Appeal No. UKEAT/0201/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 July 2017
Judgment handed down on 21 December 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

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(1) FELTHAM MANAGEMENT LIMITED — APPELLANTS
(2) MR D FELTHAM
(3) MR M FELTHAM

(1) MRS J FELTHAM
(2) B FELTHAM (MAINTENANCE) LTD
(3) MS H FELTHAM — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR JASON BRAIER (of Counsel) Instructed by: Kuit Steinart Levy LLP 3 Mary's Parsonage Manchester M3 2RD
For the First Respondent	MS RACHEL WEDDERSPOON (of Counsel) Peach Law Limited Landmark House Station Road Cheadle Hulme SK8 7BS
For the Second and Third Respondents	MR JASON BRAIER (of Counsel) Instructed by: Kuit Steinart Levy LLP 3 Mary's Parsonage Manchester M3 2RD

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

SEX DISCRIMINATION - Direct

The Employment Tribunal did not err in law in its findings concerning the date of termination of the Claimant's employment, nor in its findings concerning the effective date of termination. **Kirklees Metropolitan Council v Radecki** [2009] IRLR 555 distinguished.

The Employment Tribunal did not err in its findings concerning contribution and **Polkey**.

The Employment Tribunal's findings of sex discrimination would, however, be remitted for reconsideration. The Employment Tribunal did not sufficiently address the explanation given for the withholding of pay which it found to be direct sex discrimination.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This appeal is concerned with aspects of a Judgment of the Employment Tribunal sitting in Manchester (Employment Judge Slater, Mrs Linney and Mr Chaudhary) dated 25 February 2016. It arises from a family dispute. His Honour Judge Shanks, when he sent the case through to a Full Hearing, first stayed it in order for mediation to be considered. The stay did not bear fruit; hence this appeal.

2. At the heart of the case are four siblings: Jane, who is the Claimant, and David, Martin and Stephen, who were Respondents at the ET. They along with other family members worked in a family business founded by their father. The family business operated through companies; one such company, Feltham Management Limited, a Respondent at the ET, is of particular importance because it employed the Claimant. In this Judgment I will refer to it as "the Company" and I will refer to David, Martin and Stephen by name. Two other family members are also central to the story: Hazel, who is the adult child of David, also working in the business as a Clerical Assistant; and Mr Eckersall, the Claimant's husband, a self-employed joiner who did work for the business without ever being employed within it.

3. The appeal raises issues which can conveniently be grouped into four sections: whether the ET correctly rejected a contention that the date of dismissal, or the effective date of dismissal, was about 30 October 2014; whether the ET correctly declined to make a **Polkey** deduction; whether the ET correctly declined to make a deduction for contributory fault; and whether the ET erred in law in making findings of sex discrimination.

4. I will deal with these issues in separate sections after I have summarised the background facts and given an overview of the ET's Reasons.

5. The appeal was argued before me orally on 7 July. Mr Jason Braier appeared for the Company, David and Martin. Ms Rachel Wedderspoon appeared for the Claimant. In one important respect further written submissions were required; I gave directions for them and have received them from both parties. This is my Reserved Judgment.

The Background Facts

6. When his father retired from the business David took over as Managing Director of the Company. The Claimant was employed by it at least from 2002 onwards. She had a written contract of employment from 2006. She was described as Property Letting Manager and Director; and she was a Director of the Company. Until 15 August 2013 she was regarded as a valuable and effective member of management. She was in effect Office Manager.

7. It was common ground before the ET that there was a sharp disagreement on 15 August 2013. Mr Eckersall had been sending inappropriate texts and Facebook messages to Hazel. On that day Mr Eckersall emailed her and asked her to call him. She did so. He then told the Claimant that he was leaving her because he had feelings for Hazel. The Claimant accused Hazel of inappropriate conduct with her husband; Hazel did not accept that she had done anything wrong. Other family members became involved. Harsh words were said. David, in particular, said to the Claimant that the situation was her fault because she did not take Mr Eckersall's name on marriage, or respect him as head of the house, and undermined him in front of others, and did not welcome him home; perhaps that was why he wanted Hazel. The Claimant, already upset, was upset yet further and left work. She did not attend again.

8. The ET did not make findings as to whether Hazel had in fact behaved inappropriately with Mr Eckersall. Hazel had not retained his messages or her replies. She did not vouchsafe in evidence what she had said to Mr Eckersall. But she had always denied wrongdoing and insisted on a full retraction and apology. She took over the Claimant's work with support from David.

9. Both the Claimant and her husband were unwell for a period. The Company ceased to pay the Claimant at the end of August; but nothing else was done which might indicate termination of employment, and the Claimant remained a Director, retaining benefits such as the company car and credit card. By September she was trying to mend fences. She met Hazel and apologised for shouting; but this was not sufficient for Hazel and the Claimant was not prepared to go further. By 9 September the Claimant was feeling a little better. She met Stephen on 9 September and said that she would return to work on the following Monday. Stephen said she could not return.

10. The ET made detailed findings as to what transpired over the following months; it is not necessary to repeat them all here. Suffice it to say that there were attempts to find a way forward involving both the vicar of the church which they attended and another brother, Alan. They were unsuccessful. During this time Hazel wrote a letter which the ET described as unpleasant in tone. The ET found that the letter was seen by David and expressed views which he held as well as her. Material to the issues in this appeal is the following passage:

> **"Jane has not been sacked. She has not been given her P45. She voluntarily failed to return to work in the weeks after the event. She then announced to Stephen that she would be returning [to work] without the matter being resolved. This was and still is impossible. How can she or anyone else expect things to work after the accusations she had made without her even attempting to make amends - and actually meaning it."**

11. Eventually, on 19 June 2014, the Claimant wrote a measured letter to David, Martin and Stephen. She proposed mediation and suggested the names of mediators. She said:

> **"I was in a state of emotional turmoil and was not fit to come into work for three weeks [from the argument in August 2013]. Further, on speaking to Stephen three weeks after that fateful day, I explained to him that I was going to come back into work and was told that I couldn't come back until the situation was 'sorted out'. The fact that I had been told not to return until the matter had been sorted out should not then mean that I am penalised in terms of my pay. I do not accept the position that I have not been paid and, therefore, I expect to be reimbursed for all of my pay since that day in August 2013 and for my pay to be reinstated moving forward."**

12. This letter received no reply at all until 30 October. The reply, signed by David, Martin and Stephen, was written after taking legal advice. It contained the following passage:

> **"(1) You walked out of the business on Thursday 15th August 2013 and did not come back.**
>
> **(2) The Company took this as your resignation and as such your employment with the Company ended on that date. …**
>
> **(3) There is, therefore, no entitlement for you to receive any salary from 15th August 2013 to the present time and you are not entitled to any salary going forward."**

13. The letter asserted that any personal benefits had been paid since August 2013 only as a matter of goodwill. Dates were given in the future for the transfer of some benefits (car, medical insurance and phone) and for the cancellation of another (credit card).

14. The Claimant instructed solicitors. She did not accept that she had resigned; they said so in correspondence. The Company now instructed solicitors; they re-iterated the position in a letter dated 15 December 2014 saying that she had been taken off payroll and a P45 had been issued. She took this letter as dismissing her; and commenced ET proceedings.

The Employment Tribunal's Reasons in Overview

15. The ET, after making findings of fact and stating the law, reached the following principal conclusions favourable to the Claimant.

16. Firstly, it found that the effective date of termination of the Claimant's employment was 15 December 2014. By the time of the hearing the Company no longer contended that the Claimant had resigned in 2013; it contended that the effective date of termination was 30 October 2014. If that had been the case the unfair dismissal complaint would have been out of time. The Company appeals.

17. Secondly, it found that the dismissal was unfair because the Company did not establish a potentially fair reason for dismissal. The Company does not appeal against this finding.

18. Thirdly, it found that there should be no **Polkey** reduction. The Company appeals.

19. Fourthly, it found that there should be no reduction for contributory fault. The Company appeals.

20. Fifthly, it found that the Claimant was prevented from attending work from September 2013 onwards. She was entitled to her wages from the Company from that time onwards pursuant to Part II of the **Employment Rights Act 1996** subject to any period when she was unable to work through sickness. There is no appeal against that finding in principle; but the Company appeals on the basis that the Claimant's complaint was out of time because the time limit started to run on 30 October.

21. Sixthly, it found that the Claimant was entitled to holiday pay from the Company accrued but untaken at the time of the effective date of termination. There is no appeal against that finding except again on the basis that the claim was out of time.

22. Seventhly, it found that the withholding of salary from the Claimant was direct sex discrimination by the Company and by David, Stephen and Martin. The Company, David and Martin appeal against that finding. Stephen originally did so, but he has withdrawn his appeal.

23. Eighthly, it found that the treatment of the Claimant by David on 15 August 2013 was direct sex discrimination for which David and the Company were responsible. They appeal against that finding on a time limit ground.

The Contractual Date of Termination and the Effective Date of Termination

The Employment Tribunal's Reasons

24. The ET, after quoting from the letter dated 30 October 2014, went on to say (paragraph 51):

> **"51. Prior to the letter of 30 October 2014, the respondents had not previously said or done anything which would have led the claimant to believe that her employment had ended. We do not consider that this letter could reasonably be understood as terminating the claimant's employment; instead it was asserting a position that the claimant knew to be incorrect and was inconsistent with the way the respondents had acted since 15 August 2013. Indeed the evidence of David Feltham was that by writing this letter he was fairly certain that employment would end by the end of the year. Even he was not clear that the letter was terminating the claimant's employment."**

25. The ET went to find that the Claimant was dismissed by the letter dated 15 December. It said (paragraph 55):

> **"55. Whilst this letter reiterates a stance taken by the respondent in the letter of 30 October, in the context of the reply to [the Claimant's solicitor's] letter, we consider that the claimant could reasonably understand from this letter that her employment was being terminated. Her actions thereafter are consistent with the understanding that her employment had been terminated."**

26. The ET therefore subsequently concluded as follows (paragraph 85):

> **"85. We have found as a fact that the letter of 30 October 2014 could not reasonably be understood as the letter of dismissal. However, read in context, the letter of 15 December 2014 was making it clear that the claimant's employment was terminated. We, therefore, conclude that the claimant's employment terminated on receipt of the letter of 15 December 2014. The unfair dismissal complaint is, therefore, in time."**

Submissions

27. On behalf of the Company Mr Braier submitted that the correct test for the ET to apply, in deciding whether the letter dated 30 October terminated the Claimant's employment, was objective: see **Willoughby v CF Capital plc** [2011] IRLR 985 and **Sandle v Adecco UK Ltd** [2016] UKEAT/0028/16. It must take account of all surrounding circumstances. Moreover an employer's act of ceasing to pay an employee's salary and informing the employee that no salary would be payable brings the contract to an end when the employee learns of it; he relied on **Kirklees Metropolitan Council v Radecki** [2009] IRLR 555. Even if the employer's conduct is repudiatory it may amount to a termination: see **Radecki** which followed **Robert Cort & Son Ltd v Charman** [1981] IRLR 437 in this respect. Applying these principles he submitted that the ET erred in law by concentrating on the Claimant's understanding, and even David's understanding, rather than that of the reasonable employee in the light of the surrounding circumstances. Further it erred in concentrating on what the letter said about the past rather than considering its consequences for the future. The ET's Decision was perverse: paragraphs (2) and (3) of the letter showed unambiguously that the employment had been ended. Benefits were to be retained only as a matter of goodwill. It was inconsistent for the ET to find that the letter dated 30 October did not terminate the employment, whereas the letter dated 15 December did, when the latter was mainly a repetition of the former.

28. On behalf of the Claimant, Ms Wedderspoon accepted that the test for the ET to apply was objective and that the ET should take into account all the surrounding circumstances. She submitted that the ET applied this test. It found that by 30 October nothing had been said or done which would have led the Claimant to believe that her employment had ended. This was a key point, amply supported by evidence, including Hazel's letter. The letter dated 30 October

did not purport to terminate the contract of employment; it asserted incorrectly that the Claimant had resigned. The ET applied the objective test and reached a permissible conclusion.

29. Mr Braier's oral submissions had concentrated almost entirely on the unfair dismissal claim; and the principal case on which he relied (**Radecki**) was concerned with the concept of effective date of termination, which as we shall see is specific to the law of unfair dismissal. His Notice of Appeal was however broad enough to encompass the claim for unlawful deduction from wages, and he submitted that the ET ought also to have held this claim to have been out of time. In his written submissions he argued that similar principles should apply to that claim; the letter dated 30 October terminated the contract of employment. Ms Wedderspoon submitted that the letter was not sufficiently clear to terminate the contract of employment; and even if it was repudiatory the repudiation was not accepted and did not in itself terminate the contract of employment - see **Societe Generale v Geys** [2013] IRLR 122.

Discussion and Conclusions

30. I propose to begin by considering the date at which the Claimant's contract of employment terminated as a matter of contract law. This will determine the starting point of the time limit for the Claimant's claim for outstanding pay under Part II of the **Employment Rights Act 1996**. This is because the time limit runs from the last of a series of deductions: see section 23(2) and (3) of the **Employment Rights Act 1996**. The Claimant's right to salary terminated with her contract of employment; so the time limit began to run at that time.

31. It is an "obviously necessary incident of the employment relationship" that the other party should be notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised and how and when it is intended to operate: see **Societe Generale v**

Geys per Lady Hale at paragraphs 52 and 57 in a passage with which Lord Hope, Lord Wilson and Lord Carnwath agreed. Whether such notification has been given is to be objectively ascertained, having regard to what a reasonable recipient would understand.

32. Applying these principles, the ET was in my view plainly correct to conclude that the Company's letter dated 30 October did not terminate the contract as a matter of contract law. It did not purport to do so. It stated falsely that the Claimant had resigned the previous year when she had not done so at all. No reasonable recipient would say that the Company was exercising a contractual right to terminate the Claimant's employment. The letter dated 30 October was no doubt a repudiatory breach of contract; but the Claimant did not accept that breach. Applying the normal contractual principles upheld in **Geys**, the repudiatory breach of contract did not of itself terminate the contract.

33. I am not deflected from this conclusion by the ET's finding that the letter dated 15 December did terminate the contract of employment. I confess to some doubt whether it did; but if it did not it was repudiatory and the Claimant in any event this time accepted the Respondent's repudiation. The question does not arise for decision.

34. It follows that the claim under Part II was in time and the ET's Judgment will be upheld.

35. I now turn to consider the question, which must be kept separate, of the "effective date of termination" for the purpose of Part X of the **1996 Act** - the unfair dismissal claim. This concept is governed by section 97 of the **1996 Act** which provides, so far as relevant:

> **"(1) Subject to the following provisions of this section, in this Part "the effective date of termination" -**
>
> > **(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,**

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect …"

36. Section 97 was considered by the Supreme Court in **Gisda Cyf v Barratt** [2010] IRLR 1073, a case principally concerned with section 97(1)(a). The Supreme Court approved authority to the effect that the effective date of dismissal is a statutory construct, to be interpreted in its setting, which is part of a charter protecting employees' rights. An interpretation that promotes those rights, as opposed to one which is consonant with traditional contract law principles, is to be preferred: see Lord Kerr at paragraphs 37 and 41. For that reason the Supreme Court upheld the rule that, for the purposes of section 97(1)(a), where dismissal was effected by letter, the effective date of termination was the date on which the employee actually read the letter or had a reasonable opportunity of discovering its contents.

37. The leading case on section 97(1)(b) has long been **Robert Cort**. In that case the employee was not given notice; he was simply told that he was to part company with his employer and given salary in lieu of notice. The question arose whether the effective date of termination was the date when he was told to part company, or the date when notice would have expired. The EAT said that the result did not depend on contractual analysis. Browne Wilkinson J said (paragraphs 12(4) and 13):

"12. …

(4) We consider it a matter of the greatest importance that there should be no doubt or uncertainty as to the date which is the 'effective date of termination'. An employee's right either to complain of unfair dismissal or to claim redundancy are dependent upon his taking proceedings within three months of the effective date of termination (or in the case of redundancy payments 'the relevant date'). These time limits are rigorously enforced. If the identification of the effective date of termination depends upon the subtle legalities of the law of repudiation and acceptance of repudiation, the ordinary employee will be unable to understand the position. The *Dedman* [[1973] IRLR 379] rule fixed the effective date of termination at what most employees would understand to be the date of termination, ie the date on which he ceases to attend his place of employment.

13. For these reasons we hold that, where an employer dismisses an employee summarily and without giving the period of notice required by the contract, for the purposes of s.55(4) the effective date of termination is the date of the summary dismissal whether or not the employer makes a payment in lieu of notice."

38. **Robert Cort** has been followed by the Court of Appeal in **Radecki** and more recently in **Rabess v London Fire and Emergency Planning Authority** [2017] IRLR 147, which confirms that **Robert Cort** remains good authority on the interpretation of section 97 and is not affected by the approval by the Supreme Court in **Geys** of the "acceptance theory" of termination. Mr Braier is therefore correct to say that for the purposes of section 97(1)(b), a termination may take effect even by an act of the employer which amounts to a repudiatory breach.

39. However, given its statutory setting and importance, section 97(1)(b) in my judgment requires words or conduct which in their context amount to a plain and unambiguous termination by an employer. The termination may be by words or conduct or a mixture of the two; but it must unequivocally convey to the employee on an objective reading or understanding that the employer is terminating the contract. Words or conduct which reasonably leave the employee in doubt as to whether the employer has terminated the contract will not trigger the effective date of termination.

40. Contrary to Mr Braier's submission, I do not think that informing an employee that no salary will be payable necessarily conveys that the employer is terminating the contract. An employer may withhold salary for good reason or bad without necessarily terminating the contract. This case affords good examples. The Company could withhold salary if the Claimant was ill; and, on its own case advanced at the hearing (though not in the October and December letters), it withheld salary from August 2013 for more than a year without during that period terminating or intending to terminate the Claimant's contract of employment.

41. I do not think **Radecki** compels the contrary conclusion. In **Radecki** the position was different; on the finding of the majority it was plain that cessation of salary was because the employee's contract was being brought to an end: see the reasoning of Rix LJ at paragraph 53, with which Toulson LJ agreed at paragraph 46.

42. In my judgment, on the particular facts of this case, the ET was entitled to find that the effective date of termination was not 30 October (or, strictly speaking, on receipt of the letter dated 30 October). The letter did not purport to terminate the contract of employment. It stated that the Claimant had walked out of the business the previous year and the Company had taken it as her resignation. This was, as we have seen, simply untrue; and the natural reaction of an employee reading such a letter would not be "this letter is terminating my employment" but "it is untrue; I did not resign and you did not take anything as my resignation". This was indeed the Claimant's reaction: she instructed solicitors and queried the position. The words and conduct of the Company were such as to leave her in reasonable doubt whether the Company intended to terminate her contract.

43. In my judgment the ET did not err in law in concluding that the letter could not reasonably be taken as terminating her employment. I reject the submission of Mr Braier that the ET applied a subjective test; its use of the word "reasonably" shows that it did not fall into this error. Its reference to David's own belief, at the end of paragraph 51, is simply an additional point supporting the conclusion it had already stated. I also reject his submission that its conclusion was perverse. For the reasons I have given its conclusion was entirely sustainable.

44. It follows that the unfair dismissal claim was also in time and must be upheld.

Polkey **Deduction**

The Employment Tribunal's Reasons

45. The Company's pleaded case relating to unfair dismissal was that the reason for dismissal related to conduct. The ET was not satisfied that this was the case. It noted that the Company had not advanced "some other substantial reason" as the reason for dismissal. It went on to say that even if the dismissal had been for some other substantial reason - by which it meant family breakdown - it would have found it unfair because the Company followed nothing resembling a fair procedure in dismissing the Claimant.

46. This is the context in which the ET dealt with an argument that the award should be reduced on **Polkey** principles. It said (paragraph 88):

> **"88. We consider this is one of the situations in which, applying the guidance in *Software 2000 Ltd v Andrews and others* [2007] ICR 825, EAT, the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. A *Polkey* reduction is, therefore, not appropriate. It is far from clear what the outcome of a reasonable investigation would have been. An investigation would have had to consider issues including matters which raised questions about Hazel Feltham's conduct e.g. why did she delete the Facebook messages some time soon after 15 August 2013 if these could have exonerated her as she now claims? Why would Wayne Eckersall have taken the drastic step of informing his wife, the claimant, that he was leaving her because he had feelings for Hazel if there had been absolutely nothing to encourage him in a belief that his feelings might be reciprocated? An investigation would have to consider whether Wayne's depressive illness was such that it rendered him delusional to this extent. It is far from clear that a proper investigation concluded by somebody who was not biased towards believing the account of Hazel would not have concluded, not only that the claimant genuinely believed the allegations she made to be true, as the respondents accepted was the case on 15 August 2013, but that she continued to have reasonable grounds for this belief. It is also far from clear that, at the end of a reasonable investigation, and possibly after mediation, if appropriate, the employer would have reasonably concluded that the claimant and others could not properly continue to work together from the same offices. If the [Company] concluded that they could not, it is not obvious that the person to leave would be the claimant."**

Submissions

47. Mr Braier attacked the reasoning of the ET in three ways. Firstly, he submitted that as a general rule an ET ought to make a **Polkey** assessment even where a significant degree of speculation is involved. Nothing in the facts of this case took it outside the category where an assessment should have been made. The ET, while referring to the **Software 2000** case, must

have misdirected itself in law. Secondly, he submitted that the ET missed the point in paragraph 88 of its Reasons; whether Hazel had behaved inappropriately was irrelevant to the question whether the Claimant could have been fairly dismissed for her conduct on and following 15 August 2013. The ET ought to have focussed on the Claimant's conduct. Thirdly, he submitted that its reasoning was perverse. He took me to features in the evidence which he said demonstrated that there was a substantial chance that the Company could and would have dismissed the Claimant fairly.

48. Ms Wedderspoon submitted that the ET correctly identified the principles which it ought to apply by reference to the **Software 2000** case. Hazel's behaviour was not irrelevant; the Claimant's perception of it underlay her distress on 15 August and the Company, if it had treated a senior and long serving employee fairly, would have been bound to investigate whether there was any substance in her perception. She took me to features in the evidence which demonstrated a basis for the ET's conclusion.

Discussion and Conclusions

49. The **Software 2000** case helpfully distils a great deal of learning on the question whether compensation for unfair dismissal should be reduced because of a chance that the employer might, if it had acted fairly, in any event have dismissed the employee. Elias P said (paragraph 54):

> **"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).**
>
> **(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the**

view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role."

50. I prefer the submissions of Ms Wedderspoon. I see no reason to suppose that the ET failed to direct itself properly or took too narrow a view of its role. This case is far removed from the general run of **Polkey** cases, where the employer establishes a true reason for dismissal but is found to have acted in some respect in a manner which was procedurally unfair. Here the Company did not establish the reason for dismissal to the satisfaction of the ET at all; and it had entirely failed to adopt any reasonable procedure at any stage. The ET was entitled to take the view that if the Company had acted fairly an independent investigation would have been necessary; that such an investigation would have considered whether there was reasonable cause behind the distress of the Claimant; and that Hazel's deletion of key evidence rendered the outcome of that investigation extremely difficult to assess. It was also entitled to take the view that it was by no means obvious that, if by reason of a relationship breakdown one party had to leave, it should be the Claimant, who was a shareholder and a long-standing employee. I can see no error of law in this reasoning; and I do not think its conclusion can possibly be described as perverse.

Contributory Conduct

The Employment Tribunal's Reasons

51. In his written submissions to the ET Mr Braier had closely aligned his arguments on **Polkey** and conduct contributing to dismissal. The matters which he relied on as contributory

conduct were that the Claimant (1) aggressively confronted Hazel by accusing her of having an affair with her husband, (2) had a heated exchange with Susan Feltham, pushing Susan Feltham, (3) had a heated exchange with David, walking off and saying to him "what the fuck has it got to do with you", and (4) failed to return to work thereafter.

52. The ET expressed its conclusions on the question of contributory conduct very briefly. It said (paragraph 89):

> **"89. The Tribunal is not satisfied that the claimant was guilty of any culpable and blameworthy conduct. No deduction for contributory conduct is, therefore, appropriate."**

Submissions

53. Mr Braier submitted that the ET had not given adequate Reasons for its Decision in this respect and that the Decision was in any event perverse. The ET had made findings of fact on the basis of which it could have made a reduction for contributory conduct; it did not return to these or carry out any analysis at all. Its Reasons were therefore not complaint with Rule 62(5) of the **Employment Tribunal Rules of Procedure** or **Meek v City of Birmingham District Council** [1987] IRLR 250.

54. Ms Wedderspoon submitted that the finding in paragraph 89 had to be read in the light of all the findings made by the ET and in the light of the fact that the ET was not satisfied that the real reason for dismissal related to conduct. She took me through the findings of the ET, dedicated to showing that the brief conclusion of the ET in paragraph 89 was sufficient in the light of its earlier findings.

Discussion and Conclusions

55. It is well established that the Decision of an Employment Tribunal is to be read in the round, avoiding pernickety criticism. It must contain a summary of the basic factual conclusions and a statement of the reasons which have led it to reach the conclusion it did. The parties are entitled to be told why they have won or lost.

56. In this case the ET's Reasons would have been improved by a short summary in paragraph 89 of the reason why it did not accept the four heads of contributory conduct put forward by the Company. But I am entirely satisfied that, when its Decision is read in the round, and when it is appreciated that the submissions relating to contributory fault were closely allied to those relating to **Polkey**, the ET's reasoning sufficiently appears.

57. The first three headings of contributory conduct all relate to the events of 15 August 2013. The ET made detailed findings about these in paragraphs 22 to 27 of its Reasons. The ET found (and it appears not to have been in dispute) that the Claimant genuinely believed that Hazel had sent inappropriate messages to her husband and that Hazel did not - either then or subsequently - show her the messages which would have disproved this. The ET did not accept that the Claimant pushed Susan. The ET found that David made comments to the Claimant of a most wounding kind; I have already set them out. This was the context in which the ET found that, when the Claimant was leaving and David asked where she was going, she used a single swear word in her reply. In the context of these findings it is entirely plain why the ET did not consider that the Claimant was guilty of contributory conduct by what happened on 15 August. Its reasoning in respect of **Polkey** further explains its position; it was not satisfied that a fair and independent investigation would have found her to have committed misconduct. It was, indeed, not even satisfied that conduct was the true reason for dismissal.

58. The final heading of contributory conduct related to the Claimant's alleged failure to return to work. Again the ET dealt with this in detail in its findings of fact. It accepted the Claimant's evidence that she was unfit for work due to illness from 15 August, feeling better around 9 September; and found that Stephen said she could not return. Against this background it is plain why there was no basis for a finding of contributory conduct relating to her failure to return to work.

59. In the circumstances, while the Reasons would have been improved by a short summary in paragraph 89, I accept Ms Wedderspoon's submission that the Reasons, read in the round, make it clear why the ET rejected the allegations of contributory conduct.

Sex Discrimination

The Employment Tribunal's Reasons

60. The ET found two matters to be direct sex discrimination.

61. The first was the withholding of salary. This was a decision taken by David with the agreement of Martin and Stephen. The ET found the Company and each of these individuals liable. The ET reasoned as follows (paragraph 110):

> **"110. In relation to the withholding of salary, the differential treatment of Wayne, while not an employee himself, could lead us to infer that the claimant's treatment was because of her sex. The claimant has satisfied us of facts from which we could conclude discrimination. The burden, therefore, shifts to the respondent to prove a non discriminatory reason for the treatment. The respondent has not satisfied us that they had a non discriminatory reason for withholding the claimant's salary. …"**

62. The ET had found, in paragraph 36 of its Reasons, that from 20 September 2013 Wayne was paid by the business for some weeks when he did no work at all for the business and in full for some weeks where he only worked one day, despite the fact that he was an independent contractor not an employee.

63. The second was subjecting the Claimant to a "rant" on 15 August. This allegation was established against David and the Company. The ET reasoned as follows (paragraph 112):

> **"112. In relation to David Feltham's comments to the claimant on 15 August 2013, which the claimant describes as a "discriminatory rant", the first two clearly on their face related to sex, and in their context the third and fourth comments also appear to be comments likely to be made to a woman but not a man. The burden shifts to the respondent to prove a non discriminatory reason for making these comments. David Feltham has not satisfied us that he made the comments for any non discriminatory reason."**

64. The ET found that the Claimant was subjected to a detriment by these comments. It said that she was caused further distress by these comments which were clearly of an inappropriate nature to be made by the Managing Director of the family businesses.

65. The ET found that the withholding of salary was a continuing act until the termination of the Claimant's employment, and the remarks were part of a "continuing discriminatory state of affairs, which included the withholding of salary" (paragraph 116). It considered that the claims were brought in time. But, for reasons given in paragraph 117, it found in the alternative that it was just and equitable to consider the claims out of time. It said:

> **"117. … The situation with pay carried on until the termination of employment. The claimant was making attempts to sort out the situation without legal action, as evidenced by her letter of 19 June 2014. This was a delicate family situation as well as an employment matter. It was understandable, in the circumstances, that the claimant did not wish to resort to legal action until it was obvious, on receipt of the respondent's letter of 15 December 2014, that there was no other course open to the claimant."**

Submissions

66. Mr Braier made the following criticisms of the ET's reasoning concerning sex discrimination.

67. Firstly, he submitted that the ET erred in law in treating Mr Eckersall as a statutory comparator. Section 23 of the **Equality Act 2010** requires that on a comparison of cases there must be no material differences between the circumstances relating to each case. Here there

plainly were differences. Mr Braier accepted that the ET could have treated Mr Eckersall as an evidential comparator; but he submitted that if it did so it was required to make fuller findings as to the material differences, and to assess how they impacted on the Company's reasons for paying him when it did not pay the Claimant.

68. Secondly, he submitted that the ET erred in law in finding that, on the issue of payment, the burden of proof shifted from the Claimant. The finding appeared to be based only on a difference of treatment and gender (Mr Eckersall was paid while not working, whereas the Claimant was not): see Mummery LJ in **Madarassy v Nomura International plc** [2007] IRLR 246 at paragraph 56.

69. Thirdly, he submitted that the ET did not properly consider the non-discriminatory explanation which was put forward on behalf of the Company and the individual siblings concerned. There was an explanation as to why Mr Eckersall was paid: he was medically unfit for work and was paid on compassionate grounds following a request to David. There was an explanation as to why the Claimant was not paid: she was not paid because she was not attending work and the family situation needed to be resolved by a retraction of the allegations she made. The ET was required to evaluate these explanations; it did not do so.

70. Fourthly, he submitted that the remarks by David could not properly be considered as part of a continuing act with the withholding of salary.

71. Ms Wedderspoon's answered these submissions in the following way.

72. Firstly, she submitted that the ET did not treat Mr Eckersall as a statutory comparator, but as an evidential comparator. The difference in the treatment of the Claimant and Mr Eckersall was striking. Both worked in different ways for the Company. Both were off work for illness. The Claimant, though an employee, was not paid. Mr Eckersall, even though he was self employed, was paid. The ET was entitled to take note of this difference when it decided whether the failure to pay the Claimant amounted to sex discrimination.

73. Secondly, she submitted that by reason of this feature the ET was entitled to find that the burden of proof provision in section 136(2) of the **Equality Act 2010** was engaged. The ET did not simply rely on a bare difference of treatment and a difference of sex. The Claimant and Mr Eckersall were husband and wife; and the treatment of the Claimant had to be seen in the context of the remarks which David made on 15 August.

74. Thirdly, she submitted that the ET plainly must have rejected the reason which David had given for the treatment in question: paragraph 110 admits of no other possibility.

75. Fourthly, she submitted that the ET was entitled to find that the remarks by David were part of a continuing discriminatory state of affairs; they were closely linked with the reason why the Claimant was not permitted to return to work and her salary withheld. In any event the ET decided that it would be just and equitable to extend time.

Discussion and Conclusions

76. I have reached the conclusion that the ET has not sufficiently explained its finding of direct discrimination against the Company and its Directors relating to the non-payment of the Claimant.

77. The fundamental question for the ET was whether the non-payment of the Claimant by the Company was because of sex. It was not, of course, necessary for the non-payment to be wholly or mainly because of sex; it was sufficient if this was a significant reason for the treatment, either consciously or unconsciously - in other words, if the non-payment was tainted by the protected characteristic of sex.

78. In order to decide whether this was the case the ET was required to engage with and evaluate the explanation given for the treatment. This engagement is required whether or not the explanation was, on the balance of probabilities, accepted as sufficient. The burden of proof provision may in some cases be decisive; but it is never a substitute for addressing the explanation given.

79. In paragraph 110 of its Reasons the ET did not address or evaluate the explanation at all, beyond saying that David had not satisfied it that payment was withheld for any non-discriminatory reason. I do not think this sufficiently grapples with the issue it had to decide.

80. The explanation put forward was that the Claimant was not paid because she was not working - against the background that the Company and its Directors considered that she could not return to work because she had not sufficiently apologised to Hazel. It is easy to see that this attitude was unreasonable; once the Claimant intimated that she was well and wished to return to work, one would expect any properly advised employer to investigate the matter and engage in disciplinary proceedings if it thought that the Claimant was guilty of misconduct; not simply to tell the Claimant she could not return to work and not pay her. But it does not follow that the treatment was on the grounds of sex simply because it was unreasonable.

81. I doubt whether the ET regarded Mr Eckersall as a direct statutory comparator satisfying the requirements of section 23(1): the ET's explicit reference to the fact that he was not an employee tends to indicate that it regarded him as an evidential comparator. But care was required before placing weight on Mr Eckersall as a comparator of any kind.

82. It is well established that the true comparison to be made for the purposes of section 23(1) will be linked to the reason for the treatment. If the Claimant's pay was withheld because she was ill, then the comparison with Mr Eckersall is more striking; he was paid on compassionate grounds though he was not an employee. It is easy to see how the treatment of Mr Eckersall feeds into a comparison: both were ill, neither was entitled as of right to payment, but Mr Eckersall was given a discretionary payment whereas the Claimant was not.

83. However, it is far from clear that the Company ever withheld pay because it considered the Claimant to have been unwell. She did not report in that she was sick. It appears that the Company withheld pay for the reason that I have already intimated - that she was not working and could not return until she had apologised to Hazel. If so, the relevance of Mr Eckersall is not clear; he had not criticised Hazel in any way, and there was no question of his apologising before he returned to work. So, in order to evaluate the importance of Mr Eckersall as a comparator, it was essential to address the reason why the Company withheld pay.

84. I am left with a strong suspicion that David's remarks on 15 August, which were themselves found to be unlawful sex discrimination, played some part in the ET's reasoning concerning the withholding of pay. This is consistent with the ET's view, also unexplained, that they formed part of a "continuing discriminatory state of affairs". But the ET does not say this in paragraph 110 of its Reasons or indeed elsewhere.

85. For these reasons I conclude that the reasoning in paragraph 110 cannot stand and the question whether the Company and its Directors committed direct sex discrimination must be remitted for reconsideration.

86. This brings me to the finding that the Company and David were guilty of direct sex discrimination by reason of David's remarks on 15 August. Here the appeal is only on time limit grounds. The ET's findings relating to time limits depend on its linkage between the withholding of pay and the remarks of David; since its findings concerning the withholding of pay require reconsideration, so do its conclusions on the time limit issues. If the ET adheres to its reasoning that the remarks formed part of a "continuing discriminatory state of affairs", more explanation will be required than is presently found in the Reasons.

Conclusions

87. It follows that the appeal will be allowed only in respect of the complaints of sex discrimination; the matter must be remitted for the ET to reconsider (1) whether the Company and the Directors were guilty of sex discrimination by reason of withholding the Claimant's pay, (2) whether the complaints of sex discrimination were out of time and (3) whether time should be extended for the making of those complaints. In all other respects the appeal will be dismissed.

88. I have no doubt, applying the overriding objective and the criteria in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, that remission should be to the same ET. I have allowed the appeal only in respect of one aspect of a thorough and detailed set of Reasons which proceeded from careful findings of fact. The ET is well placed to listen to further submissions on the remaining issues and determine them without further evidence.