SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 46
XA43/19

Lord Justice Clerk
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

JULIE LOGAN

Appellant

against

A DECISION OF THE EMPLOYMENT APPEAL TRIBUNAL

against

FUTURE TECHNOLOGY DEVICES INTERNATIONAL LTD

Respondent

Appellant: Party
Respondent: No appearance

10 September 2019

Background

[1] The appellant was dismissed from her position as principal engineer with the respondent on 15 April 2008, having been employed subject to a probationary period of one year. She applied to the Employment Tribunal ("ET") claiming that her dismissal had been unfair.

[2] Part of the appellant's role within the company came to be liaison with an external contractor, a former company employee, whose relationship with the company and continued work for them was critical to the success of the company. A dispute arose between the appellant and the contractor about the use and application of certain coding standards. This dispute extended to involve senior managers within the company, and eventually resulted in a production stoppage. By email of 11 April 2008 to the appellant, the contractor and internal managers the Managing Director said "I don't honestly care how you sort it out but work together and get it sorted ASAP". The appellant responded that she did not think she had the MD's full support, that she believed it was time to move on, that she wished to leave on good terms and wished to ensure she had support in the form of a reference. In an email of 14 April 2008 she asked to be excused working on any project with the contractor in question. At a management meeting on 14 April 2008 certain emails sent by the appellant were considered to have been inappropriate, as were the threats to resign. It was noted that she was still within the probationary period of her contract and the decision was taken that a "clean break" should be made, terminating the appellant's employment and paying two weeks' notice in lieu. In acting this way the respondent believed that the appellant would not obtain employment protection rights.

[3] The respondent admitted dismissal but denied that this had been unfair, under reference to alleged concerns relating to the appellant's conduct and performance in relation to effective communication with sub-contractors. They relied on the fact that the appellant's contract provided for dismissal any time during the probationary period, and their understanding that this meant that dismissal could follow without further consequences. The respondent however averred that there had been difficulties with the appellant, specifically referring to problems which had developed in her working relationship with an

essential contractor. The employer averred that this working relationship with the contractor was causing "great difficulty" and was effectively stopping the development of a project. It was averred that the operations manager had offered to mediate between the appellant and the contractor but the appellant refused this offer. Thereafter the situation was described as becoming "almost impossible". It was averred that following an issue with certain project documentation "the entire production line was on hold for over two weeks whilst the Applicant held this matter up. The cost to the company in terms of revenue for a single product line being inoperative would be fairly stated at being at least $300,000 US Dollars and potentially up to half a million US Dollars". By email of 12 April 2008 the appellant indicated her intention to seek alternative employment and requested a reference. The decision to dismiss the appellant was taken at a management meeting on 14 April 2008. Although the decision was based on the (erroneous) belief that during the probationary period the appellant would not have acquired employment rights and could simply be dismissed, it was averred that "high in the mind of the management meeting was the ongoing business efficiency situation which required ongoing effective communications with sub-contractors".

[4] In the course of proceedings, the respondent subsequently admitted, in an amended ET3, that the dismissal was unfair on the basis of a failure to follow procedure, but elaborated upon the reasons for dismissal, asserting that any award should be reduced to reflect *Polkey* principles and contributory conduct. It was asserted that had proper procedures been followed, the likely outcome would have been a fair dismissal based upon conduct, largely an inability to interact appropriately with both internal staff and external contractors, which included a refusal to continue to work with the aforesaid critical

contractor. The appellant's repeated and inappropriate threats to resign had also been a feature, having regard to the respondent's need to consider business efficiency.

[5] After an evidential hearing, it was asserted for the respondent that the appellant had been dismissed for conduct reasons, namely an inability to work with colleagues and contractors in an appropriate way, intransigence in respect of her attitude to the critical contractor, and a refusal to work with him, as well as repeated criticisms of him and others as incompetent, or dishonest. The appellant maintained the reason was that the CEO was angry over the content of certain emails she had sent, at her threat to resign and at her statement that she would not work further with the contractor in question.

The Tribunal's decision

[6] The ET recognised that the onus lay with the employer to show the reason for dismissal, and that it was a potentially fair reason within the terms of the legislation such as was capable of justifying dismissal. The reason for a dismissal was a set of facts known to the employer, or beliefs held by him, which caused him to dismiss the employee (*Abernethy* v *Mott, Hay & Anderson* [1974] ICR 323). The approach of the Tribunal was to discover the real reason for dismissal by examining the facts and beliefs which led to it. It did not have to accept the employer's stated reason where supporting evidence was poor or where an ulterior motive was suspected (*Associated Society of Locomotive Engineers and Firemen (ASLEF)* v *Brady* [2006] IRLR 576). Where the employer has put the wrong label on a set of facts, however, the Tribunal may nevertheless conclude that those facts, when the correct label is applied, were sufficient to justify dismissal. If the facts were known to the employee, the fact that the wrong label was attached was of no moment, if the facts correctly labelled would justify dismissal.

[7] The ET noted that general issues relating to the appellant's working practices, relationship with other employees and so on had not been raised with her at the time, and concluded that these were neither material nor the reason for dismissal, and indeed were introduced to pad out the reasons for dismissal. It did not accept that there was dismissal for conduct. However the ET considered that there was no dispute that the material facts in the case related to difficulties between the appellant and the contractor, which led to the stoppage in production, to the appellant's email that it was time to move on, and her request not to work further with the contractor. The ET was satisfied that it was the loss of fabrication time which brought matters to a head. The company was faced with an employee still during the probationary period who refused to work with a critical contractor and who now indicated that they were considering leaving. This effectively required the MD to choose between the employee and the contractor.

[8] This was the real reason for the dismissal. The employer classified this as a conduct matter. The ET disagreed with this label: however, on the basis of *Abernethy* it was open to the ET to apply the correct label, which was in fact "some other substantial reason" of a kind capable of justifying dismissal, namely that the appellant could/would not work with the critical contractor. This was a potentially fair reason.

[9] The dismissal was nevertheless unfair since proper procedures had not been followed. The respondent had been under a duty to (i) provide the appellant with a statement of grounds for action and an invitation to a meeting; (ii) arrange a meeting, at which the appellant might be represented, to allow an opportunity to respond to the grounds; and (iii) allow an opportunity to appeal. Under reference to *Polkey* v *A E Dayton Services Limited* [1988] ICR 142 the ET considered what might have happened had the correct procedure been followed. The ET considered that had such procedures been followed, there

was an 85% chance that the appellant would still have been dismissed. The ongoing relationship with the external contractor was crucially central to the company. While the statutory procedure may have afforded the company and the appellant with an opportunity to discuss continued employment and options therein, this had to be balanced with the fact that the appellant appeared to be a difficult person to work with. The ET accordingly reduced the compensatory award by that amount. It also reduced the award by 10% because it considered that the appellant's actions caused or contributed to her dismissal. The appellant had been instructed to "sort out" progression of the project with the contractor. While resolution was not entirely within her hands and she had sought assistance from a representative of the employer she had not complied with this instruction. She was blameworthy. There was an overriding duty on her to find a solution to progress the project, and the failure resulted in a crisis point which should never have been reached. The award was increased by 15% because of the employer's failure to follow the relevant statutory procedures when dismissing the appellant, which had rendered the dismissal automatically unfair.

Leave to appeal

[10] Leave to appeal was granted by the procedural judge who noted that:

> "It is arguable that the facts and circumstances of *Abernethy* are distinguishable from the present, in that in *Abernethy* there was no issue as to the reason communicated at the time for the dismissal, only as to how it was described, or "labelled"…. The question arises as to whether, and if so when, a tribunal can make a finding of a potentially fair reason for a dismissal on (a) a set of circumstances not communicated at the time, and (b) on a ground different not only from that advanced at the time, but also from that founded upon by the employer after the proof, all by way of "relabelling" of the reason for dismissal? A further question arises; namely, if and when a tribunal proposes to do this, what procedural safeguards, if any, are appropriate to ensure that the rules of natural justice are observed? In so far as the present case is concerned, were the rules of natural justice and fairness followed?"

Submissions for the appellant

[11] A detailed note of argument was lodged and relied upon by the appellant. It covered a number of issues some of which concerned historical decisions by the ET concerning *inter alia* document production, outwith the scope of issues for review by this court. The principal argument advanced via a number of threads was that the reason relied upon by the ET and the label given by it were new and raised for the first time in its written judgment. As a consequence the appellant was not put on notice and was prevented from answering it. This had resulted in a breach of adversarial procedure, natural justice (see *Byrne* v *Kinematograph Renters Society* Ltd 1958 1 WLR 762) and the appellant's right to a fair hearing in reasonable time within the terms of Article 6.

[12] The burden of proof under the Employment Rights Act 1998 ("ERA 1998") was on the employer to establish the reason and label for dismissal. That statutory right could only be restricted by statute - *R (on the application of Unison)* v *Lord Chancellor* [2017] UKSC 51. There was no statutory authority for an ET to pick out a reason not used by the employer.

[13] In adversarial proceedings it was incompetent for a tribunal to act of its own motion - *Jackson* v *Dowdall* [2008] CSIH 41; *Margarot Forrest Care Management* v *Kennedy* [2010] UKEATS 0023/10/2611. To do otherwise was a breach of Article 6: *Affaire Clinique de Acacias et Autres* v *France* (Application numbers 65399/01, 65406/01, 65405/01 and 65407/01) at para 43. The ET required to decide a case on the basis of what was before it, not on the construction it would have adopted. *Esto* a tribunal could so act, which was denied, the facts or law relied upon required to be put to the parties - *Duraliyski* v *Bulgaria* 2014 ECHR 45519/06, 4 March 2014. This had not happened. A tribunal must confine its enquiry to the statutory tests, and to the powers defined in its rules - *Sokurenko and Strygun* v *Ukraine* 2006 ECHR 757, 29458/04; 29465/04, 20 July 2006. The ET had failed to do so. If the ET could

substitute its own reasoning for that of the employer's it would have the effect of shifting the statutory onus of proving the reason for the dismissal from the employer - a proposition emphatically rejected by the Court of Appeal in *Kuzel* v *Roche Products Ltd* [2008] EWCA Civ 380.

[14] The appellant submitted that the ET in the present case had misdirected itself to its role (see para 87 of its decision). By substituting the employer's reason and label for one of its own, not advanced by the parties at the hearing it acted in breach of Article 6 and natural justice. It fell to the present court to substitute the ET's finding for one that the employer had failed to show a principal qualifying reason under the ERA 1996 for the appellant's dismissal and set aside the *Polkey* deduction.

[15] The ET3 in the present case did not disclose the assertion founded upon by the ET that a breakdown in working relationships forced the employers to choose between the parties, nor that continued employment for the appellant required her working with the contractor in question. The ET3 raised matters of conduct and capability but did not state that the dismissal fell to be determined as one due to capability. In concluding that some other substantial reason ("SOSR") was the reason for dismissal the ET proceeded on findings in fact of which the parties had not been given notice. *Nelson* v *BBC (No 1)* [1977] IRLR 148 prohibited facts which had been found in relation to one test being applied to another possible but unpled defence.

[16] There was no obligation upon the ET to seek out a reason even when one wasn't advanced by the parties - *Kuzel; ASLEF*. The fall-back position was to hold that the employer had not established the reason. The ET had not done so.

[17] The ET incorrectly applied *Abernethy*. An employer was only permitted to rely upon a different label where it had made all the facts and beliefs known prior to dismissal. The

employer had not done so here. Nor was there notice contained in the ET3. *Hotson* v *Wisbech Conservative Club* [1984] IRLR 422 was authority for the proposition that a subsequent change of label or reason must not prejudice the claimant. The ET erred in concluding that there was a breakdown in the relationship between the appellant and the contractor which forced the employer to choose the contractor. Such a position was not advanced in the ET3 nor in evidence. The ET even acknowledged the fact no evidence had been led in its decision but still came to the conclusion that it did. Per *Smith* v *City of Glasgow District Council* [1987] IRLR 326 where any part of a reason has not been established in evidence, a tribunal could not adopt that reason. Other errors by the ET included an incorrect reliance upon a finding that there was no dispute that the appellant was party to a situation where planned fabrication was stopped (paras 94, 127). The appellant had disputed this. There was no assertion by the employer or in the ET3 that the manufacturing process was on hold at all. Merely that it was a possibility.

[18] The ET had failed to consider or expressly ignored evidence advanced by the appellant, particularly in respect of items which it labelled as falling within Protected Disclosure. It failed to consider the employer's minutes which showed that the true reason for the appellant's dismissal was the complaints in the emails she had made, rather than a breakdown in the relationship as the ET found. The minutes constituted strong *prima facie* evidence of the true reason: *Maund* v *Penwith District Council* [1984] IRLR 24.

[19] In adopting *McCrory* v *Magee t/a Heatwell Heating Systems* [1983] IRLR 414 the ET had erred.

[20] The ET erred in holding (at para 85) that a reason did not need to justify dismissal for it to be a qualifying reason. The statutory test in fact provided the exact opposite. It was also incorrect to say that its reason for dismissal required no fault on the part of the claimant

- see *Wadley* v *Eager Electrical* [1986] IRLR 93 - and that blame and fault could not save her (para 110).

[21] The ET erred in its consideration and application of *Polkey*. The employer's reason for dismissal not having been established no deduction should therefore have taken place. *Esto* it was open to the ET to adopt its own reason for dismissal, it could not lawfully adopt that reason and use it for the purposes of applying a *Polkey* deduction. The ET did not conduct a wider examination of all the circumstances, and in particular, the actions and omissions of the employer. It had wrongly applied the "no difference" test to the Statutory Dismissal Procedure; and incorrectly relied upon *W Devis & Sons* v *Atkins* 1977 ICR 662.

[22] The principles quoted by the ET from *Software 200 Ltd* v *Andrews and Others* [2007] IRLR 568, in support of its approach related to redundancy only and were not applicable in the present case. *Triangle Cars* v *Hook* [1999] UKEAT/1340/98 (1 July 1999) was, however, relevant but had not been applied.

[23] The ET correctly concluded that allegations of the appellant's conduct in relation to other individuals were unfounded; that "tittle tattle" was never raised with her nor investigated; that these were issues upon which it did not require to adjudicate and that they had played no part in the decision to dismiss (para 50 and 90). However, it wrongly took these matters in to consideration when applying and making a *Polkey* deduction (para 120), contrary to *Swanston New Golf Club Ltd* v *Gallagher* [2013] UKEAT/0033/13/BI.

[24] In calculating the uplift for failure to apply any of the statutory procedures, the ET erred in assessing only the intent and effect on the outcome (para 133 and 134). The penalty was not related to the effect on loss, but was to be judged by the degree to which the failure inhibits the goal of clarifying the reason for dismissal prior to an ET claim: *Alexander & Anor* v *Bridgen Enterprises Ltd* [2006] UKEAT/0107/06/DA.

Analysis

[25] The real issues here are (i) whether the appellant had reasonable notice of the underlying facts on which the ET based its decision; (ii) whether those underlying facts featured in any way in the decision to dismiss, regardless of the label attached by the employer to the dismissal; and (iii) whether the label attached by the ET was one which the underlying facts might reasonably bear. The appellant maintains that the facts relied upon by the ET relating to the alleged breakdown of relations with the contractor and the stoppage of production had not been raised in the ET3 and had not been addressed in evidence. It will be seen from the summary of the original ET3 noted above, and from the findings of the Tribunal, that this was not the case.

[26] The original ET3 was not produced by the appellant; nor were various orders of the ET and EAT which would have enabled this court to have a much clearer understanding of the procedural steps which had been taken in the case, which has had a long and protracted history. At the court's request the original ET3 was produced, as were certain orders of the Tribunal. It was apparent that the employer had been given leave to amend the ET3. The terms of the original ET3 and that of the amendment, both of which appeared as a "paper apart" are summarised at paras [3] and [4] above. It is not clear to us whether the second paper apart was to be in addition to, or substitution for, the original. The ET made an order seeking confirmation of this point from the employer, but since it, with numerous other orders, has not been lodged, we do not know what the ultimate position was. However, this appears to be of no moment. It is clear that the ET3 as originally provided gave the appellant notice of matters which then featured in the ET's decision. Moreover, it is clear that evidence on these matters was led without objection. Not only was the stoppage and

the breakdown referred to, the ET3 noted that at the time of dismissal the issue of communication with contractors and their importance to business efficiency featured in the decision making process.

[27] The ET made certain findings in fact which were based on the evidence led before it. These included a finding that an email from one of the employer's managers, Mr Mills, indicated that he had (a) spoken to the appellant suggesting she "grow up"; (b) spoken to both the appellant and the contractor offering effectively to mediate but that the appellant "is not up for that". The appellant advised Mr Mills that she was thinking of resigning. The Tribunal made a specific finding that the situation between the appellant and the contractor "culminated in a production stoppage" and also led to the email of 11 April 2008 from the Managing Director to *inter alia* the appellant referred to above. In response the appellant again said she intended to leave, stated that she wished to do so on good terms and asked for a reference. In respect of the management meeting which led to dismissal the ET made a finding that "rather than finding workable solutions, it was felt the claimant had become uncompromising in her way of working". In the discussion which led to the conclusion that a "clean break" dismissal within the probationary period was the way forward, the ET found that the appellant's stance and emails threatening to resign had featured. The ET found Mr Mills to be a credible witness. He gave evidence that there was an onus on the appellant as a senior employee of the company to find a resolution in the company's interests; that she had been given a lawful instruction to make progress on the project; but that instead of doing so she made it plain she would not work with the contractor and was considering resignation. The ET plainly accepted this evidence, as it was entitled to do. Mr Mills accepted that issues relating to the appellant's relations with internal staff had not been raised with her, but made it clear that the situation with the contractor had been raised

with her (see eg para 43). Mr Mills attended the management meeting at which the decision to dismiss was taken. At para 44 of its decision the ET noted that:

> "Mr Mills believed the claimant's inability to move work forward in an appropriate manner by working with [the contractor], together with her clear desire to leave the company and request a reference were two critical factors which, when taken together with the history of difficulties in the engineering department and the inability of the claimant to work well with other staff led to the decision to terminate the claimant's employment."

The ET did not in general criticise the credibility of the appellant, but clearly had issues over her reliability, saying that "we accepted that she fundamentally believed what she told us." The ET specifically rejected her evidence that she had been given specific authority by the Managing Director to deal with the contractor as she saw fit, even to the extent of removing him from the project. They gave a valid and reasoned basis for doing so.

[28] During the hearing before the ET, the appellant made submissions regarding *Polkey* and the basis upon which deductions may validly be made; and cited a total of 53 authorities which she subjected to a case by case analysis. It is instructive to note that these included *Abernethy; Software 2000; Devis; Nelson; ASLEF* and *Kuzel.* It appears therefore that the options which might be available to the ET, both in respect of finding a reason for dismissal, and as to how to address the issue of deductions all featured in the discussion. The appellant's inability to work with the relevant contractor, and intransigence in that regard, featured in the respondent's submissions, which were that dismissal had been for capability and conduct. It was submitted that her actions and attitude had "brought the company to a crisis point in their operational progress." It was submitted that the appellant's refusal to work with the contractor was "an invitation to the respondent to back either the claimant or [the contractor] and the outcome of this choice was inevitable." For the company it was accepted that the statutory procedures had not been followed, but it was

asserted that it may have been open to the company to "have contemplated some other substantial reason given the factors when combined". Submissions were then made as to the making and level of a *Polkey* deduction.

[29] It is axiomatic that a tribunal which proceeded to decide a case on the basis of material not aired in the proceedings, and of which the parties thus had neither notice nor opportunity to comment would be acting unfairly. However, as can be seen from the preceding paragraph, that is not what occurred in the present case. The essence of the employer's case was that whilst the claimant was dismissed because they understood it was an action open to them without consequence during the probationary period, the reasons which led them to that course of conduct were the breakdown in communications which had led to the expensive business stoppage. Notice of this had been given in advance, had been the subject of repeated discussions and emails with the appellant, and had featured in the evidence led at the ET without objection. The possibility that the situation might have amounted to some other substantial reason was specifically aired during submissions, and the cases cited by the appellant confirm that she must have been aware of the possibility that the ET might make a finding that this was the real reason for dismissal, on the same facts.

[30] The ET correctly directed itself on the issues arising from *ASLEF* and *Abernethy*, in the terms noted at para [6] above. It is true that the ET misspoke in saying that there was "no dispute" regarding the material facts relating to the contractor, which brought the company to a crisis, led to the stoppage, and the 11 April email. However, it is clear that these were the facts which the ET found to be established, and from its survey of the position of the appellant and summary of her submissions there is no indication that it erred in its assessment of the extent to which the appellant took issue with these matters. Her position was clearly understood by the Tribunal which records her submission that she did

not consider herself to be at fault for the stoppage. The ET noted that the appellant was not spoken to about the developing situation with the contractor, but recorded that action was taken to try to resolve the situation through the use of an intermediary, and we have noted above the findings in facts which were made in this respect. We consider that on these findings the appellant did have sufficient notice of the underlying facts upon which the ET eventually based its reasons, and in particular that the employer's frustration with her attitude to the contractor was known to her; further, that these facts were known to the employer and featured in the decision to dismiss, even though the employer believed it could simply dismiss because the probationary period had not concluded; and that on the principles enunciated in *Abernethy* and subsequent cases in which that principle has been refined the ET was entitled to make a finding that the real reason for the dismissal was some other substantial reason, namely the crisis with the contractor and the stoppage. The ET noted the appellant's submission relating to *Triangle Cars* but stated that they were satisfied that the respondent had taken steps to resolve the situation, and that when these failed (due, as they had already noted, to the appellant's unwillingness to engage), this led to the employer having to make a direct choice between the appellant and a critical contractor. We have been unable to identify any error by the ET in its approach to the *Polkey* deduction, or that it misdirected itself in respect of *Nelson*. The issue of blame was considered in terms by the ET. Criticisms were also directed at the 10 per cent deduction for contributory conduct and at the 15 per cent uplift for failure to follow proper procedures, but suffice to say that they were without merit. The appeal must therefore be refused.