# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G S Heire

**Respondent:** European Toughened Glass (Manchester) Limited

**Heard at:** Manchester **On:** 17 January 2019

**Before:** Employment Judge Feeney

**REPRESENTATION:**

**Claimant:** Mr N Grundy, Counsel
**Respondent:** Ms A Brown, Counsel

# JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that: it is not an abuse of process for the respondent to raise the issues of "glass misappropriation" and "car provision" at the remedy hearing in this case. However it is an abuse of process to raise the other issues which have already been determined at the previous hearing.

# REASONS

1. The claimant brought a claim of unfair dismissal, wrong dismissal and failure to provide employment particulars, which was heard at a hearing from 3-5 October 2018. The respondent submitted that the claimant had not been dismissed but had resigned and that if there had been a dismissal it was for capability in the sense of poor performance and some other substantial reasons ("SOSR"). The SOSR was never articulated but the capability issue was addressed in terms of the claimant's alleged poor performance. At the hearing I decided that there had been an express dismissal and that the dismissal was unfair as no procedure was followed. The claimant's wrongful dismissal and employment particulars claims also succeeded.

2. The matter had originally been listed for a full hearing on liability and remedy and the Case Management Order specifically said the parties should attend prepared to argue both liability and remedy. However, contributory conduct and **Polkey** had not been specifically referred to, either in the pleadings or at the case management discussion. At the beginning of the hearing on 3 October 2018 Ms Halsall for the respondent stated she wished to argue **Polkey** and contributory conduct, and I agreed that this would be considered. Cross examination was undertaken on this basis and submissions were made in respect of these two matters.

3. I decided that there was no contributory conduct and that the **Polkey** arguments failed. The matters advanced in respect of contributory conduct were the matters relating to the provision of unsuitable glass because it was marked and the closing down of the furnace to correct this which led in addition to another order being delivered late which I had found were not unreasonable matters/actions for the claimant to take. In respect of the **Polkey** argument the respondent argued the claimant's performance drove customers away and that it would have been fair to dismiss him for this, however I find the evidence regarding the claimant's poor performance was insufficient to establish grounds for dismissal.

4. The respondent also sought to argue dismissal for some other substantial reason but I refused to allow then to do this as there was no detail in their ET3 nor in the case management discussion regarding what they relied on for "some other substantial reason", and this had not been addressed in the witness statements, whereas issues regarding the claimant's performance had been addressed in the witness statements.

5. At the end of the hearing I had a discussion with the parties where I asked them whether the only outstanding issues for the continuation of the hearing to remedy were:

(1) The issue of whether the claimant would have retired anyway; and

(2) Whether he had sufficiently mitigated his loss.

6. The parties agreed but that this was not formally recorded. However the claimant's side went away thinking these were the issues for the remedy hearing that was listed for 16 January 2019.

7. Subsequent to the respondent's defence failing in this case they dismissed their legal representative and found alternative representation, and apparently have submitted an appeal although I am unaware on what basis the appeal has been submitted.

8. On 18 December 2018 the new legal representatives wrote to the claimant's representative advising them that they would be pursuing an argument that the claimant could have been dismissed for his theft of glass. In that letter the respondent's representative stated:

> "The respondent had visited the claimant's properties on 3 October (the first day of the hearing) where it was discovered that glass manufactured by the

> respondent had been installed (in those properties) and that this was discovered in situ for the first time on the morning of day 1 of the Tribunal hearing."

The letter went on:

> "The glass is present absent our client's knowledge and permission and was financially unaccounted for by you to our client. Our client's Managing Director gave oral evidence of his latter discovery of the glass to Tribunal and we understand of the fact that had he known of its existence sooner he would have had no option but to summarily dismiss you for its unauthorised misappropriation. You will be aware that what appears to be the continued use is commission of a civil offence of trespass and conversion. Last but not least the theft of company property is also a criminal offence.
>
> Given the above we have now had instructions to:
>
> (1) Issue an appeal of the ET judgment to the EAT;
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> (2) Issue a claim for damages for trespass and conversion;
>
> (3) Instigate criminal prosecution for the theft of glass; and
>
> (4) Seek the recovery of our client's costs.
>
> The above raises serious issues as to the withholding of relevant evidence to the Employment Tribunal and causing our client to incur substantial costs and defend what appears to be a deceit based claim tainted the validity of the Tribunal's order."

9. In relation to the glass issue at the Tribunal, in reply to a cross examination question Mr Johal began to talk about the glass. This had never been raised before and the claimant's representative indicated that this was a matter not to be raised. Due to it at this point being apparent there was some dissonance between the representative and the witness I advised the witness that he would be able to speak to his legal representative after his evidence had finished. If this was a matter that the respondent wished to pursue he could have instructed his solicitor after the end of his evidence to ask for the matter to be submitted. Of course if this was the intention given that there was no detail regarding this matter at all in the witness statements the matter should have been addressed by way of supplementary questions before cross examination. However, it will be apparent below why this did not occur.

10. Whilst there were a number of inaccuracies in this letter apart from how it was written, one of them was that the issue regarding the glass had been raised earlier by the respondent's previous legal representative in the course of ACAS discussions, but they had ultimately advised the respondent's representative that they were not going to rely on this issue. An email from Ms Halsall of 2 October stated:

> "We will not be relying on it at Tribunal as it was part of our 'without prejudice' discussions with ACAS in terms of settlement, and the conduct which has

> come to light arose after your client's employment finished with the respondent."

11. We did not have the benefit of Ms Halsall's further explanation of this comment and therefore there is some speculation as to what she meant by this which I will deal with in the conclusions, so it is not correct that the respondent did not know about this issue until the first day of the Tribunal hearing on 3 October. If that is what the representative's letter meant.

12. As I have referred to above, there was no evidence or reference to this matter in the respondent's witness statements and the matter was only mentioned during cross examination. My comment to Mr Johal was made out of concern that there was some disagreement between the witness and his representative which was not possible to resolve whilst he was in the middle of giving evidence, but I wished to reassure him the opportunity was there once he had finished giving evidence.

13. The respondent's representative also wrote further on 11 January 2019 stating that:

> "As these documents (referring to Google Earth images which showed the claimant's properties) go to the issue of misappropriate glass of which our client complaints, we have also received instructions in respect of previously unaccounted for unreconcilable stock levels; documentary evidence of the same is also attached. (However it was not attached)
>
> Further to the above instructions that in communication between yourselves and our client's previous legal representative prior to the ET hearing that it was confirmed that your client did not deny having the glass and he confirmed he had paid for it."

14. The claimant's representative replied to this on 14 January 2019 stating that her client did not say that he had paid for it but that the respondent had agreed he could have it, and accusing the respondent of trying to bully and intimidate her client, and she referred to Ms Halsall's email of 2 October stating:

> "We will not be relying upon it in Tribunal as it forms part of our 'without prejudice' discussions with ACAS in terms of settlement and is conduct which has come to light since your client's employment finished with the respondent."

15. At the time the claimant's representative had said it was unreasonable conduct and disingenuous to raise these matters and that the threat to claim substantial damages for trespass and conversion from her client in their more recent letters was abusive, oppressive and dishonest.

16. In addition, unfortunately the remedy witness statements were only received by the claimant the day before the remedy hearing. The respondent's witness statements raised other issues to which the claimant objected as follows:

(1) That Mr and Mrs Johal were revisiting issues regarding the claimant's performance and customer complaints that had been fully canvassed in the previous hearing, as they were relevant to the issue of whether there

could be a fair dismissal, contributory conduct and **Polkey.** further that new issues regarding stock controls were being raised by Mrs Johal that had not been raised at the previous hearing even though they were highly relevant to the dismissal and other points. The alleged stock deficiencies arose in 2016, Mrs Johal said that the emails regarding this should have put in the original bundle (remembering this was a joint bundle on liability and remedy), and she did not know why they had not been put in the bundle.

(2) Mrs Johal provided further evidence regarding procedures which appeared to go to the question of whether the claimant had received a contract of employment/further particulars. Again this had been fully canvassed at the first hearing and a judgment had been made.

(3) Regarding the issue of alleged glass misappropriation the previous representative had said it was not being pursued.

(4) Finally regarding the claimant's car, the respondent had indicated prior to the previous hearing that they would seek to recover the car via County Court proceedings but were now seeking to rely on the fact that the claimant had this car as a matter which should be taken into account in assessing compensation.

17. The claimant claimed that all these matters were abuse of process.

**Submissions**

Claimant's Submissions

18. The claimant's submissions are that it was an abuse of process to:

(1) seek to bring new evidence to the remedy hearing which had already been canvassed at the previous hearing and on which judgment had been made on those issues, namely the claimant's performance in relation to substandard produce and missing orders, and whether or not he had received a contract of employment;

(2) now raise matters which the previous legal adviser had clearly stated were not going to be relied on; and

(3) it had been agreed at the end of the previous hearing that the only matters relevant to the remedy hearing were the claimant's mitigation of loss and whether he was intending to retire, and that quantum would be subject to those two issues only.

Respondent's Submissions

19. The respondent's submissions are that this remedy hearing is not a new set of proceedings and any matter can be relied on.

20. Failing that, the indication of the previous representative that the glass issue would not be relied on at the hearing was a not an unequivocal concession that bound the remedy hearing, as it was ongoing proceedings.

21. Further, that it would be unfair to the respondent not to hear highly relevant information on that issue in relation to the tribunal's requirement to consider whether any compensation awarded was just and equitable.

22. The respondent further submitted issue estoppel and **Henderson v Henderson** did not apply as this was still the same hearing and it was not a case of a further set of proceedings being issued.

**The Law**

Relevant Remedy Law

23. Section 123 of the Employment Rights Act 1996 states that:

> "(1) Subject to the provisions of this section…the amount of the compensatory award shall be such amount as the Tribunal considers 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.
>
> (2) The loss referred to in subsection (1) shall be taken to include –
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> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal; and
>
> (b) subject to subsection (3) loss of any benefit which he might reasonably be expected to have had but for the dismissal…
>
> (6) Where the Tribunal finds 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."

24. The issue of contributory conduct, therefore, is set out in the statute and there has been further case law on it which was summarised in my previous Judgment.

25. In respect of **Polkey**, this arises from case law and is a well-known proposition derived from the case of **Polkey v A E Dayton Services Limited [1998]** House of Lords. Originally this established that in a procedural unfairness case compensation could be reduced to reflect the likelihood the employee would still have been dismissed in any event had a proper procedure been followed. **Polkey** can now also apply in cases that were not only procedurally unfair but substantively unfair (**O'Dea v ISC Chemicals Limited [1996]** Court of Appeal).

26. In **O'Donoghue v Redcar & Cleveland Borough Council [2001]** Court of Appeal the respondent successfully argued that although her dismissal was unfair she would have been dismissed in any event within six months. The Court of Appeal opined that:

> "If the facts are such that an Employment Tribunal, while finding that an employee applicant has been dismissed unfairly, whether substantively or procedurally, concludes that but for the dismissal the applicant would have been bound soon thereafter to be dismissed fairly by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that the compensation for unfair dismissal should be awarded on that basis. We do not read **Polkey** or **King v Eaton Limited** as precluding such an analysis."

27. I note that both these matters were dealt with at the liability hearing.

28. Where an employee is dismissed and then the employer discovers matters after the dismissal which could have formed the basis for a fair had the employer known about it at the time, this cannot be contributory conduct as it did not contribute to the original dismissal which at this stage will have been found to be unfair, however the Tribunal is entitled to take it into account in accordance with the general statutory provision governing the calculation of the compensatory award (section 123(1)(i) Employment Rights Act 1996. The inclusion of the words "such amount as is just and equitable" in that provision implicitly allows a Tribunal to take into account a factor such as the employee's wrongdoing in order to limit or reduce the amount of the compensatory award that would otherwise have been awarded (**W Devis & Sons Ltd v Atkins [1977]** House of Lords).

29. The respondent referred to the case of **Mansfield v Taran Microsystems Limited [2018] EAT** which reiterates this principle. Of course it must be considered whether or not the misconduct did actually take place and whether it would have been fair to dismiss for that misconduct. It also has to be pre-termination conduct that does not come to light until after the dismissal not post termination conduct, although in some extraordinary circumstances that may be considered, but those circumstances do not apply here.

30. Even if a claimant is found to have acted in a blameworthy way the Tribunal still has to decide what losses the claimant is still entitled to. In **Abbey Motors (Hemel Hempstead) Limited v Carter [1995]** an employee had deliberately misled the Tribunal when he told them he had not been able to find work during the 18 months following his dismissal. Evidence was provided to show that he had earned £2,000 since the date of dismissal. The Tribunal reduced the claimant's compensatory award but not in total as he still had outstanding losses, and this was upheld by the EAT (although the Tribunal deducted losses more than the actual £2,000).

Abuse of Process

31. As a matter of general principle there has to be finality in proceedings, and where a judgment is made without an application for reconsideration or appeal the decisions made in that judgment are final insofar as they are relevant to the claim made and the issues arising out of those claims. Therefore, seeking to re-open issues in a remedy hearing which could have reasonably been considered at a previous hearing is arguably an abuse of process.

32. In respect of specific abuse of process issues such as issue estoppel and Henderson v Henderson, the principles arising there apply where new proceedings are brought, and establish that an individual should not be able to litigate a matter which could have been raised in previous proceedings (and indeed where they had been raised in previous proceedings), and specifically in Henderson v Henderson where the surrounding circumstances lead to a conclusion that it is an abuse of process. However, these principles do not apply where the matter at issue is within the same proceedings as here.

33. I was not referred to any specific caselaw on abuse of process or on concessions by representatives.

**Conclusions**

34. Having been asked to make decisions in respect of contributory conduct and **Polkey** at the previous hearing, I made those decisions following cross examination and submissions and they are set out in a Judgment promulgated on 21 November 2018. I find those decisions are final subject to an appeal being successful, and the failure of the representative allegedly to raise relevant matters in evidence or refer to relevant documentation in the bundle cannot be revisited as it would make a mockery of the principle of finality in the Judgment. Therefore references in the remedy witness statements concerning the claimant's performance and whether or not he had a contract of employment or written particulars, and whether or not he was seeking to undermine the respondent's business, are all matters which were considered and determined at the first hearing.

35. The question of the alleged "glass misappropriation" is a matter, however, which in my view the respondent can rely on at the remedy hearing as the principles of issue estoppel and **Henderson v Henderson** do not apply as we are still within the same proceedings.

36. Subject to the argument that the legal representative at the previous hearing has made some sort of binding concession that the issue was not going to be pursued, there are difficulties with that. Firstly, there is some ambiguity as to whether that is what the previous representative thought, was it that the issue was only relevant to remedy (hence the reference to settlement) but not to liability? It is possible to read the email in that context, albeit the hearing was supposed to adjudicate on both liability and remedy. Secondly the question of what is just and equitable is at large in a remedy hearing and that issue has not been disposed of at the previous hearing, albeit it apparently appeared to be agreed by the previous representative that the only issues were whether the claimant was going to retire and whether he had mitigated his loss. Again, however, that was not specifically recorded by the Tribunal and was just a general discussion. If the respondent had given notice to the claimant that other issues were going to be pursued at the remedy hearing it is likely I would not have found the respondent was bound by that discussion. Here there was an issue about sufficient notice but as the matter had to be postponed in any event the claimant has now significant notice of the issues.

37. Accordingly, in line with section 123 and the relevant principles on considering matters arising after dismissal, I find that the respondent is able to pursue the issues of the alleged glass misappropriation.

38. In respect of the car issue, these are not matters that were relevant to contributory conduct but are potentially relevant to a section 123 broader decision regarding what is just and equitable to award, and therefore I find the respondent can pursue that issue also.

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Employment Judge Feeney

Date: 30th January 2019
RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

1 February 2019

FOR THE TRIBUNAL OFFICE