Appeal No. UKEAT/0170/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 October 2013
Judgment handed down on 7 March 2014

Before

THE HONOURABLE LADY STACEY

PROFESSOR K C MOHANTY JP

MR D G SMITH

WINCANTON GROUP LTD — APPELLANT

(1) MR K DE CORT
(2) MR P KEMP — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CARLO BREEN (of Counsel) Instructed by: Hill Dickinson LLP Solicitors 1 St Paul's Square Liverpool L3 9SJ
For the First Respondent	MS TALIA BARSAM (of Counsel) Bar Pro Bono Unit
For the Second Respondent	MR K DE CORT (The First Respondent acting on behalf of the Second Respondent)

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Remedy hearing in respect of unfair dismissal. The Employment Tribunal substituted its own view for that of the Respondent. Remitted to ET to consider compensation afresh.

THE HONOURABLE LADY STACEY

Background

1. This is a case about unfair dismissal in a redundancy situation. We will refer to the parties as the First and Second Claimant, and the Respondent, as they were in the Tribunal below. This is an appeal by the Respondent against a judgment of an Employment Tribunal (ET) chaired by Employment Judge Lewis sitting at East London in which the reasons were copied to parties on 16 January 2013. Ms Barsam, counsel, appeared for the First Claimant. The First Claimant represented the Second Claimant. The Respondent was represented by Mr Breen, counsel. At the Tribunal hearings which had dealt separately with liability and with remedy, Mr Breen had appeared. The Claimants had both appeared in person at the first hearing, and Mr De Cort had appeared on his own behalf and for Mr Kemp at the second hearing.

2. The Claimants claimed unfair dismissal at an earlier hearing. They succeeded, reasons being sent on 22 February 2012. They succeeded in their contention that they had been unfairly selected for redundancy and that the Respondent failed to follow a fair procedure. A remedy hearing was then fixed and the appeal before us follows from that remedy hearing. No appeal was taken against the finding of unfair dismissal.

3. The issue on which the appeal was allowed to proceed following the sift decision of Langstaff (P) is as follows:

> **"Perversity is unarguable as such.**
>
> **However, the real grounds here are that the ET arguably adopted the wrong approach in assessing compensation by asking what it, the ET would have done, rather than by asking what were the chances that this employer, acting within the bounds of fairness, would have decided that either or both of the Claimants would have been dismissed; and secondly it may not have dealt appropriately with the chance of further redundancy at a later stage.**

> **Failure to mitigate loss has to be proved by the employer showing that the employee had acted unreasonably in failing to do so. The findings of fact clearly preclude that, and the appeal on this ground is untenable.**
>
> **Accordingly, save for perversity and mitigation, the case is arguable."**

The decision of the ET

4. The ET decided that each Claimant had received the sum equivalent to his basic award from the Respondent as a redundancy payment. The ET made compensatory awards in each case. In Mr De Cort's case the grand total is £51,999.30 and in Mr Kemp's case the grand total is £9031.04.

5. The ET set out its task as follows:

> **"1. In order to reach a conclusion the Tribunal had to consider what would have happened had the Claimants not been unfairly dismissed.**
>
> **2. The Tribunal had to embark on that exercise doing the best we could to reconstruct the world as it might have been had the Respondent carried out its redundancy selection exercise fairly."**

6. In order to go about that task the ET heard evidence from Mr Allen of the Respondents and from the Claimants. They also took into account evidence heard at the liability hearing. As the hearing on liability and the remedy hearing were separate, the ET was in the position of hearing evidence from the witnesses who knew that the ET had decided that the Claimants had both been unfairly dismissed. The ET reminded itself that they had already made a finding that the Respondent had not carried out any assessment of the Claimants' respective roles and what they involved prior to selecting them for redundancy. They also remind themselves that they had found that at the internal appeal against dismissal, job descriptions, which were not accurate in terms of what the Claimants actually did, were used.

7. The situation in which the Respondent found itself was that there were five employees and three jobs. Those three jobs were a traffic operator at a salary of £24,000, a spot traffic operator at a salary of £35,700, and a senior traffic operator at a salary of £37,000 plus £3000 car allowance. The five employees would have been both Claimants, Mr Lamb, Mr Sharp, and Mr Plosa. The ET accepted the Respondent's evidence that they would have used the criteria set out by them together with a competitive interview.

8. The ET reminded itself in its paragraph 6 that its role in the remedy hearing was different from the role at the hearing on liability. It stated that it was required to make findings as best it could, based on the evidence, as to what it found would have happened. In contrast, at the liability hearing, the ET had to reach findings as to the reasonableness of the views formed by the Respondent at the relevant time. Thus the ET heard evidence from Mr Allen of the method and the selection criteria for redundancy; it also heard from Mr Allen as to the scores that he maintained he would have given the Claimants. It heard from the Claimants as to the scores that they believed they should have been given. At paragraph 8 the ET stated as follows:

> **"We considered what would have happened if the Claimant had been assessed fairly against the criteria. In doing so we bore in mind that there is a temptation to justify a decision after the event, in the same way that in the challenge to the scoring is put forward in behalf of the Claimants there is going to be a temptation to ensure that they do well, and we balance those conflicting interests in reaching our conclusion as to what would have happened."**

9. Thus the ET stated that their task was to decide what would have happened, based on evidence given by the parties each of whom had an interest in, with all integrity, maximising their own position.

10. At paragraph 10 the ET found that at the remedy hearing, Mr Allen made some errors or inaccurate judgements in his assessment on assumptions about how the Claimants would have scored against the criteria put forward by the Respondent. According to Mr Allen's evidence,

the First Claimant would have come out third, behind Mr Lamb and Mr Sharp; Mr Kemp would have come out fifth. The ET noted that Mr Allen was not at the premises where the Claimants worked on a daily basis but was there possibly every two weeks; the First Claimant was in charge of running those premises; he knew more than Mr Allen did about the day-to-day work of the premises. The ET found that the First Claimant tried his best to be balanced and fair in his evidence and that he gave examples to support the scores that he said he and the Second Claimant would have been awarded had the procedure been fair. The ET found that a patent error had been made in respect of the Second Claimant's absence record.

11. Turning to the competitive interview, which the ET accepted the Respondent would use as part of its selection process, the ET found fault with the method described in the Respondent's evidence. It decided that the questions, except for one, were not about the specific roles carried out by the Claimants. Rather they were competency-based questions. The ET found that that they could not accept Mr Allen's evidence when he said that the Claimants would not do as well as the other three employees because they were not carrying out the role on a day-to-day basis. They found that Mr Allen, in his evidence, had ignored the findings made by the ET at the liability hearing to the effect that all five men had involvement in traffic operations on a day-to-day basis. The ET found at paragraph 22 the following:

> **"We could not accept Mr Allen's assessment, therefore, that the Claimants would not do as well as the current job holders and we found they had at least as good a chance as the others, if not slightly better."**

12. In paragraph 23 the ET noted that they "applied a pinch of salt" to Mr De Cort's assessment of Mr Kemp and of himself, but they were satisfied that Mr Allen was wrong to mark Mr Kemp down on flexibility. The various criticisms made by the ET of the selection process led them at paragraph 24 to decide that the Claimants must have had a reasonable

chance of succeeding in the redundancy selection exercise against the other three in the pool. They stated:

> **"Given the range of skills and Mr De Cort's experience, we are satisfied that Mr De Cort would have been a clear front runner and it is difficult to see how the others would have beaten him in the scoring if they were carried out fairly and objectively against the criteria set out by the Respondent."**

13. They went on to say that they were satisfied from their own experience of observing Mr De Cort presenting his own and Mr Kemp's case that he would have been an impressive candidate in interview and would therefore have been the top scorer in any exercise carried out fairly. They were satisfied that with his experience he could have carried out any of the available roles. As they decided he would have been the best candidate, they decided he should have been entitled to pick which role he preferred. They decided he would have taken the most senior role, which had the salary nearest to his previous salary. The accepted his own evidence that he would have taken a drop in salary so that he did not place himself in the position of looking for a job while out of work.

14. The ET also decided that Mr Kemp had been unfairly under marked. They accepted evidence that Mr Sharp had taken the step of approaching Mr Allen during the redundancy consultation exercise to make a special plea for Mr Kemp to be kept on. They were satisfied that Mr Kemp, under a fair assessment, would have scored more highly than Mr Plosa. They also accepted evidence from Mr Kemp that he would not have put himself in the position of looking for work when he was out of a job and would have taken a job at a lower salary especially as he had a wife and a new baby to support.

15. The Tribunal then went on to consider the question of the likelihood of future redundancy. They accepted that the Respondent had had further reductions in business and

they considered the likelihood, the percentage chance, that either of the Claimants would have been made redundant at a later date. The ET found as there was a reduction in the Respondent's business, in Mr Kemp's case the likelihood was that he would have been made redundant in July 2011 and so awarded compensation of up until that date.

16. In Mr De Cort's case, they took the view that it was likely that he would survive any further redundancy exercise, based on a fair application of the Respondent's criteria and competitive interview, and that he would still have been in post at the date of the hearing and was therefore sustaining a continuing loss.

Submissions for the Respondent

17. Mr Breen, counsel for the Respondent, submitted that there were two issues. Firstly, the ET decision was flawed to the extent that it had substituted its own decision in the scoring and selection carried out on the redundancy exercise and secondly that the decision was fundamentally flawed in the consideration of the "chances" of further redundancies at a later stage.

18. He submitted that the ET had never found that the redundancy exercise was in any way a sham. It could not be described as capricious, and it had not been suggested that the Respondent had some ulterior motive in selecting the Claimants. He reminded us that the ET had said in the liability decision that they regarded Mr Allen as trying his best to give honest evidence. The ET found that that had been no real consideration of a pool of persons who might be made redundant. That was because Mr Allen decided which job titles would be made redundant and did not think about moving people about between jobs. At the remedy hearing, Mr Allen's evidence had been that the roles which the two Claimants had held were redundant and they would have to have accepted different jobs on different salaries if they had stayed with

the Respondent. Thus, as narrated above, the Respondent would require to go through a selection process which it would do by means of scoring against the criteria and having a competitive interview. Mr Allen had given evidence that the Claimants would be applying for jobs which they had not held in the past but which were held by Mr Lamb, Mr Sharp and Mr Plosa who would be in effect applying for the own positions. The latter three men therefore had more recent experience in those jobs.

19. Counsel argued that Mr Allen had given details and legitimate reasons for his view on how the scoring would have taken place. The Respondent had to make the difficult decision as to who would be made redundant because there was a downturn in business. While the jobs which were available were closer to the jobs done by Mr Lamb, Mr Sharp and Mr Plosa, the reduction in business meant that a degree of reorganisation was needed.

20. Mr Breen argued that the ET had not directed itself in law, in the judgment given after the remedy hearing. The liability hearing reasons did end with a section headed "Polkey reduction," followed by a paragraph in which the ET stated that it would need to hear evidence at the remedy hearing in order to determine the amount of any **Polkey** reduction. He argued that the only part of the reasons in the judgment following the remedy hearing which could be seen as a direction was in paragraph 6, in the following terms:

> **"In this exercise we are required to make findings as best we can based on the evidence before us as to what we find would have happened. Whereas for liability we were reaching findings as to the reasonableness of the views formed by the Respondent at the relevant time. We make our findings on remedy on the evidence before us at the remedy hearing and where relevant our earlier findings on liability."**

21. He argued that it was apparent from that that the Tribunal perceived that its task was to substitute its own view for what would have happened rather than considering whether the evidence from the Appellant about the selection criteria was evidence which showed that they

would employ a reasonable method and act fairly. Thus, argued Mr Breen, even if Mr Allen had made errors that could never justify the ET "stepping into Mr Allen's shoes" in determining its own scoring exercise.

22. Counsel argued that the ET thought that it had to perform a two stage process, namely: (a) an assessment of whether the Claimants would have been dismissed under the selection and scoring exercise put forward by the Respondent and (b) a selection exercise on whether the Claimants would have been appointed to the roles created within the new structure. He argued that these tasks are distinct. The ET did not direct itself on section 98(4) of the **Employment Rights Act 1996** and did not refer to the well-known decision **Williams v Compair Maxam** [1982] ICR156**.** He argued that the ET ignored the fundamental right which the Respondent had to manage its own business and to make selections on criteria and scoring which in the Respondent's own mind was reasonable. Counsel submitted that as stated in **Williams**, it is not the function of the ET to decide whether they would have thought it fairer if the Respondent had acted in some other way; rather the question was whether the employer had a adopted a course of action which lay within a range of reasonable actions. He accepted that the Respondent had to show that it was reasonable to dismiss the particular Claimant, and so if the circumstances necessitated dismissal for redundancy, the employer still had to show it was reasonable to dismiss the Claimant for that reason. Therefore the means by which the Claimant was chosen had to be shown to be reasonable.

23. Counsel argued that law was set out in a number of cases, none of which had been referred to by the ET. These were **Darlington Memorial Hospital NHS Trust v Edwards and Vincent** 1996 UKEAT/678/95, **Ralph Martindale & Call v Harris**, 2007 UKEAT/0166/07 **Morgan v Welsh Rugby Union** [2011] IRLR 376, **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274 and **British Aerospace v Green** [1995]

IRLR 433 and finally and importantly, the ET did not consider the authority which it was supposed to be applying, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503. Further, the ET did not direct itself in terms of sections 118 and 123 of the **Employment Rights Act 1996**. With reference to the case of **British Aerospace** counsel argued that the statement of Waite LJ, although *obiter,* set out the basic requirement thus:-

> **"In general, any employer who sets up a system of selection which can reasonably be described as fair and applies it without overt sign of conduct which mars its fairness, will have done all that the law requires of him."**

He went on to argue that in a case such as the present, where the Respondent had not only to make some workers redundant but had to select workers for new jobs after reorganisation, a separate exercise had to be undertaken. The employer was entitled to decide what method he would use for that selection, and so long as he acted in good faith and acted reasonably, he did all that was required.

24. Mr Breen argued that it was obvious from the terms of the judgment that the ET had substituted its own decision for that of the Respondent. He made reference to the case of **Buchanan v Tilcon Ltd** [1983] IRLR 417 from which he argued that employers have only to prove that their method of selection was fair in general terms and to do so it is sufficient to call a witness of reasonable seniority to explain the system. Counsel argued that the ET should not concern itself with whether another employee should have been made redundant. Rather it should decide whether the Claimants had a chance of being fairly dismissed. Counsel referred to the ET's decision that they did not accept Mr Allen's evidence that the Claimants would not do as well as the other employees because they were not doing the role day-to-day. He said that the Tribunal had put themselves in the position of management and determined what they would have decided. He categorised that is an error of law. Counsel argued that if Mr Allen

gave honest evidence that he reasonably believed that the Claimants would not have performed as well as other applicants for the same job then the ET should not interfere with that.

25. The ET's error in substituting its own judgment was also to be seen in their stating that Mr De Cort would have been the front runner and would have chosen the best paid job. The ET gave as its reason for that decision that their own observation of him was such that they found that he would be an impressive candidate in interview. Mr Breen criticised that. He argued that the ET were no doubt impressed by Mr De Cort's ability to present his case and indeed that of Mr Kemp but it was not for the ET to transpose their impression of Mr De Cort in the Tribunal room to what should have happened at his employment. He made reference to the **Williams** case at page 161 as follows:

> **"It is not the function of the Industrial Tribunal to decide whether they would have thought it fair to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted."**

He made reference also to the case of **Samsun Electronics UK Ltd v Monte d'Cruz** UKEAT/0039/11/DM, a case decided in 2012 by a Tribunal presided over by Underhill (P), and which contains a useful summary of the cases referred to above.

26. Mr Breen submitted that there is no rule of law that the selection criteria in a redundancy exercise must be exclusively objective, for which he referred to the case of **Ball v Kirkpatrick Ltd** EAT 823/1995. He referred to the dicta in the **Darlington** case as follows:

> **"If there are new posts with a different job description from anything which the various applicants brought to them then it seems to us that the employer is most certainly not under a duty to carry out something like the exercise which he has to carry out in deciding who to select from redundancy. On the contrary if he is to be allowed to manage his business he must select who he thinks right. If he tells the employees that they will be allowed to apply for new jobs, as was manifestly the case here, then of course he will be required to carry out the exercise in good faith. If they are to be allowed to apply their applications must be considered properly. If the criteria are different from the old jobs so be it, that was part of the original occasion of redundancy; it was as much reorganisation as redundancy, although redundancy was the result. But to say that they are the same process, and that it must be based on similar**

principles, is quite simply wrong in our view. It may be, we are not going to decide this, that the duty goes beyond faith, and that it may be said that there was some sort of duty of care, but there it is, it is something which the employer has said he will do and he must do it. He must consider the applicants."

Therefore Mr Breen argued that the ET had erred in law by deciding not only that the Claimants should have been scored differently but also that they should each have been appointed to new roles following reorganisation. The cases showed that when reorganisation was necessary and there were more employees than there were jobs, the employer had to be able to decide who best to employ. Mr Breen argued that it was only necessary for the Respondent to show that he had an objective system and was not capricious nor was he acting with ulterior motive. They had been no finding in fact by the ET in the present case that there was anything capricious or sham about the decisions made by the Respondent.

27. Mr Breen criticised the ET in its decision-making on the question of future redundancy. He argued that the ET had not referred to the terms of s.123 of the **Employment Rights Act 1996**. The ET gave no indication in its reasons that it had considered in calculation of the compensatory award, that it must be 'such amount as the Tribunal considers just and equitable in all the circumstances.' It had not set out any reasoning to show that it had considered the chance of future redundancy as a percentage chance. Thus in respect of both Claimants it had erred in law.

28. In relation to Mr Kemp, counsel argued that the ET had failed to take into account, or at least had failed to mention, the fact that Mr Kemp had indicated in the consultation exercise that he did not want to take up alternative employment. He referred to the case of **The Ministry of Defence v Debique** [2010] IRLR 471. We noted that the ET had accepted Mr Kemp's evidence that he would have taken another job, even if the pay was less. That is a matter of fact for the ET to decide. We regarded this argument as not open to the Respondent in

light of the grounds of appeal which were allowed on the sifting process. We say no more about this point.

29. The ET found that Mr De Cort would not have been made redundant at all. That was criticised by Mr Breen as wrong in law given that they had found that Mr Kemp would be made redundant by 2011 by reason of there being a drastic reduction in the Respondent's work. Thus Mr De Cort must have had some chance of being made redundant, given that he worked in the same place and so was liable to suffer the same down turn in work. Further, he argued that the Tribunal required to consider the guidance set out in the case of **Software 2000 Ltd v Andrews** [2007] IRLR 568. The ET should have considered the likelihood of Mr De Cort being dismissed in any event under a fair procedure and should have considered, if there was a chance of that, what that percentage chance was and should have made an appropriate reduction in his compensation. While Mr Breen accepted that there may be unusual cases in which it is correct for an ET to decide that a person would not have been made redundant at all he argued that this case was not in that category because the ET had accepted that there was a drastic reduction in work and had accepted that the redundancy exercise carried out was legitimate. Thus there was no reasoning from the ET as to why Mr De Cort would have survived.

30. Counsel sought to have the appeal allowed and the case remitted to a new Tribunal. He argued that the ET had given its view in such a way as to preclude it considering matters again, and applying its mind fairly.

31. Ms Barsam on behalf of Mr De Cort submitted that Mr Breen had sought to raise new matters that had not been raised in the ET. She argued that the submission about the different exercise which had to be carried out when considering the Respondent's selection of employees for new jobs had not been made before. She argued that Mr Breen was attempting to raise a

perversity point, that no ET could have rejected Mr Allen's evidence. He did not have a ground of appeal to that effect.

32. On the question of substitution, which Ms Barsam agreed was properly raised, she argued that while the ET had not mentioned the cases, it had referred to **Polkey** at the end of the reasons in the liability judgment, and it was plain from a proper reading of the reasons in the remedy judgment that it did understand its task, and had carried it out. She argued that Mr Breen argued that too much deference had to be given to the evidence from Mr Allen, when as was stated in **Software 2000** all of the evidence had to be taken into account. The ET was entitled to prefer the evidence from the Claimants.

33. Ms Barsam argued that the case of **Hill** was an authority which set out the correct way in which to approach a **Polkey** reduction. The ET required to predict the future, and to decide, as best it could on the evidence before it, what the particular Respondent would have done had he acted fairly. It was not a matter of assessing whether he would make a decision lying in range of reasonable decisions. She argued that in this case the ET had done that. She referred to paragraph 8 onwards of the reasons. The ET were entitled to find as they did in paragraph 10 that Mr Allen's evidence showed that he did not apply his own system accurately. He did not have detailed knowledge of the work people did. Therefore for both those reasons his evidence about what would have happened had the unfair dismissals not taken place could not be accepted. While there could be an element of subjectivity in an employer's decision making, in this case it could be seen that Mr Allen was adhering to his position as it had been before the ET in the liability hearing. It was necessary to examine carefully what the Respondent said as otherwise the protection provided to those who were unfairly dismissed was weakened. She argued that the ET had directed themselves appropriately at paragraph 28 when they said:-

> **"We accept that the Respondent had further reduced their business in Tilbury and other of their operations since dismissing the Claimants. We considered the likelihood, the percentage chance, that either of the Claimants would have been made redundant at a later date."**

34. Ms Barsam argued that the cases referred to by Mr Breen which deal with the procedure to be followed when people were to be considered for new jobs following reorganisation were irrelevant. There had been no such reorganisation. Rather the amount of work had declined. Separately, she argued that the ET had not decided that Mr De Cort would never be made redundant until he reached retirement; they had awarded two years future loss.

35. In her submissions on disposal, Ms Barsam argued we should refuse the appeal. If we were to allow the appeal, we should remit the case to the same Tribunal. It had heard all of the evidence. It could be directed, if it was decided that there had been an error or errors of law, to apply the law correctly. It would not be proportionate to have the evidence heard again.

36. Mr De Cort on behalf of Mr Kemp adopted the submissions of Ms Barsam. He argued that in terms of the case of **Polkey**, the ET had to assess the chance of future fair dismissal. He made reference to the case of **Software 2000 Ltd** and it noted that while it was for the employer to lead evidence to found a submission that the employee had a chance of being made redundant on a fair procedure, the Tribunal had to have regard to all of the evidence would making its assessment. Mr De Cort accepted that the exercise that an ET was required to carry out under the case of **Software 2000** had in it a degree of uncertainty and an element of speculation.

37. Mr De Cort argued that the ET had correctly defined its role in paragraph 6 as "make findings as best we can on the evidence before us as to what we find would have happened". He argued that that is implicitly a reference to what the Respondent would have done. He argued that the ET had not substituted its own views for those of Mr Allen. Rather they judged

Mr Allen's evidence to be unacceptable. They had done the same thing at the liability hearing. Mr De Cort's contention was that the ET had to decide what would happen, on a chance basis, if the Respondent acted fairly. It was therefore necessary for the ET to look carefully at the evidence given by the Respondent and so long as they explained why they did not accept it then they were carrying out their role properly. He argued that they had given ample explanation in this case. The ET had been careful to state that they had taken Mr De Cort's assessment with a pinch of salt and therefore it could not be argued that the ET had simply accepted evidence either of the Respondent or the Claimant. Rather it had applied its mind to what was likely to happen all was in the context of the Respondent acting fairly. Similarly, according to Mr De Cort's argument the ET was entitled to state that they formed the view that he would be impressive in an interview having watched in the Tribunal. In doing so they were simply doing their best to ascertain, from all the evidence available how the Respondent would have scored the Claimants if they acted fairly.

38. As to future redundancy, Mr De Cort argued that the ET had considered carefully what was likely to happen. They had noted that there was a reduction in work and had decided that Mr Kemp would be made redundant by July 2011. As for Mr De Cort, they were entitled, he argued, to find that he would still have been employed. They give reasons for coming to that decision and did not simply substitute their view for that of the Respondent.

39. In a short reply Mr Breen argued that he had not introduced any new point of law. While the ET may not have been addressed on every case brought before us, the arguments were put before them.

Discussion and decision

40. We did not find that Mr Breen had sought to introduce any new legal point and we regarded all that was put before us as properly before us for our consideration. We decided in light of the findings made by the ET that the Respondent intended to put a new structure in place (in the reasons for the liability decision), the cases referred to by Mr Breen, on the subject of an employer's entitlement to choose whom to employ, were relevant.

41. The task of the ET at the remedy hearing was to consider what would have happened if the Claimants had not been unfairly dismissed. They required to do so in order to assess compensation as set out in s.123 of **Employment Rights Act 1996**. The case of **Polkey** is authority for the proposition that in deciding on compensation, the ET has to consider if there is a chance that a person who had been unfairly dismissed could have been dismissed fairly at some stage after his actual dismissal. The question is, as it was put in the case of **Hill**,

> **"could the employer fairly have dismissed and, if so, what are the chances that the employer would have done so? The chances at the extreme (certainty that it would have dismissed or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. ….the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."**

42. The ET had already found at the liability hearing that the Respondent had not acted fairly in deciding to make both Claimants redundant. At the remedy hearing, the ET required to consider the evidence from all sources. It was correct to note that all the witnesses had an interest in that stating their position at its highest. We emphasise that the ET did not find that anyone lacked integrity; but it was sensible that the ET should realise that the witnesses would naturally present things in the best light possible for their own interest.

43. What the ET was not entitled to do however was to substitute its own view of what should have happened. It had to decide what would have happened had the Respondent acted fairly. It had to decide what the chances of the Claimants remaining in employment were. It had to factor into that consideration of whether the Claimants might have been dismissed, fairly, and if they found that there was a chance that they would be dismissed then in terms of **Polkey**, they required to fix a percentage and to apply a reduction.

44. While the liability judgment does refer to the case of **Polkey**, we note that the judgment given on the remedy hearing does not refer to any case law or to any statute. We accept that the ET at paragraph 28 does set out in part the exercise it had to undertake. The difficulty is that the ET does not make clear that it considered what the Respondent would do, if it acted fairly.

45. The language used in the judgment following the remedy hearing does suggest that the ET substituted its own views for those of the Respondent. We find it significant that the ET did not find that the redundancy exercise was in any way a sham or that there was any ulterior motive; it did not find that the Respondent deliberately set out to dismiss either or both Claimants. That being so, while it was for the ET to check that the criteria for selection given in evidence by the Respondent was cogent and could be described as fair, we are of the view, in light of the authorities, that it was not for them to go further and to decide that a different selection could have been made. It was not for the ET to decide who the best candidate was, and to decide that on the basis of its own view of the questions asked, and of the performance of the First Claimant in the Tribunal. We are aware that the exercise which had to be carried out was difficult and involved a degree of artificiality. We have however decided that the ET have considered what they would have seen as the correct outcome, and so have substituted their view for that of the Respondent.

46. We are therefore of the view that this case must be remitted. We are concerned about the proportionality of doing so, given that the matter is now about three years old. If we remit to a new Tribunal it will require to hear all of the evidence again. If we remit to the same Tribunal then it will be on the basis that they should reconsider the evidence which they heard and apply properly the law as set out in the cases referred to in this judgment. We bear in mind the guidance given in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. We note that there is no question of bias or lack of impartiality; we do not regard the decision as so flawed as to make reconsideration impossible; we have every confidence that the ET will act professionally and will be able and willing to reconsider matters in light of the direction that they should do so.

47. Accordingly we remit to the same Tribunal, in order that they may reconsider the evidence they have heard already; and to decide in light of the authorities and legislation we have discussed, and submissions which will be made on behalf of the parties, what awards should be made.