Neutral Citation Number: [2025] EAT 198

Case No: EA-2024-SCO-0000105-LP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 22 December 2025

Before :

THE HONOURABLE LADY POOLE

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Between :

DONALD GORMLEY **Appellant**

- and –

PHOENIX BUSINESS SOLUTIONS (UK) LIMITED **Respondent**

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Mark Allison, Advocate (instructed by Quantum Claims) for the **Appellant**
Lydia Banerjee of Counsel (instructed by Mishcon De Raya LLP) for the **Respondent**

Hearing date: 16 December 2025

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JUDGMENT

SUMMARY

Redundancy; Unfair dismissal; Contract of Employment

The appellant's job as a legal director with the respondent was terminated. The employment tribunal dismissed his claims for unfair and wrongful dismissal. However, the tribunal also awarded the appellant a redundancy payment, and compensation. Parties agreed that the financial orders made were incompatible with the tribunal's purported rejection of the unfair dismissal claim, and a finding that the unfair dismissal claim succeeded should be substituted. However, they differed as to the consequences of that substitution; whether the rest of the judgment should stand, or whether the case should be remitted to the tribunal to hear evidence and decide the issue of remedy afresh.

Held: The appeal was allowed in part. The tribunal's finding that the unfair dismissal claim did not succeed was overturned. A finding that the unfair dismissal claim did succeed was substituted. No further order was made.

THE HONOURABLE LADY POOLE:

Introduction

1. The appellant commenced work with the respondent as a legal director on 1 December 2021. In 2023, the respondent restructured its legal services department. The appellant was warned about impending redundancy in October 2023. The respondent wrote to the appellant terminating his employment with effect from 15 December 2023, in a letter dated 13 December 2023 and sent to the appellant by email on 14 December 2023.

2. The appellant brought a claim in the Employment Tribunal ("**ET**") for unfair and wrongful dismissal. For the purposes of the unfair dismissal claim, the respondent conceded that there had been failures properly to consult on redundancy, consider alternative roles, and afford a right of appeal. The respondent argued that there should be a reduction of any compensatory award for unfair dismissal, because even if there had been due process, the appellant would have been dismissed (**Polkey v Dayton Ltd [1988] AC 244**). The wrongful dismissal claim was for notice pay due under the employment contract, but the respondent argued it was not liable for notice pay because the appellant was himself in material breach of contract.

3. On 23 October 2024, the ET issued a decision in which it dismissed the appellant's claims for both unfair dismissal and wrongful dismissal. The ET found that there was a diminution in the requirements of the respondent's business for the appellant to carry out work of the particular kind he was engaged to do. The respondent had fairly and reasonably applied selection criteria to determine that the claimant would be made redundant. However, the respondent had failed to consult. The ET ordered that the respondent pay the appellant a statutory redundancy payment plus two weeks of pay in respect of a failure to consult. That was on the basis that it was possible to conclude what would have happened had a fair process been followed. A fair consultation process would have taken two weeks. The ET found that the appellant would not have accepted lower paid alternative roles available, and his job would have come to an end. In respect of wrongful dismissal, the ET found

that the appellant had been in breach of his employment contract by continuing to carry on his own consultancy business while working for the respondent. As a result, his claim for notice pay did not succeed.

4. The appellant appeals to the Employment Appeal Tribunal ("**EAT**") against the decision of the ET to dismiss his claims for unfair dismissal and wrongful dismissal. The five grounds of appeal fall under three broad heads; liability for unfair dismissal, remedies for unfair dismissal, and wrongful dismissal. Parties are agreed that the ET erred in law in its decision in relation to liability for unfair dismissal. They are in dispute as to whether it also erred in other ways, and as to the appropriate outcome. The EAT is grateful to parties for their assistance in skeleton arguments, authorities and clear oral submissions, all of which have been taken into account.

Liability for unfair dismissal

5. The appellant had the right not to be unfairly dismissed by the respondent (section 94 of the Employment Rights Act 1996 ("**ERA**")). It was not in dispute that: the appellant was dismissed by the respondent; this was by reason of redundancy (section 139(1) of the ERA, ET decision para 65); and it was not a redundancy situation of automatic unfairness (section 105 of the ERA). However, to resist the appellant's claim, the respondent still had to show that it had acted reasonably in treating redundancy as a sufficient reason for dismissing the appellant (section 98(1) and (4) of the ERA). If it failed to do so, the appellant was entitled to remedies under chapter II of part X of the ERA.

6. Failure to consult will often render a dismissal unfair (**Polkey v Dayton Ltd [1988] AC 244** p355C, p364A-B and 366A-B). As put by Lord Bridge:

> "the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation".

While it is open to the ET to find a dismissal fair when there has been no consultation, in such a situation it would be expected that the ET would provide reasons why it was reasonable to depart from usual good industrial relations (**Haycocks v ADP RPO UK Ltd** [2023] EAT 129 at paras 21-22 and 30, parts of which were endorsed by the Court of Appeal [2024] EWCA Civ 1291 (paras 41 and 49) but not the overall outcome).

7. In this case, the ET found there was a redundancy situation, which was the reason for dismissal (para 118). It made a clear finding that there was no consultation (para 120) and "that cannot be regarded as fair in this instance" (para 125). It found that had the respondent consulted, that would have taken a period of two weeks, after which the appellant's employment would have terminated (para 136). The ET went on to say that the appellant was not entitled to a compensatory award (para 137), and purported to dismiss his unfair dismissal claim (paras 3 and 143). However, the ET made not only a redundancy payment equivalent to the basic award (para 1), but also an award of two weeks' pay to represent the consultation period it had found would have been reasonable (paras 2 and 142), using the words "just and equitable" in this context (para 127).

8. The appellant submits that the ET should not have considered liability for unfair dismissal at all, standing concessions made by the respondent (at the time of submissions before the ET) that it did not consult, consider the appellant for an alternative role, nor provide an appeal. That is not accepted, because it was for the ET to decide whether the dismissal was fair under section 98(4) of the ERA, and in doing so it was entitled to look at all of the circumstances before it and not only the respondent's concessions.

9. However, it is accepted, given the ET's findings about the dismissal for reason of redundancy, the absence of any consultation, the dicta in **Polkey** set out above, and the ET's financial awards to the appellant, that the ET erred in law in dismissing the appellant's unfair dismissal claim. There were clear findings of redundancy, and that the lack of consultation in this particular case was unfair. Having regard to sections 98(2)(c) and 98(4) of the **ERA**, the only available conclusion from the ET's

findings was that the appellant had been unfairly dismissed. For these reasons, ground of appeal 1 (error of law in approach, and inadequate reasons) partially succeeds, and ground of appeal 2 (perversity of conclusion dismissing the unfair dismissal claim) succeeds. The EAT's findings in paragraphs 3 and 143 should be overturned and substituted with a finding that:

> "The claimant's claim for unfair dismissal succeeds".

The EAT's general approach

10. Parties were not agreed as to the consequences of the substitution of the finding that the appellant's unfair dismissal claim succeeds. The appellant argued, in summary, that because of the ET's various errors, the entire judgment was unsafe. There should be a remit to a differently constituted tribunal to hear evidence on remedy for unfair dismissal and other matters. That was particularly so, given that fair procedure during the redundancy process might have resulted in a different redundancy outcome, so it could not be said no issues of substantive fairness arose. The respondent on the other hand argued that the unfair dismissal was procedurally and not substantively unfair. The ET had expressly found that the outcome would have been the same, and therefore nothing was required beyond the substitution of the finding set out above.

11. In determining the remaining grounds of appeal in this case, it has to be acknowledged that there are a number of problems with the ET's decision. It is true that the ET's decision is substantial, extending to 35 pages and 145 paragraphs, including many factual findings, and it demonstrates endeavour and consideration on the part of the ET. However, as already identified, it contains an inexplicable finding about the unfair dismissal claim not succeeding, and there are other issues. For example, there is a factual finding which is scored through with no explanation (para 56), some of what is in the "relevant law" section appears to be repeated for no good reason (eg paras 81 and 89), and the findings in relation to unfair dismissal could be better structured to deal first with liability issues, then with issues surrounding compensation, rather than dotting between them (paras 119 to 127).

12. Nevertheless, it is appropriate to bear in mind the approach of the EAT to decisions of the ET in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 (paras 57-58). In particular, the decision of the ET must be read fairly and as a whole, without focussing merely on individual phrases or passages in isolation, and without being hypercritical. The ET is not required to express every step in its reasoning in any greater detail than that necessary to be Meek compliant (**Meek v Birmingham City Council** [1987] IRLR 250). What is out of sight in the language is not presumed to be out of mind. Where the ET has correctly stated the legal principles to be applied, the EAT should be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. If the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. The remaining grounds of appeal are approached in the light of those principles.

Remedies for unfair dismissal

13. The grounds of appeal relating to remedies for unfair dismissal centred on the appropriate compensatory award for unfair dismissal. Ground of appeal 3 is that the ET erred in law in its approach to **Polkey**, and ground of appeal 4 is a fallback position that if the ET did not err in law, its conclusion was perverse. There was no dispute that the basic award for unfair dismissal (section 119 of the ERA) was essentially dealt with by the sum awarded by the ET in para 1 of its decision as a redundancy payment.

14. The appellant requests the EAT to recall the compensatory award made by the ET, and remit the matter to the ET for reconsideration. The appellant argues that the ET failed to make sufficient findings on fact on essential matters to be able to consider remedy properly. These include the nature and extent of the appellant's duties, the nature, scope and structure of the respondent's legal services operation both before and after re-structure, and the respondent's legal services needs as at the date

of the redundancy. Those were material matters, and the failure to make the findings is an error of law, resulting in the conclusions on remedy being unsafe. The appellant argues that the respondent's admitted failures were not just procedural, but may have made a difference to the outcome. It is submitted that the ET erred in law not only in failing to find sufficient facts, but also in an absence of adequate reasons to explain the decision.

15. The respondent on the other hand argues that there is no need for any remit. The ET's findings should stand, with a compensatory award only for two weeks' pay, representing the time the ET found a fair consultation period would have taken after which his employment would have ended in any event. The respondent submits that because the only proper basis for a finding of unfair dismissal is procedural unfairness, there is no effect on remedy. The findings criticised as being absent go to whether there was a general redundancy situation, and because that matter was not appealed it should not be challenged on the basis of an attack on the approach to remedy. The time for the appellant to lead evidence on remedy was prior to the ET's decision, during the two days of evidence that was heard, and it would be inappropriate for it to have a second bite at the cherry by the EAT remitting the case now. The conclusion on the compensatory award not being in error of law or perverse, and the decision on remedy should not be set aside.

16. The law governing the level of the compensatory award for unfair dismissal stems from section 123 of the **ERA**. A compensatory award is to 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 in so far as that loss is attributable to action taken by the employer".

In considering the loss resulting from the dismissal, it is legitimate to consider what would have happened if the employer had taken appropriate steps before dismissing the employee. The reflection in a compensatory award of the chance that a person would have been fairly dismissed, had a proper procedure been applied, is often called the "**Polkey** reduction". If taking the appropriate steps would

not have affected the outcome at all, then there may be no compensation above the basic award or redundancy payment (**Polkey** p364H to 365E). However, if a fair procedure would have taken some time, there may be some compensation to cover the period over which consultation takes place (**Teixeira v Zaika Restaurant and DaSilva** [2022] EAT 171 para 12). In some cases, it is too speculative for the tribunal to be able to make findings about what would have happened, had there been a fair procedure, but since the consequence is a finding that the employment would have continued indefinitely, the tribunal should not be unduly reluctant to engage in the process (**Software 2000 Ltd v Andrews and others** [2007] ICR 825 at para 54). In considering what might have happened, one possibility is that employment would have continued but only for a limited fixed period (**Software 2000** para 54(7)(c)).

17. In determining whether the ET erred in relation to remedies for unfair dismissal, the ET's judgment must be read as a whole, having regard to substance rather than form. The ET made a number of findings relevant to the issue of the compensatory award. It took into account submissions of the claimant about the absence of process and the effect on the issue of a **Polkey** reduction, in the light of **Software 2000** (para 67), and competing submissions of the respondent (para 62). It correctly set out the law governing the level of the compensatory award and the **Polkey** test (paras 67, 106-107, 97). It noted the respondent's concessions about lack of consultation, absence of consideration for an alternative role, and no formal appeal (para 111). Nevertheless, it decided that in this case it was possible to conclude what would have happened had a fair process been followed (para 126). It found that the requirements of the employer's business for the claimant to carry out work of the particular kind he was engaged to do had diminished, and the dismissal was caused wholly or partly by that diminution (paras 118, 119, 122, 129 and 134). It found that if a fair process had been followed, it would have allowed the appellant to consider alternative roles. But those roles were at a significantly lower-paid level (para 126). It found the appellant would not have accepted them, had they been offered during a fair consultation process (para 126 and 135). Although the ET said no compensatory award was due at all (para 136), it nevertheless found that a fair consultation would

have taken two weeks after which the employment would have been terminated due to redundancy (para 136). Those findings were made in the context of earlier factual findings about the respondent's business and the nature of the appellant's role (paras 10-14), the decision to restructure which involved removing experienced legal review of contracts, providing the existing sales team with a "playbook" or set of guidelines instead, and the removal of the appellant's role (paras 24-25, 32, 111), and the alternative roles available due to the restructure having a salary of between £30,000 and £33,000 representing a very significant drop from the appellant's salary of around £124,000 (para 56).

18. The ET was obliged to find sufficient facts to support its decision about the amount which was just and equitable to compensate the appellant, having regard to the appellant's loss. It is accepted that, in some cases, the level of loss might be affected if operating a fair process may have resulted in employment continuing in some form. It is also accepted that consultation at a formative stage might affect whether a person is made redundant or not (**Haycocks** in the EAT, para 22). However, it was for the ET to make factual findings about the situation in this particular case. It made a clear finding, having heard evidence, that it was possible to conclude what had happened had a fair process been followed. It accepted that the restructure of legal services, and the replacement of experienced legal review by a "playbook" for the sales team, meant there was a redundancy situation. Selection criteria were fairly and reasonably applied to the appellant. The ET considered alternative deployment, but it made a finding that the appellant would not have accepted it (against a factual finding that the alternative roles attracted a salary of approximately a quarter of the appellant's existing salary). The ET found as fact that at the end of a two-week consultation period the appellant would have been subject to redundancy. It made that finding having taken into account the respondent's concession about the absence of an appeal. The ET found it would not be just and equitable to make any award, beyond the two weeks that the appellant would have continued working while consultation occurred. The ET had the advantage of hearing the witnesses at a two-day hearing, including the claimant and three employees or former employees of the respondent, and considering

all of the evidence before it before coming to its conclusions.

19. In those circumstances, the EAT finds that the approach of the appellant to the ET's decision about financial redress is impermissibly hypercritical. The ET correctly stated the governing legal principles for compensatory awards. It was ultimately for the ET to assess the evidence and decide on loss, using its common sense, experience and sense of justice (**Software 2000** para 54(1)). The ET made adequate factual findings on which to base its award of a loss of a two-week period of earnings, and not a greater award. It may have been open to the ET to make more extensive findings about structure of legal services before and after the restructure, and no doubt other matters. However, its duty was to make sufficient findings to support the award that it made, and it was not an error of law for it to have failed to make the more extensive factual findings the appellant suggests were necessary. It was not perverse for the ET to restrict a compensatory award in effect for unfair dismissal to two weeks' pay, standing the findings it made and the guidance in **Software 2000** (para 54(7)(c)). The EAT finds that there are no good grounds to recall the ET's decision about the appropriate level of the financial awards to be made. It follows that it is not necessary to remit the issue of remedies for unfair dismissal for reconsideration.

Wrongful dismissal

20. The final ground of appeal concerns the appellant's claim for notice pay. The appellant argues that notice was given to him by the respondent on 14 December 2023 for termination of his employment on 15 December 2023. However, under his contract he was entitled to 30 days' notice or pay in lieu. The respondent, on the other hand, argues that the ET accepted that the appellant fundamentally breached his contract by continuing to work on other matters without the permission of the respondent. Although these breaches of contract were not discovered until after the termination of the employment, the respondent submits it was entitled to rely on them to defend the wrongful dismissal claim (**Boston Deep Sea Fishing & Ice Co v Ansell** [1888] 39 Ch D). The appellant nevertheless argues that the decision of the ET does not demonstrate it applied the correct test. The

ratio of **Boston Deep Sea Fishing** is not that if any breach of contract is established, that automatically defeats a claim for notice pay. The ET's decision does not address or take account of whether the appellant's conduct was deliberate or through oversight, the likely position if permission had been sought from the manager, the extent to which this had any effect on the respondent's business, and the objective seriousness of the breach. (Neither party addressed the EAT on whether the *ex gratia* payment of 30 days' notice promised in the letter of 13 December 2023 in any event had an effect on the measure of damages for wrongful dismissal, so the EAT does not consider this matter any further).

21. The appellant's submission, that **Boston Deep Sea Fishing** does not establish a principle that any breach of contract discovered after a dismissal can justify a wrongful dismissal, is accepted. What is discovered must be of the level of seriousness to amount to a repudiatory breach. For example, in **Boston Deep Sea Fishing**, a discovery that an employee had taken a secret commission from a shipbuilding company was found to be sufficiently serious to justify dismissal, and so the dismissed employee was not entitled to certain salary payments. However, it is not accepted that the ET erred in law in its approach to the wrongful dismissal claim in this particular case, or that it failed to give adequate reasons for its decision to reject the appellant's claim for notice pay.

22. The starting point for consideration of this ground of appeal must be the decision of the ET itself, approached in accordance with the guidance in **DPP Law Ltd v Greenberg**. The ET made a finding in fact about the appellant's contract of employment providing for 30 days written notice of termination (para 15). It also made findings in fact that the contract provided that the appellant would not engage in other business activity without the respondent's advance written consent, but that he did so without such consent (paras 16, 17 and 20). The ET made a number of factual findings about email use and the appellant's consultancy business activities (paras 34 to 38). It made findings about the appellant being given notice of termination with effect from 15 December 2023, in a letter dated 13 December emailed on 14 December 2023 (para 53), and that being accepted by the appellant as notice (para 103).

23. The ET noted the submission of the respondent that there should be a nil notice pay award

(para 64), and the appellant's response that the conduct established could not be said to be fundamentally inconsistent with continued employment, so he should get notice pay (para 70), both under reference to **Boston Deep Sea Fishing**. The ET rejected the evidence of the claimant that it was permissible for him to continue to offer external consultancy (para 72) (evidence from which it might reasonably be implied the appellant accepted that he did offer such external consultancy), and similar evidence of a former employee on this matter (para 73). The ET set out the law it applied in relation to notice pay (para 108-109, which included reference to **Boston Deep Sea Fishing**. It stated that:

> "an employer who discovers after the employee has been dismissed that the employee was guilty of a fundamental breach of contract, which would have justified summary dismissal, can rely on that breach to rebut a claim of wrongful dismissal".

The ET then applied that law between paras 138 and 140. It found that the claim for wrongful dismissal did not succeed (para 144).

24. While the ET did not again refer to **Boston Deep Sea Fishing** in the paragraphs where it decided the claim for notice pay (paras 138-140), it had the principles in that case in mind, having referred to them at paras 64, 70 and 109. The ET correctly recognised that the principles operated only in situations of a fundamental breach of contract which would have justified summary dismissal (para 109). There is nothing in what is said to suggest that the ET did not apply the correct principles when deciding the claim for notice pay. The ET was entitled to find that the terms of the written contract of employment, signed by the appellant who was a lawyer, superseded any informal agreement when he was introduced to the respondent. The ET found a clear breach of the written contract in the appellant continuing to operate his own consultancy while working for the respondent. Despite recognising that the appellant satisfied himself there was no conflict, the ET nevertheless found that was not what the contract of employment provided for (the ET having earlier found that the appellant's salary was around £124,000 and that clause 5 of the employment contract specified

that the appellant was not to engage in other business activity without the respondent's advance written consent (paras 56 and 16)). The ET found it significant that the appellant was a lawyer, but had taken no steps to regularise the situation in accordance with the employment contract. The ET went on to say that it was considered unnecessary in those circumstances to draw any conclusion from the appellant's actions in sending respondent email chains to his personal email (para 140, final sentence). It may reasonably be inferred from this sentence that the ET considered the breach of clause 5 of the employment contract to be serious enough of itself without the need to go on and consider other alleged breaches of contract. Given that sentence, the statement of legal principles (para 109), and the dismissal of the wrongful dismissal claim (para 144 and 4), it is evident that the ET found that the appellant operating his own consultancy in breach of contract was fundamental and justified summary dismissal.

25. Although the reasoning in the decision section on wrongful dismissal is brief, it has to be read in the context of the whole decision. When that it done, no errors of law are disclosed. Whether the breach found was sufficiently serious to amount to repudiatory breach rebutting the claim for wrongful dismissal was a question that was highly fact dependent, and one primarily for the ET. Its decision read as a whole demonstrates that it found the established breach was sufficiently serious. The conclusion the ET reached cannot properly be described as perverse. Nor does the failure to address explicitly the four particular matters suggested by the appellant disclose any error of law. The ET's existing factual findings adequately explain the decision reached. The fifth ground of appeal is refused.

Conclusion

26. The appeal is allowed in part only. On the facts found in this particular case, as there is only one conclusion the ET could have reached about whether the appellant was unfairly dismissed, there is no need to remit the case to the ET for reconsideration on that matter (**Secretary of State for Justice v Dunn** [2018] EWCA Civ 1998 para 34). The ET's finding on liability for unfair dismissal

is substituted with a finding that the appellant's claim for unfair dismissal succeeds. The other grounds of appeal are not well founded, and are refused. In those circumstances, the EAT declines to make the further orders for recall and remit to the ET requested by the appellant. Consequently, it is not necessary to consider the terms of any remit or whether it should be to the same or a differently constituted ET.