Appeal No. UKEATS/0016/17/AT

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
At 52 Melville Street
On 29 August 2018
At 10:30am

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

WESTERTON (UK) LTD — APPELLANT

KEITH ARMSTRONG — RESPONDENT

Transcript of Proceedings

RESERVED JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant
Ken McGuire Advocate
instructed by
Quantum Claims
70 Carden Place
Queens Cross
Aberdeen

For the Respondent
Ms Alice Stobart Advocate
Instructed by
Stronachs LLP
Advocate and Solicitor
28 Albyn Place
Aberdeen

SUMMARY

UNFAIR DISMISSAL ; Polkey Deduction : Contributory Fault

The claimant, an employee in the oil and gas sector in Aberdeen, was dismissed by his employer. The Tribunal having concluded that the dismissal was both procedurally and substantively unfair, the respondent sought to reduce the compensatory award on the Polkey principle and to reduce compensation on the basis of the claimant's contribution to his dismissal. A Polkey reduction of one third was made but there was no reduction for contributory fault. The respondent appealed.

Held ;-

1) **The one third deduction could not be regarded as manifestly less than the percentage that might have been proper (*Contract Bottling Limited v Cave and another [2015] ICR 146).* A substantial chance of redundancy could easily be less than 50%.**
2) **The single error on the part of the claimant fell far short of anything that might have caused or contributed to dismissal and the Tribunal's approach to the application of section 123(6) ERA 1996 had been correct.**

Appeal dismissed.

Introduction

1. The claimant was employed by the respondent, a company concerned with the provision and operation of specialist "Downho" Tools for the oil and gas industry, particularly the offshore drilling sector, from around 1 January 2010 until his dismissal effective from 14 December 2015. He succeeded in an unfair dismissal claim before the employment tribunal in Aberdeen (Employment Judge J M Hendry sitting alone). The respondent employer appeals the tribunal's decision of 17 January 2017 on two specific areas of remedy only, namely the level of the reduction of the compensatory award on the **Polkey** principle and the decision not to make a reduction in compensation on the basis of the claimant's contribution to his dismissal.

2. Before the tribunal the claimant was represented by Mr R Alexander, Solicitor and on appeal by Ms Stobart, Advocate. The respondent was represented by Mr Lefevre, Solicitor before the tribunal and on appeal by Mr McGuire, Advocate. I will refer to the parties of claimant and respondent as they were in the tribunal below.

The tribunal's judgment

3. The circumstances leading to the claimant's dismissal are narrated in full in the judgment and the following is a brief summary. In October 2017 the claimant was involved with a client of the respondent, ExxonMobil in Canada. The contract involved was a high value one to cut well-pipes offshore. The claimant and a colleague, Mr McPherson, travelled to Canada at a crucial point in the contract only to find that Mr McPherson did not possess the necessary Work Permit and so could not enter the country for the purpose of carrying out his duties as a Field Engineer. The claimant was allowed to enter the country only to attend meetings but not to carry out work for which a permit would be required. Mr McPherson was ultimately deported. The respondent company was (and is) headed up by a Robin Porter, who is also the major shareholder and the person to whom the claimant reported. Following the problems that arose with Mr McPherson being denied entry to Canada, Mr Porter insisted that the claimant carry out the work offshore there as he had previously been a Field Engineer. However, the claimant's offshore training certification had lapsed and he had developed a back problem. He was concerned also about his ability to operate the particularly complex piece of machinery involved. The client suggested that a third party be instructed to operate the equipment. That was done and the contract was completed successfully.

4. Mr Porter was dissatisfied with what he perceived as the claimant's failure to realise the importance of the contract. There had been an issue with his having failed to pick up an email sent

to him by the client in relation to when Mr McPherson, the engineer should arrive in Canada. In any event, following the client's return from Canada, Mr Porter instigated a "home-made" disciplinary process and the claimant's employment was terminated without notice or payment in lieu of notice and he was not offered a right of appeal against the decision to dismiss him.

5. The claimant made the following material findings in fact insofar as relevant to this appeal:

> **"37. The Respondent's letter, dated 10 November 2015, stated that the Claimant's position was *"no longer required"*. There had been no reference to redundancy prior to this letter, nor was there any reference to redundancy up to the Claimant's dismissal. Since his dismissal the respondent has not carried out any redundancies of employed staff.**
>
> **38. Following the Claimant's dismissal the Respondent hired a Mark Johnson on or around July 2015 in the role of Service Technician to help out in the workshop. He now carries out the role of Workshop Manager which covers much of the duties of the role of Service Manager.**
>
> **39. In addition the Respondent has run advertisements in the Press and Journal newspaper for shore-based and offshore-based staff. Matt Davies continued to carry out work for the Respondent following the termination of the Claimant's employment by being 'sub-contracted' through another company. The Respondent placed advertisements in the Press & Journal and online for the position of an Engineer, from on or around November 2015. The job description contained in this advertisement matched the previous job description of Matt Davies. The Respondent subsequently placed an advertisement for the role of Mechanical Design and Development Engineer on both LinkedIn and 'Job Site' on or around 26 May 2016. This role would be to replace Matt Davies, Design Engineer.**
>
> **40. The Respondent placed an advertisement for the role of Offshore Engineer on their website on or around December 2015. This stated that the role was "Reporting to Operations Manager". This role would have replaced Neil Wallace, Service Manager. The Respondent has also utilised contractors to carry out this role, including Engineer Steve Browning.**
>
> **41. Mr Yuxian Tao, who was formerly the Respondent's Electronics Engineer, was promoted to Engineering Manager. This role encompassed some of the duties of the role of Operations Manager.**
>
> **42. If the Claimant's job had become redundant, the Claimant would have been prepared and able to carry other less senior roles such as Senior Field Engineer."**

6. Having found the claimant generally credible and reliable the tribunal had the following comments to make about the evidence of Mr Porter:

"45. In relation to Mr Porter at some points I found him credible and I had some sympathy with the situation in which his company found itself generally and in particular in relation to the ExxonMobil contract. He seemed to lack insight that the relatively unsatisfactory performance in relation to the Canadian Contract was not just the Claimant's fault but possibly due to the failures of others including himself in the way the company went about conducting its business for example in having no one tasked to discover whether work permits were needed for a contract. However, overall I could not accept all of his evidence some of which seemed unreliable and confused."

Reference was made on appeal to some of the submissions that had been before the Employment Judge before he made his decision and these included the following:

"48. In relation to the effective date of dismissal taking effect on the 14 December this doesn't appear in the claimant's ET1. It was clear from the circumstances he was dismissed on the 14 this was evidence of Mr Burr. The Respondents' witnesses were reliable and in Mr Lefevre's view even if the Tribunal took the view that the dismissal was in some way unfair the contributory fault should be 100%. It was also apparent that because of the downturn in the oil industry he would have been highly likely to have been made redundant very shortly after these events because of that downturn.

49. Mr Alexander provided the Tribunal with detailed written submissions for which I extend my gratitude. He supplemented these briefly orally. Essentially his position was this was a situation where the Claimant had clearly been unfairly dismissed both procedurally and substantively. There was no basis for the dismissal he suggested. The various issues raised by the Respondent were a smokescreen and the Claimant had answered every allegation made against him. The difficulties that had arisen in relation to the ExxonMobil work in Canada could not be held to be his responsibility. In his submission there was no basis for contributory fault or for the compensatory award to be reduced to reflect the likelihood there would have been a dismissal in any event.

50. The evidence in relation to the likelihood of the Claimant's future redundancy or dismissal was poor and indeed there was evidence that the company was gearing up for a possible upturn rather than cutting staff. Mr Alexander suggested that the Claimant was a wholly credible witness and that the Respondents' witnesses, in particular Mr Porter, were unreliable and incredible."

7. So far as the tribunal's reasoning is concerned the following paragraphs are pertinent to the issues on appeal:

"60. In the present case it was clear that Mr Porter had decided to dismiss the Claimant before he returned to the UK from the Canadian job. Indeed his diary notes (JB p135) reflect what the Claimant alleged occurred at the first

meeting namely he was given the choice of resigning or facing disciplinary action. Mr Porter noted that there was *'No Decision'* in the diary. There was no investigation or any attempt to analyse the Claimant's culpability for events or listen to any mitigation.

61. All of this is consistent with a decision having been made to dismiss earlier although it was 'dressed up' as a possible redundancy in the letter the Claimant was handed. Mr Porter was aware that some sort of process had to be gone through. Any doubts as to the position can be dispelled following a cursory glance at Mr Porter's diary entry of the 17 November (JB p136) where he confirms the Claimant's evidence that there were three ways to leave the company namely *'resignation, disciplinary or redundancy'*. I would add at this stage that given the fall in work Mr Porter might probably have wondered if the company actually needed an Operation Manager but he had not taken this further or considered wider redundancies at this point. The catalyst and principal reason for removing the Claimant clearly related to the ExxonMobil situation."

…

66. The two other major difficulties that occurred with the contract were firstly the failure to pick up the email requiring the mobilisation of Mr MacPherson for the following Monday and the fact that no one was aware that Mr MacPherson needed a visa or work permit. Looking at the latter issue there was no evidence that the Claimant was tasked with checking the position. The company had carried out work before in Canadian waters and no one was aware that the situation had apparently changed and a work permit was now required. Mr Porter suggested that this was a failing on the Claimant's part. I cannot accept that. There was no instruction to him to check the matter or even keep such matters under review. The travel arrangements seem to have been carried out generally by Ms Porter. It was not clear in exactly who was responsible for which part of the process.

67. The second issue is not as clear cut. Mr MacPherson hoped to get back to Scotland for a few days following his completion of the offshore training course. On the Friday he was to travel the Claimant was in contact with the clients about when they needed the engineer. The Claimant emailed at 2.21pm suggesting having the engineer available for Tuesday. The email was sent from his iPhone. He was aware of Mr Macpherson's travel plans. He did not ask for confirmation of the position and was unaware that at 18.12pm the response was to have the engineer available on Monday. It must be remembered that the tools were only arriving on Tuesday and the Claimant's assumption of when the Engineer should be present appears reasonable. The Claimant only picked up the crucial email the following day.

68. There was no suggestion that the Claimant was at fault in giving permission for Mr Macpherson to come home but given that from early on Friday there was a push to get the tools to Canada quickly a more prudent manager might have asked Mr MacPherson to wait in Canada until matters were clarified. The issue that appeared to annoy Mr Porter was the failure to pick up the email that evening. Looking at the matter in the round it is hard not to agree that in the circumstances the failure to get an agreed mobilisation date and

then a failure to monitor for any response was poor practice and not what one might have reasonably expected from a senior manager overseeing an important contract. However, it was only a request and not a requirement to have the Engineer present on Monday. In addition a reasonable employer would have to take into account the fact that the matter was retrieved and Mr MacPherson did get back to Canada in time. The outcome of the contract was ultimately judged to have been a success.

…

74. In all the circumstances and considering the way in which this disciplinary matters were approached the Tribunal accepts that the Claimant was unfairly dismissed for the reasons set out above. The disciplinary process was clearly predetermined. No reasonable employer would have dismissed on the basis of what had happened here and the Claimant's role these events. The process adopted was also unfair with there being no real investigation into the allegations or those allegations being fleshed out. The dismissal process was as Mr Lefevre suggested 'home made' and inadequate. There was little basis for most of the allegations made.

…

76. Tribunals are often required to consider when assessing 'just and equitable' compensation under section 123 of the Employment Rights Act 1996 whether the employee could have been fairly dismissed at a later date or fairly if a proper procedure had been adopted. This is a case where the dismissal was unfair not just for what are often described as procedural reasons. The basis for the disciplinary charges was itself wanting. The Polkey principle is not yet exhausted as the Respondent argued that the Claimant would have been made redundant in any event. The company was on the point of closing according to Mr Porter and he also at this point in time had realised that they could afford the Claimant. I regret that I did not find this evidence at all convincing. The company did not in the event close nor had any plans been made at that point for redundancies to be made. The Respondent's solicitor pointed to the fact that the company did not replace the Claimant and 'released' Mat Davies a Design Engineer and at the end of July 2016 a Neil Wallace and then Mat Brandie left the company. The Claimant's position was that Mr Davies and Mr Wallace were contractors and not employees and that Mr Davies continues to be used for work periodically. There was also evidence that the company continued to monitor the job market for skilled personnel and was restructuring itself in anticipation for an upturn in the oil price. It is not easy to adjudicate between these competing positions.

77. Mr Alexander referred the Tribunal to the case of <u>Software 2000 Ltd v Andrews and Othrs UKEAT0533DM</u> and the proposition that the Tribunal has to be able to make an assessment with sufficient confidence about what is likely to have happened. It is certainly true that the evidence in relation to what might have occurred is often incomplete and usually disputed. It is certainly in the Respondent's interest to suggest that the Claimant would have been made redundant anyway and evidence of their intentions should be approached carefully.

78. The Tribunal had to have regard to the overall picture both the marked decline in operations in the North Sea and the indications that the Respondent company had to some extent 'pulled in its horns' and reorganised itself. This does not mean that the Tribunal accepts that the Claimant was bound to have been dismissed on the grounds of redundancy at this exact point in time or at all. Various other options were no doubt available such as making others redundant and keeping senior staff for the hoped for upturn or even requiring the Claimant to work as a Field Engineer although in respect to the latter suggestion there was no evidence that the Claimant's back condition would permanently exclude him from such a role. What we know is that the company had survived and seems to be gearing up for the upturn by continuing to advertise for engineers. It was clear from Mr Porter's evidence that he put a premium on getting and retaining experienced and skilled staff and that he tried to take a long term view of the various industry cycles.

79. That said the Claimant was receiving a significant salary and he was carrying out a role that Mr Porter had formerly carried out. His post was bound to come under scrutiny. The Tribunal approached this matter broadly and concluded that it could say with some certainty that there would be a substantial chance of the Claimant's redundancy and that one third was the appropriate 'chance' of this occurring in the New Year of 2016.

80. We now turn to contributory fault bearing in mind that a reduction has already been made for the chance of being fairly dismissed on the grounds of redundancy. There were elements of the Claimant's behaviour in relation to the ExxonMobile contract that are the subject of criticism. The leading case remains that of Nelson v BBC (No2) 1980 ICR 110. The Tribunal must consider if the actions are blameworthy, that they contributed to the dismissal and whether it is just and equitable to reduce the award. This is not an easy matter and the Claimant's conduct was not such that would warrant dismissal in the Tribunal's view. He had a clean disciplinary record and his main mistake of not keeping a lookout for the email from the clients confirming when the engineer was required one that caused no upset to the clients, although Mr MacPherson was greatly inconvenienced having to immediately return. The matter was poorly handled but was not of sufficient gravity for the Tribunal to conclude that a further reduction should be made.

81. There is no doubt that Mr Porter was 'furious' about the situation that developed but many of the factors that led to his anger and frustration such as the failure to obtain a work permit for Mr MacPherson were matters that could not be blamed on the Claimant."

The respondent's arguments on appeal

8. Mr McGuire advanced two separate grounds of appeal, first in relation to the level of the **Polkey** deduction and secondly in relation to the finding not to make any further reduction for the blameworthy conduct of the claimant. In relation to the first argument, he submitted that the tribunal had erred in law in failing to apply the **Polkey** principle by reducing the compensatory

award by only one-third to reflect the chance of the claimant being made redundant when a much more substantial reduction should have been made. The error of the Judge was in not following his own conclusion (at paragraph 79) that he could say with some certainty that there was a "substantial chance" of the claimant being made redundant had he not been dismissed but then calculating that chance at only one-third. The submissions for both sides (paragraphs 48 – 51) had encapsulated the contention of the respondent that it was highly likely that but for the dismissal the claimant would have been made redundant shortly after the event because of the downturn in work in the oil industry and the claimant's response that there had not in fact been redundancies and that the company had geared up for a possible upturn in work. While those had to be balanced against each other the Employment Judge had himself concluded (at paragraph 61) that when considering what basis to terminate the claimant's employment on, Mr Porter might have wondered whether the company actually needed an Operations Manager at all. Accordingly, an issue of whether the claimant's job still had been open with something the Judge himself had alighted on.

9. The reasoning in relation to **Polkey** deduction is contained in paragraphs 76 – 79 inclusive of the Judgment. It was clear that the "substantial chance" reference was a key part of it. Mr McGuire contended that giving the word substantial its ordinary meaning meant that it was "of ample or considerable amount or size; sizeable, fairly large". That was one of the definitions of substantial given in the Shorter Oxford English Dictionary. In this context, he submitted that having decided that the chance was substantial, it must be something more than one-third, the figure by which the award was ultimately reduced. The Employment Judge had used language suggesting that the reduction would be more than a third and so had erred in not following that through. He had made no finding that the "highly likely" submission made on behalf of the respondent was rejected and had not framed his decision in terms of likelihood at all. Had he described the chance as "negligible" or "an outside chance", the one-third reduction might have been appropriate but it could not be said to amount to the substantial chance that he had identified.

10. Counsel also advanced an inadequate reasons point in relation to the first ground of appeal. He referred to the well-known passage in **Meek v City of Birmingham District Council [1987] IRLR 250** at paragraph 8, confirming that a tribunal judgment must contain an outline of the facts, a summary of the tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those facts. *"The parties are entitled to be told why they have won or lost"*. In this respect Mr McGuire contended that

paragraph 79 of the judgment was inadequate. While the word substantial was used in relation to the chance of redundancy the deduction that followed it was not then substantial and so it was incumbent upon the Employment Judge to explain why that was. There was nothing in the judgment to confirm why deduction in percentage terms of over 50% was not made having regard to the substantial chance identified. More would have been required to justify that.

11. Reference was also made to the case of **Contract Bottling Limited v Cave and Another [2015] ICR 146.** There, Langstaff P had allowed an appeal by the respondent's employer on the basis that the tribunal had made an error of law in failing to explain why there was only a 20% likelihood that the claimants would have been fairly dismissed. On appeal the EAT decided to substitute its own decision and fixed a percentage of 33%. In doing so, the then President of the Employment Appeal Tribunal had reiterated that it was important that the tribunal explain why it is adopting a particular percentage. Mr McGuire submitted that, just as in the case of **Contract Bottling Limited** where the EAT had seen fit to substitute its own decision on this point, so too should the present tribunal, in allowing the appeal, fix a particular percentage. The percentage sought by the respondent as a reduction was now 70%. While it was acknowledged that in **Contract Bottling Limited** this approach was taken partly because the tribunal had already failed previously to supply reasoning, the circumstances of the present case, including the length of time since the dismissal took place, justified a similar course. Reference was made to **Jafri v Lincoln College [2014] ICR 920**, where the Court of Appeal had confirmed that where the appeal tribunal was able to conclude what the result would have been had the tribunal not made an error, it could decide what the outcome should be and substitute a decision. That would be appropriate in this case. Finally, on the first ground, Mr McGuire clarified that, while an initial point had been taken about whether the tribunal should have given consideration to the particular timing of any anticipated redundancy, that was no longer insisted on.

12. Turning to contribution, Counsel contended that the tribunal erred in law in failing to find that the claimant had contributed to his dismissal and to make the appropriate reduction in compensation under section 123(6) of the Employment Rights Act 1996. It was accepted that this argument constituted different territory from the first ground because it contested the absence of a finding that the claimant had been at fault and was a just and equitable test. However, Mr McGuire submitted, under reference to paragraph 80 of the judgment, that the fatal error in the tribunal's reasoning was the line ;- " … *the claimant's conduct was not such that would warrant dismissal in the tribunal's view".*

The background of a contributory fault discussion was that the claimant had been unfairly dismissed and the tribunal had accepted that. What the tribunal was required to do was, having regard to the substantial finding that his dismissal was unfair, look for any blameworthy conduct on the part of the claimant to see what contribution if any that had made. Whether or not the conduct warranted dismissal was irrelevant because that had already been decided. There were passages in the judgment which supported the contention that the tribunal had found that the claimant was at fault. For example in paragraph 45, in dealing with Mr Porter's credibility, the tribunal had commented that he lacked insight that the unsatisfactory performance in relation to the Canadian contract was "… not just the claimant's fault". Further, the submission made to the tribunal (at paragraph 48) on behalf of the respondent was that contributory fault should be 100%. While that may have been optimistic, it was made against a background of there being some acknowledgement that the claimant had done things wrong. At paragraph 66 of the judgment this was to some extent acknowledged by the Employment Judge in relation to the issue of the failure to pick up the email from Canada requiring the mobilisation of Mr McPherson for early the following week and the fact that no-one was aware that Mr McPherson needed a visa or work permit. While in the tribunal's view the claimant was exonerated from the latter issue, the tribunal was left with the fact that the claimant had failed to pick up an email. The circumstances of that were narrated in paragraph 67. Further, the problem that had arisen was that Mr McPherson had already come home only to have to turn around and return to Canada when the crucial email was picked up. At paragraph 68 the tribunal talks of what "a more prudent manager" might have done in that respect. Accordingly, there were two important failures in conduct identified, namely the failure to pick up the crucial email and the failure to consider that Mr McPherson could be asked to wait in Canada. Although those failures had to be balanced against the ultimate success of the contract it did not matter. There was, on the Employment Judge's own findings, blameworthy conduct albeit that the overall dismissal was unfair. The tribunal's clear findings of fault on the part of the claimant were inconsistent with a conclusion that no deduction for that conduct should be made. The Employment Judge had gone astray effectively by looking for conduct that would warrant dismissal rather than general blameworthy conduct.

13. Mr McGuire submitted that the findings made by the Employment Judge were sufficient to allow the tribunal to conclude first that the claimant's actions were blameworthy and secondly that they contributed to the dismissal which had taken place immediately after the trip to Canada. It was accepted that in the case of **Nelson v BBC (No.2) 1980 ICR 110** that the discussion took

place against a background of acceptance by both the first tribunal and the appeal tribunal that would be just and equitable to reduce the award, unlike in the present case where it is a failure to do so that is challenged. However, it would still be possible on the basis of the findings made by the tribunal here to take those and conclude that an appropriate figure for reduction would be 50%.

14. In all the circumstances, Mr McGuire submitted that the appeal should be allowed and the proposed percentages substituted on the two separate grounds. If there was to be any remit, it should be to a different Employment Judge as the present one appeared to have "made his mind up" and, albeit that it could be assumed would do his best, it might be difficult to ask him to revisit findings he had already made.

Submissions for the claimant

15. Ms Stobart for the claimant invited dismissal of the appeal. On the first argument relating to a **Polkey** contribution and the reasons given for a particular deduction, Counsel relied on paragraphs 76 – 79 of the judgment where she described the Employment Judge as "doing a good job" of setting out the factors that were relevant to his conclusion about the chance of a dismissal on the basis of redundancy had the claimant not been fairly dismissed for a conduct reason. The context was that the evidence of Mr Porter for the Respondent had been that the company was on the point of closure when the claimant was dismissed but the Employment Judge had rejected that evidence and had also noted that information was available that the company had not actually closed and was recruiting employees. This case was very different on its facts from that of **Contract Bottling Limited v Cave and Another [2015] ICR 146** where dismissal took place against a background of there being a redundancy situation, the case being about the selection process within that. In the present case it was clear from the judgment that the respondent had no good basis or reason to dismiss the claimant. In those circumstances, it was on one view generous to the respondent that the Employment Judge went on to consider the possibility of redundancy at all.

16. Counsel analysed the findings of the tribunal between paragraphs 32 – 42. These were all relevant as background to the issue of whether any redundancy was in contemplation at the time of the claimant's dismissal. They were important findings and illustrated that there were no redundancies at the time of or following the claimant's dismissal, that the respondent was advertising for staff and that the claimant would have been prepared to undertake other less senior

roles had it been necessary. It was against that background that the Employment Judge weighed matters up at paragraphs 76 – 79. As an experienced Employment Judge sitting in Aberdeen, the downturn in the oil industry in the North Sea was well known to the decision maker. That was taken into account at the first part of paragraph 78.

17. The weighing up exercise is one for the tribunal in the first instance. While that exercise had been carried out by Langstaff P himself in **Contract Bottling Limited v Cave and Another** he did so only because the Employment Tribunal had failed twice to do so and a final decision was required. Ms Stobart referred to paragraphs 19 and 20 of that judgment and in particular the use of the term "point of balance" as between the chance of employment continuing and the risks that it will not. This was the exercise that the Employment Judge in the present case was involved in. He had weighed up the various factors for and against the chance of redundancy happening but for the unfair dismissal and he had fixed a point of balance in selecting one-third. It was important that paragraph 21 of Contract Bottling Limited Langstaff P had made clear that a specific percentage chosen by the tribunal could only be criticised if it was *"manifestly less or more than the percentage which might have seemed proper"*. Looking at the various factors he weighed in the balance, it seemed that the Employment Judge had been more in favour of the likelihood of either no redundancy or a redundancy situation where the claimant would not be made redundant than the other extreme, namely the claimant himself being made redundant by the company. That was reason enough to fix the one-third deduction. In **Croydon Health Service NHS Trust v Beatt [2017] ICR 1240** the Court of Appeal had indicated (at paragraph 100) that in this context one could look to other parts of the judgment where the reasoning on a **Polkey** deduction was brief. It was an important distinction between the application of the **Polkey** principle and that of contributory fault that the former was a hypothetical exercise and the latter was not. That was emphasised by Underhill L J at paragraph 101 of **Croydon Health Services**. Reading the judgment in this case as a whole there were sufficient reasons given for the choice of a one-third deduction applying the **Polkey** principle. The word "substantial" in the Employment Judge's description of the chance just meant "having substance" and Counsel for the respondent could not say that the Employment Judge had erred in his conclusion and could only have found that it was highly likely that there would have been a redundancy. The Employment Judge had taken a broad brush approach and if he had not used the word "substantial" there could have been no criticism of the one-third deduction based on his findings.

18. So far as contributory fault was concerned, Ms Stobart contended that paragraph 80 had to be read "in the round" and not taken as a statement of law on the part of the Employment Judge. The expression that the claimant's conduct would not have warranted dismissal was made in the context of an acknowledgment that the matter of contribution was not easy because he had already decided that the unfair dismissal was pre-determined (paragraph 74) and had been procedurally and substantively unfair. Against that background, it was difficult to assess whether any conduct on the part of the claimant had contributed. In any event, the tribunal was entitled to conclude, having highlighted that there had been one or two aspects of the Canadian contract that had been handled poorly by the claimant, that such conduct was not of sufficient gravity for any deduction to be made. In **Nelson v British Broadcasting Corporation (No.2) [1980] ICR 110** the Court of Appeal had confirmed that not all unreasonable conduct was necessarily culpable or blameworthy in this context. Everything depended on the degree of unreasonableness involved in the claimant's conduct.

19. In the circumstances of the present case, any reference to conduct on the part of the claimant went no further than concluding that it might have been better if he had looked at the email earlier, although even then there was a reason for his approach. He had been unaware of the response timed at 18:12 from Canada. The assumption made by the claimant of when the engineer should be present in Canada was specifically characterised as "reasonable" by the tribunal at paragraph 67. Accordingly, the evidence did not suggest that any real question of fault on the part of the claimant arose. That a more prudent manager might have done it differently was not sufficient to reach that conclusion. The tribunal's finding that no reasonable employer would have dismissed the claimant supports the characterisation of the claimant's actions as not unreasonable in all the circumstances. Accordingly, the tribunal judge had not misdirected himself and was entitled to form the view that the email issue, the only one in which the claimant could be blamed in any sense, did not give rise to culpability in the sense of contributing to the dismissal. Even at best for the respondent, the expression at paragraph 45 of a "relatively unsatisfactory performance" could be distinguished from the type of unreasonable or culpable conduct required.

20. Ms Stobart submitted that the appeal should be dismissed on the basis that the Employment Judge had not erred or that any error was not a material one such as to justify interference with the decision. If the Respondent was successful, this tribunal should not decide the matter but remit back to the same tribunal for further reasons if that was thought to be required.

There was no reason why the same judge could not re-apply his mind to the issue if he was asked to do so.

Discussion

21. The first ground of appeal relates to the application of the principle set out in the case of **Polkey v A E Dayton Services Limited 1988 ICR 142 ("Polkey")** in relation to the calculation of a compensatory award under section 123(1) of the Employment Rights Act 1996. The compensatory award requires to be the amount that the tribunal considers is just and equitable in all the circumstances *"having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".* Where an argument is presented that, but for the unfair dismissal, the claimant's employment would have come to an end anyway, the issue of whether and if so to what extent that should be factored in to quantification of loss sustained by way of a reduction arises. As indicated, that argument was presented on behalf of the respondent in the present case and is dealt with by the tribunal at paragraphs 76 – 79 of the judgment. The issue was what the chance was of the claimant having been made redundant in 2016 had he not been dismissed towards the end of the previous year.

22. The parties' positions on the issue of a **Polkey** deduction represented two extremes. Mr Porter's evidence was that the company was on the point of closing and that he had realised that he could not afford the claimant to continue in the company. The claimant on the other hand pointed to evidence from both before and after the date of dismissal illustrating that the respondent made no redundancies and had advertised for more staff. It was the tribunal judge's task to make sense of those conflicting positions on the basis of the evidence that he heard. It is clear that he rejected Mr Porter's evidence in this regard. However, the matter was not without difficulty because there was a downturn in work and a question could properly have arisen as to whether the company needed an Operations Manager or whether that work could be redistributed or even possibly a redundancy made. The Employment Judge took those factors into account at paragraphs 78 – 79. Importantly, in my view, paragraph 78 distinguishes between redundancy at the particular point in time at which the dismissal took place and a longer term view. It is clear from the last two sentences in paragraph 78 that some emphasis was placed by the tribunal on the company's survival and its policy of getting and retaining experienced and skilled staff to be ready for further upturns in the market rather than to downsize whenever there was less work. That was an important consideration in deciding whether the claimant would ever have been made redundant. In my view, the use of the expression "substantial chance" of the claimant's

redundancy occurring in the New Year of 2016 must be read against the background of those findings and the earlier passages in the judgment. Taking the factors on which the Employment Judge explicitly relies before giving his conclusion, I consider that the use of the word "substantial" in this context does not suggest something greater than 50%. On the Shorter Oxford English Dictionary definition put forward by Mr McGuire, substantial can mean "sizeable" and it cannot be said a one-third (33.33%) deduction is not a sizeable one. Other synonyms for "substantial" can include "material". A material chance that something will happen can be far lower than a 50% chance. Only when the balance of factors leads to a conclusion that it is more likely than not that a certain state of affairs will come into being will the chance necessarily be regarded as 50% or greater. On a plain reading of the judgment it is apparent that the tribunal concluded that it was less likely that a redundancy situation would have arisen **for the claimant** and so, while the chance was substantial, it was always going to be less than 50%. The selection of the particular fraction of one-third was a matter for the tribunal on the basis of the evidence.

23. The words of Langstaff P in **Contract Bottling Limited v Cave and Another [2015] ICR 146** are of some assistance in this context. Having reiterated that a tribunal in conducting this exercise is not looking to decide the possibility of a past event having happened but is seeking to determine the likelihood in percentage terms of a future event occurring, Langstaff P expressed matters as follows:

> "*20. Whether the word "chance" is used or "risk" is used is, in my view largely immaterial. They express the same concept, though from different perspectives. The aim of the assessment is to produce a figure that is accurately as possible represents the point of balance between the chance of employment continuing and the risks it will not, expressed in terms of weeks, months or years or as an overall percentage. ...*
>
> *21. .... It is important that a tribunal should spell out, as best it can, what factors it takes into account in determining why it adopts a particular percentage. However there can be no legitimate ground for criticising a particular percentage unless it is manifestly less than or more than the percentage which might have seemed proper or unless it is simply unreasoned. This is because, of its very nature, justifying 20% rather than 25% (as the case maybe, or some slightly higher or some slightly lower percentage) is not susceptible of detailed reasoning. It is, and has to be, a process of assessment."*

24. Counsel for the Respondent contended that insufficient reasons had been given in the judgment as to why the particular fraction of one-third was adopted. I have concluded that, while paragraph 79 is briefly stated in selecting the appropriate chance of redundancy as being one-

third, that conclusion must be read together with all of the factors mentioned above that the Employment Judge took into account in reaching that conclusion. Had his findings and analysis tended to suggest to the reader of the judgment that he had accepted the evidence that the company was in a parlous state and would have to make redundancies and that the claimant's role would be the first to go, then the fraction ultimately selected would look odd. The reasons given in the preceding paragraphs, however, are entirely consistent with the conclusion that while the chance might be regarded as substantial, redundancy was something that would probably have been avoided by the claimant had he not been unfairly dismissed. Accordingly, I reject the contention that the reader of this judgment is left in doubt as to why a particular deduction arrived at in relation to the application of the **Polkey** principle was selected. The Tribunal Judge was entitled to approach the matter broadly and to say that he done so. As Langstaff P pointed out in **Contract Bottling Limited**, a particular percentage (or fraction) is not susceptible of detailed reasoning. There is in my view sufficient in paragraphs 76 – 79 of the judgment to support the conclusion reached. In any event, as Ms Stobart pointed out, it is acceptable to look at other parts of the judgment in this context if that was required. While paragraphs 37 – 42 discuss the issue of redundancy as part of the reasoning in relation to the reason for dismissal, those paragraphs contain particularly important passages in relation to the claimant's flexibility to carry out less senior roles if required and provide the detail behind the Employment Judge's rejection of the contention that the company was on the verge of either folding or making redundancies. In my view, this is not a case where the percentage chosen by the tribunal is either manifestly less than the percentage that might have seemed proper, or inadequately explained. For these reasons, the respondent's first ground of appeal does not succeed.

25. Turning to the issue of contributory fault, section 123(6) of the **Employment Rights Act 1996** provides:

> **"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding**."

The leading authority on what is involved in culpability for the purposes of this provision is that of the Court of Appeal in **Nelson v British Broadcasting Corporation (No.2) [1980] ICR 110**, where the provision under discussion was that in previous legislation but in effectively the same terms. In that case Brandon L J, having amended a position that it could never be just or equitable

to reduce a successful complainant's compensation unless the conduct on his part relied on as contributory was culpable or blameworthy, expressed matters as follows:

> *"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative ……, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessary, culpable or blameworthy; it must depend on the degree of unreasonableness involved."*

26. The Employment Judge in this case made an appropriate self-direction in relation to the **Nelson** case. He said that *"the tribunal must consider if the actions are blameworthy, that they contributed to the dismissal and whether it is just and equitable to reduce the award".* He understood, then, that there were various stages, namely the characterisation of the actions of the claimant, the question of contribution to the dismissal and then the application of the just and equitable test in deciding whether to reduce the award. It is only after that appropriate self-direction that the sentence appears that Mr McGuire described as fatal to the reasoning. Having knowledge that the matter was not an easy one the tribunal stated that *" ... the claimant's conduct was not such that would warrant dismissal in the tribunal's view."* It seems to me that the issue in relation to that sentence is whether it represents an error in approach because of course the tribunal had already decided that the dismissal was unfair or whether was no more than a reference back to the tribunal's own finding that the dismissal was substantively unfair because it had been pre-determined and that no reasonable employer would have dismissed on the basis of what had happened and the claimant's role in those events (paragraph 74). Having considered matters, I prefer the interpretation offered by Ms Stobart to the effect that the sentence amounts to no more than an acknowledgement of the difficulty in disentangling any conduct on the part of the claimant from the overall finding that he should never have been dismissed. In any event, the tribunal then proceeds to record specifically the single mistake attributed to the claimant on its own findings, namely of not keeping a look-out for the email from the clients in Canada confirming when an engineer was required to attend. Although the claimant's colleague had been greatly inconvenienced having only just returned from Canada and then having to turn round and go back, the Judge records that this error on the part of the claimant was not one that caused any upset to the client. That is why the tribunal ultimately regarded it as something that the claimant had had handled poorly but was not a conduct of sufficient gravity to justify any further reduction.

The tribunal is clear in expressing the view that any failure to obtain a work permit for Mr McPherson could not be laid at the claimant's door. Accordingly, any criticisms of the claimant's actings that had been accepted by the tribunal were not in the *"unreasonable in all the circumstances"* category that might have justified a deduction.

27. For the reasons given above, I reject the contention that the tribunal erred in its approach to the issue of whether the claimant had contributed to his dismissal. Section 123(6) requires a finding that the dismissal was (to any extent) caused or contributed to by any action of the claimant before a question of reduction of compensation arises. The claimant's dismissal was, on the findings of the tribunal, caused by Mr Porter unreasonably blaming what had occurred in Canada on the claimant. As the claimant had been exonerated in respect of the work visa problem, it would have been surprising if the tribunal had concluded that he had somehow caused or contributed to his dismissal. Insofar as there was a suggestion that conduct which is not culpable or unreasonable should somehow be taken into account in applying section 123(6), I consider that to be inconsistent with the statutory provision. In my view, the way in which the tribunal approached the issue of contribution in this case is beyond reproach. The Employment Judge was aware of and narrated the correct test and was not applying any statutory test when referring to the claimant's conduct not warranting dismissal. The tribunal's conclusions in this respect have to be read together with the detailed discussion about the potentially unreasonable conduct that could have led to a reduction in compensation at paragraphs 63 – 73. The strident conclusion that **no reasonable employer** would have dismissed the claimant coupled with the view of the tribunal that any conduct on the part of the claimant fell far short of anything that might have caused or contributed to dismissal support a conclusion that the approach taken in this case was correct.

Disposal

28. For the reasons given above neither of the two grounds of appeal advanced on behalf of the respondent succeeds. Accordingly no issue of a remit to the tribunal arises and the appeal is dismissed.