's two Judgments and a brief summary will suffice for present purposes. The Appellants worked for the Respondent as welders, the Respondent erroneously regarded them as self-employed but the Tribunal at a pre-hearing review concluded that they were employees. The Respondent provided welders to the railway industry, its main customer was Network Rail.

4. In April 2009 there was a reduction in the size of the railway maintenance industry generally because the Government had allocated a smaller budget for that purpose, and more

particularly the Respondent lost its Network Rail contracts, save for one contract in Scotland. Other rail maintenance companies suffered a loss of work at that time and one of them, Amey, gave up directly employing welders and offered its work to the Respondent to cover its contracts with Network Rail. Amey thus became the Respondent's principal customer.

The Tribunal's first Judgment

5. The loss of welding work by the Respondent after 1 April 2009 was described by the Tribunal as 'dramatic'. Figures before the Tribunal showed that a turnover in 2008 of £1.669 million of which £1.263 million was derived from Network Rail and £342,000 was derived from Amey had reduced in 2009 to £819,000 of which £218,000 was derived from Network Rail and £580,000 from Amey. For convenience I have rounded up the figures referred to in paragraph 28 of the Tribunal's first Judgment to the nearest £1,000.

6. Because the Respondent did not appreciate that its welders were employees, it did not embark on a redundancy procedure for them, although other employees were made redundant. The Respondent ceased paying its welders a weekly retainer and shared out the much reduced amount of welding work between them. The Tribunal heard evidence of the factors which the Respondent had used in allocating the reduced amount of work. In addition to accreditation with Amey, which was the principal factor, those factors were quality, reliability, geography (that is to say where the welder lived) and pairings because two welders worked together and at least one of any pair had to be a qualified welder and able to stamp his own welds.

7. In its first Judgment on liability, the Tribunal concluded that the Appellants had been assured by the Respondent that the reduced amount of work would be allocated fairly but the Respondent had failed to honour that promise. This failure had entitled the Appellants to resign

and to claim constructive dismissal. The Tribunal made a number of other criticisms of the Respondent's conduct.

8. When considering the claim of Mr Budge (then known as Mr Baker) the Tribunal said in paragraphs 98 and 99 of its Judgment:

> **"98. The Respondent attributed [Mr] Baker's lack of work after July partly to his loss of Amey approval following some defective welds on 10 June but, with work on another site and re-assessment, he could have regained Amey accreditation. The Respondent made no effort to enable him to regain that accreditation.**
>
> **99. The other part of the Respondent's explanation was that Mr Baker lost his national registration as a qualified welder on 4 July because he was not reassessed by that date. Mr Wilson, the welding manager who was going to re-assess him, told us that it had been arranged for him to work alongside Mr Baker and re-assess him on the last possible day - 4 July. However, he claimed, Mr Baker telephoned a day or two earlier and said that there was no need for the assessment because he was going to join another company - Bridgen. Mr Baker said that he had spoken to Mr Wilson from time to time about jobs with other companies but denied making a call to say that the assessment had become unnecessary. On that conflict of evidence, we prefer the evidence of Mr Baker because continued national accreditation was essential to him and it is inherently unlikely that he would have failed to take the opportunity on the last day when renewal was a straightforward procedure. Moreover, Mr Wilson was responsible for checking the dates when his welders needed their assessments and he chose to leave Mr Baker's until the last possible day, which does not indicate any keenness to retain Mr Baker's services."**

9. In respect of Mr Martin, the Tribunal said in paragraphs 101 and 102:

> **"101. We accept Mr Martin's evidence that one of the attractions of the job which he was offered by the Respondent was that he would be trained as a qualified welder. There was no suggestion by the Respondents' witnesses that he was told that this was a mere possibility, dependent on there being three other trainees, and that it might never take place. After two and a half years of employment by the Respondent, without the promised training, we consider that the Respondent is in fundamental breach of contract.**
>
> **102. We have already explained our conclusion that work was not allocated fairly to the three Claimants. One factor which made it more difficult for Mr Martin to obtain work was the removal of his company van. By stocking consumables in his garage, he had been self-sufficient for many jobs but used the van to travel with his equipment and consumables to the sites. In our view, the removal of the van placed Mr Martin at an unfair and unwarranted disadvantage in being allocated work."**

The Tribunal's second Judgment

10. In its second Judgment the Tribunal referred to the case of **Polkey** and said that it would consider what would have been the likely outcome if the Respondent had taken appropriate steps by way of a redundancy procedure; see paragraph 44.

11. The Tribunal then reached certain conclusions which were common to both of these Appellants. Before the Tribunal there was a third Claimant, Mr Howard, but he has not appealed to the Employment Appeal Tribunal.

12. The Tribunal concluded that because of the substantial reduction in the volume of welding work the Respondent would have declared a substantial proportion of its welding workforce redundant in a redundancy procedure that would have begun in March 2009. In paragraph 59 of its second Judgment, the Tribunal said:

> **"59. In summary, if the Respondent had begun a redundancy procedure at any time in 2009, it is certain that it would have reduced the workforce of welders to no more than 14 and, if it had understood their employment status, it is more likely that it would have reduced to even lower levels. It is against that scale of redundancies that we have to measure the Claimant's prospects of avoiding being selected for redundancy in such a procedure."**

13. The Tribunal then considered what criteria would be likely to have been applied by the Respondent in such a procedure and said this in paragraph 60:

> **"We heard evidence as to the criteria according to which the available work was distributed during the Claimant's employment in 2009 and it seemed to us that it is highly likely that these would have been the criteria used."**

14. In paragraph 61 of its second Judgment, when dealing with the criteria and their impact, the Tribunal said:

> **"The most important criterion was Amey accreditation. Fewer welders were Amey approved than the number who could stamp welds for Network Rail. Amey provided 85% of welding turnover after 1 April 2009. None of the Claimants possessed such accreditation during or shortly before the respective dates when their employments ended. This alone is likely to have proved a major negative factor for all three Claimants, making them highly likely to have been selected for redundancy."**

15. The Tribunal then referred to the other four criteria and considered how the Appellants faired against them. In paragraphs 63 and 64 it said:

> **"63. The change of principal work provider from Network Rail to Amey had an adverse geographic impact on the Claimants. The Network Rail contract was for its western territory, which covered from Cornwall to Bristol, as well as South Wales. By contrast, Amey's work was predominantly in South Wales, where they had a large re-signalling programme at Newport. The Claimants lived in Somerset, so they were no longer conveniently located. This would have been another significant adverse factor affecting all three Claimants.**

64. Of the 14 welders who remained after November 2009, all except one was based in Wales and we were told he normally undertook work in Scotland. Most of those who left during 2009 lived outside Wales and included the 'pairs' of the Claimants. Thus, geographic and pairing considerations would have adversely affected the Claimant's prospects in any redundancy procedure."

16. The Tribunal then considered the three Claimants individually. Its conclusions in respect of Mr Baker in paragraphs 67 and 68 were as follows:

"67.The criteria would have applied to Mr Baker as follows:

67.1 Amey: Mr Baker was Amey accredited until his accreditation was suspended by Amey on 10 June. Moreover, his ability to stamp welds for any company lapsed with his welding qualification on 4 July. So, a major negative factor (Amey) would have become an even worse negative after 4 July.

67.2 Quality: Mr Baker lost his Amey accreditation because he carried out and stamped three welds on 10 June which were found to be defective, so the Respondent would have been likely to score Mr Baker adversely under this heading.

67.3 Reliability: We were not told of any complaints about the reliability of Mr Baker's attendance. So, we conclude that this would have been a positive score.

67.4 Pairings: His normal pair was Mr Howard until the latter resigned on 21 May, leaving him without a regular pair. Mr Martin could have been paired with him until Mr Baker lost first his Amey accreditation and then his welding qualification - thereafter such a pairing would have lacked a qualified welder. So, the pairing heading would have yielded another negative score.

67.5 Geography - Mr Baker lived in Taunton, Somerset. This would have been another significant negative factor.

68. Mr Baker would have been among the lowest scoring welders in any redundancy procedure - with low scores on Amey (after 10 June), Quality, Pairings and Geography headings and a positive score only on one heading. So, we conclude that there is a 100% probability that he would have been selected for redundancy either in March or on 26 October (his effective date of termination)."

17. The Tribunal's conclusions in respect of Mr Martin in paragraphs 69 and 70 were as follows:

"69.The criteria would have applied to Mr Martin as follows:

69.1 Amey: He was not a qualified welder - working only an assistant - and therefore could not be accredited by Amey. This would have been a significant negative factor.

69.2 Quality: We were not told of any complaints about the quality of his work or about any exceptionally good quality work. So, we conclude that this would have been a neutral factor.

69.3 Reliability: We were not told of any complaints about his reliability. So, again, we conclude that this would have been a positive score.

69.4 Pairings: His normal pair was Mr Roger Wilkins, who was Amey accredited, but Mr Wilkins left in mid-April. Thereafter, Mr Martin lacked a regular partner and no qualified welder was available in or near Somerset after Mr Baker lost first his Amey accreditation on 10 June and then his welding qualification lapsed on 4 July. Finally, from 26 October, there was not even another of the Respondent's welders living anywhere near him. So, this would have been an increasingly negative score.

69.5 Geography: Mr Martin lived in Weston-super-Mare, Somerset. This would have been another significant negative factor.

70. Mr Martin would have been among the lowest scoring welders in any redundancy procedure, with negative scores on Amey, Pairings (after mid-April and especially after 4 July) and Geography headings and, on the other two headings, one neutral and one positive score. So, we conclude that there is a 100% probably that he would have been selected for redundancy either in March or on 18 November 2009 (his effective date of termination)."

Discussion

18. In our Judgment the Tribunal directed itself as to the correct question by reference to **Polkey**. We are satisfied that it did not fall into the error very recently identified by the President of the Employment Appeal Tribunal, Langstaff P, in **Ministry of Justice v Parry** UKEAT/0068/12/ZT of adopting an "all or nothing" approach as to whether redundancy was likely or unlikely if the Respondent had adopted a fair redundancy procedure.

19. Although Ms Martin submitted in her skeleton argument that the Tribunal should have considered whether the Respondent ought to have applied different criteria for deciding who to make redundant under a fair redundancy procedure, we are satisfied that the Tribunal was entitled to conclude that it was likely that the Respondent would have used the same criteria as it had used to distribute the reduced amount of work. We are not here concerned with the issue of redundancy in the abstract but with redundancy in particular circumstances where the Respondent had lost a major customer, where that customer had been replaced by another customer, Amey, which had its own specific requirements as to accreditation and location of the available welding work.

20. It seems to us that the Tribunal's conclusion that there would have been a substantial number of redundancies was inevitable given the dramatic reduction in the amount of welding work. As I have mentioned, Ms Martin accepted that there was some chance of redundancy but submitted that the chance was not very great. During her submission she pointed to the fact that

welding work had picked up in 2009. However, we are bound by the Tribunal's findings of fact and on those findings there was undoubtedly a substantial likelihood of redundancy. The only question is whether the Tribunal was entitled to conclude that that likelihood was as high as 100%.

21. When giving permission to appeal on 30 April 2012, HHJ David Richardson summarised the issue as follows in paragraph 12 of his Judgment:

> **"It is arguable that the Tribunal has not reflected in its Second Judgment findings which it made in the reasons for the First Judgment; see especially paragraphs 98, 99, 100, 101 for the majorities' reasons for the First Judgment. It is arguable that the fact that the Respondent was in breach of contract and had behaved unfairly as regards the way it dealt with training and accreditation, ought to have been taken into account by the Tribunal in it's Polkey reasoning. Could and would the Respondent have dismissed fairly on the basis that an Amey accreditation was required when it had treated the Claimants in the way the Tribunal found at the First Hearing?"**

22. Ms Martin pointed to the Tribunal's conclusion that although Mr Baker had lost his Amey accreditation following some faulty welds on 10 June, with work on another site and re-assessment he could have regained that accreditation. Re-assessment was not a complicated or particularly onerous procedure; it was simply a question of going out on the following shift and the quality of the welds being re-assessed. Although there was no express finding by the Tribunal as to how easy or difficult the process of re-assessment would have been, it seems to us that the fact that the Tribunal concluded that the Respondent was to be criticised for making no effort to enable Mr Baker to regain his accreditation suggests a recognition by the Tribunal that re-accreditation was a relatively simply and straightforward process which the Respondent could and should have facilitated.

23. So far as the loss of Mr Baker's national welding registration, the Tribunal found that that was due to failures on the part of the Respondent to make the necessary arrangements until the last possible moment.

24. As far Mr Martin is concerned, Ms Martin's submissions were threefold; first the fact that he was still an assistant welder and not a fully qualified one was, on the Tribunal's findings in its first Judgment, because of the Respondent's failure to honour its promise that he would be trained; see paragraph 101 of the first Judgment. We were told that this training would involve a three week course and thereafter working on the job for six months, effectively under the oversight of an experienced welder. Secondly Ms Martin submitted that Mr Martin was unfairly disadvantaged in terms of the location criterion because his van had been removed from him; see paragraph 102 of the first Judgment. Thirdly, in any event, as an assistant welder, he could have still have been paired with Mr Baker if the latter had been fairly treated by being enabled to regain his Amey accreditation.

25. On behalf of the Respondent, Mr Rees submitted that the Tribunal was not required to speculate. While a hypothetical fair redundancy procedure had to be assumed, that hypothetical fair procedure had to be applied to the facts as the Tribunal had found them to be after 1 April 2009. On the facts as found by the Tribunal Mr Baker had lost his Amey accreditation in July, Mr Martin was not a qualified welder and without a qualified welder as a pair he would have failed the pairing criterion.

26. We accept the Tribunal is not required to speculate but it was a central plank of Mr Rees's case on behalf of the Respondent that this is one of those appeals where the Tribunal was in a position to reach conclusions as to what would have been the likely outcome of a fair redundancy procedure and what that fair procedure would be likely to have been.

27. It is common ground between the parties that although the other criteria were relevant and would have been applied, the Amey accreditation criterion was the most important factor.

The difficulty in our judgment with Mr Rees's submission that the hypothetical fair redundancy procedure had to be applied to the facts as found by the Tribunal, and the Tribunal in its first Judgment had found that the fact that Mr Baker, having lost his accreditation with Amey, had not been enabled to regain it was part and parcel of the Respondent's own unfair treatment of him; paragraph 98 of the first Judgment.

28. In respect of Mr Martin, the Tribunal found that the reason why he was still an assistant welder was because the Respondent had failed to honour its promise to train him to be a fully qualified welder. In applying the most important criterion, Amey accreditation, a fair redundancy process would have taken into consideration the fact that Mr Martin's lack of accreditation was due, on the basis of the Tribunal's conclusions in its first Judgment, to the Respondent's own unfairness, but this issue is not addressed at all in the Tribunal's second Judgment.

29. Mr Rees submitted that in a situation where the Respondent had a surplus of qualified welders it would have been most unlikely that even acting fairly it would have gone to the time and expense of training Mr Martin to be a qualified welder. It seems to us that there is some force in that submission but on the Tribunal's findings in paragraph 98 of the first Judgment, the position in respect of Mr Baker is very different. Regaining his Amey accreditation was not a difficult matter, hence the Tribunal's criticism of the Respondent for making no effort to enable him to regain his accreditation, and if Mr Baker had not been treated unfairly and had been able to regain his Amey accreditation and to retain his national registration then, of course, he would have been available as a fully qualified welder as a pair for Mr Martin as an assistant welder even if the Respondent's failure to give Mr Martin training was ignored. The Respondent's unfair removal of Mr Martin's van had placed him at a further disadvantage, but it does seem that the principal reason why the Tribunal found that Mr Martin would have been

among the lowest scoring welders was his lack of Amey accreditation because he was not a qualified welder and the unavailability of a qualified pair for him.

Conclusion

30. For these reasons we have concluded that the Tribunal did err in reaching the conclusion that the **Polkey** reduction should be 100% in that it failed to take account of its own conclusions in its first Judgment, in particular paragraphs 98 and 99 and 101 and 102 when considering how the Respondent would have applied the criteria, in particular the all important Amey accreditation criterion, if it had been operating a fair redundancy procedure.

31. We would like to make it clear that we did not accept Ms Martin's submission that the risk of redundancy under a fair procedure would have been relatively small. We are satisfied that it would have been in excess of 50%. We do not say that it could not have been as much as 100% but in deciding what the appropriate percentage should be, the Tribunal should have full regard to its conclusions that I have mentioned in its first Judgment. We are not in a position to reach any finding ourselves as to that matter. Regrettably the matter must be remitted to the Tribunal. We have considered whether it ought to be remitted to a different Tribunal. In our view, the balance of advantage lies clearly with remitting it to the same Tribunal which will be well familiar with the facts having already given two Judgments in the matter. For those reasons this appeal is allowed.