Harvey on Industrial Relations and Employment Law

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DIVISION AII CONTRACTS OF EMPLOYMENT

Remedies for breach of contract; calculation of damages for wrongful dismissal

AII [510]

Hall v London Lions Basketball Club UK Ltd UKEAT/0273/19 (4 February 2020, unreported)

Normally, damages for wrongful dismissal proceed on a relatively simple basis of wages for the notice that the employee has lost, on the basis that the employer could always have dismissed by giving that notice. However, that applies to the usual case of a straightforward dismissal by the employer of an employee dismissible under the contract on set notice. This case before Gavin Mansfield QC in the EAT, however, had two complications: (1) it was a case of *constructive* wrongful dismissal; and (2) the employee was under a fixed-term contract.

The claimant was a player employed by the club under a contract dated August 2017 for the 2017/18 season, to end with the final game on 20 May 2018. He resigned with immediate effect on February 2018 when the club failed to pay him his contractual pay (and failed to progress his grievance). In his claim, the ET accepted that there was a constructive wrongful dismissal and the question then became the damages due. The claimant argued for wages until the end of the contract, but the ET refused this and only awarded 14 days' pay because of a clause in the contract that said that the *claimant* could terminate it on 14 days' notice in the event of employer misconduct.

The EAT allowed the claimant's appeal. That clause was irrelevant to whether and how the *employer* could have terminated the contract. In that context, the contract was a fixed-term one, subject only to the right of the employer to terminate it by notice if the employee was in breach of contract.

That was not the case here and so the prima facie measure of damage was wages for the rest of the fixed term. That orthodox solution was backed by a holding that in general the existence of a contractual mechanism for the employee to terminate on notice does not negate the common law right to terminate immediately if faced with a repudiatory breach by the employer.

A problem them arose as to disposal. As the amounts involved were relatively small, counsel for the claimant sought to have the decision taken by the EAT and the judge obviously had a similar view *but* because the ET had not considered this outcome and made necessary findings of fact (especially on the issue of possible mitigation during the remaining fixed-term period), there was no alternative to remission to the ET.

DIVISION DI UNFAIR DISMISSAL

Reasonableness of dismissal; procedural factors; the significance of procedures

DI [993]

***Gallacher v Abellio Scotrail Ltd UKEATSl0027l19* (*4 February 2020, unreported*)**

The seminal *Polkey* case is now remembered for establishing the '*Polkey* reduction' in the law of compensation for unfair dismissal, but historically it was also of major importance in ending several years of the courts down-playing procedural observance ('just a factor') and putting it back centre stage, thus re-establishing the category of procedurally unfair dismissal. However, it did not do so as an immutable rule of law and at one point the judgment of Lord Bridge accepts that there may be cases where non-observance does not have this effect:

> 'It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.98(4) may be satisfied.'

This passage is cited in the instant decision of Choudhury P in the EAT when deciding that it was indeed such an exceptional case.

The claimant was a senior manager who over a considerable period had a deteriorating relationship with her manager, at a time of economic difficulty for the employer. Attempts to rectify this were to little avail and eventually the decision was taken that she had to go. On the advice of HR this was done by due notice but without invoking the employer's normal disciplinary procedure (including no appeal). On her claim for unfair dismissal, the ET held that this was an SOSR case based on breakdown of trust and confidence in the employee and, on the facts, was fair.

The claimant appealed but the EAT dismissed the appeal. The President's judgment emphasises that any case where the employer argues that to have gone through procedures would have been futile must be examined carefully by an ET but, citing *Polkey*, rare cases can occur when such an argument can succeed. Here, the claimant herself had recognised the breakdown, she had done little to remedy it, the organisation was in a difficult position where it was important for the claimant and her manager to work together, and to have invoked the formal procedures would not just have been futile but might actually have worsened the situation. Given these facts found by the ET and accepting that it had set out the law accurately, the EAT held that it was open to the ET to have found that the employer had acted within the range of reasonable responses.

When will reinstatement or re-engagement be ordered? Lack of trust and confidence

DI [2397.03]

***Kelly v PGA European Tour UKEAT/0285/18* (*26 August 2019, unreported*)**

One of many considerations when an ET is considering reinstatement or re-engagement can be whether trust and confidence has broken down to such an extent that an order is not practicable. At **DI [2397.01]** the text cites the case of *United Lincolnshire Hospitals NHS Foundation Trust v Farren* UKEAT/0198/16, [2017] ICR 513, for the proposition that 'it is the employer's view of trust and confidence – appropriately tested by the tribunal as to whether it was genuine and founded on a rational basis – that matters, not the tribunal's'. That was at the heart of the instant decision of Judge Auerbach in the EAT.

The claimant was marketing director of the PGA European Tour. After a change in senior management it was decided that he should be dismissed, partly on a conduct matter and also on a question of capability. He was dismissed and at ET it was accepted that this was unfair. The claimant sought reinstatement which was opposed by the employer on the basis of loss of trust and confidence. The ET held unanimously that reinstatement was not practicable, but by a majority ordered re-engagement as commercial manager, China PGA Tour.

The employer appealed against this order and its appeal was allowed by the EAT. Citing *Farren*, the employer had pointed to a passage in the ET judgment which said that it was applying its own view of whether trust and confidence had broken down (the claimant having argued that it was salvageable). This was clearly wrong and at [75] the judgment states:

> 'Accordingly, the Tribunal must consider whether the employer genuinely and rationally believes that trust and confidence has been broken, so that re-employment is not practicable: that is, not capable of being carried into effect with success. An employer cannot merely assert that this is the case in a self-serving way, in order to successfully resist the

> Order sought. The Tribunal should test and evaluate against the evidence before it, whether the employer's stated belief is both genuinely and rationally held. But it must keep in mind that the ultimate question is about whether it is practicable for *this employer* to re-employ *this employee*.'

There was debate as to whether the ET had in fact applied this test in spite of its initial faux pas but the EAT came to the conclusion that it had not and so the appeal against the order was upheld.

There was a further reason for doing so. The employer pointed out that the job specification for the China posting included a requirement of speaking Mandarin (with Cantonese as a desirable ability) but the ET majority had in effect overridden this and held that the claimant would still be appropriate (having expressed a willingness to learn). Again, this was held to be an error of law. There was argument about whether to re-engage into a job without a necessary qualification is for the ET (impermissibly) to create a new job, but the judgment takes a different tack, going back to practicability; at [100] and [101] it states:

> 'If an employee does not, in fact, meet an essential requirement of the job, then whether or not that is regarded as meaning that the job itself is no longer the same, the underlying issue of substance is, in any event, whether it sets the bar too high to require the employer nevertheless to take the employee back in that role on that basis. Approaching the question in that way, it seems to me that, in a case where the employer has genuinely, for cogent reasons, distinguished between essential and preferable elements of the job specification, and the employee does not meet an essential requirement, it will usually be an error to require the employer to re-engage the employee in that post. That does not turn on whether the post is viewed, philosophically, as the same or a different post, but arises because requiring the employer to put someone into a post for which they do not meet one of the essential requirements, is the wrong side of the line between what is practicable and what is possible'.

DIVISION K EQUAL PAY

Work rated as equivalent; material factor defence; lapse of defence

K [252.01], K [506]

Walker v Co-operative Group Ltd [2020] EWCA Civ 1075

The decision of the EAT in this case is considered in two places in the text:

(1) at **K [252.01]** where it is relevant to the principle that a job evaluation study only applies from its date and cannot be applied retrospectively;

(2) at **K [506]** where it is relevant to the question whether an established material factor defence can lapse over time.

The basic facts were that when the claimant was taken on in February 2014 along with her two comparators, the organisation was in financial trouble.

The other two (males) were put on to higher salaries on four bases – vital roles, executive experience, flight risk and market forces. These constituted material factors at that stage. However, in February 2015 a job evaluation scheme showed that by that time matters had changed to the extent that her work was equal to that of the others (in fact, scoring higher). When she was dismissed she brought several ET claims, including one for equal pay, seeking to establish it back *before* February 2015. It is not difficult to see her commonsense argument, ie that the initial material factor defence *must have* lapsed in the intervening period (it did not suddenly happen in February 2015). The ET was sympathetic, but the EAT (applying the above two considerations) held that things are not that simple and she lost on both of them.

The Court of Appeal have now upheld that decision and rejected her appeal. On the first point, the court applied *Bainbridge v Redcar & Cleveland BC* [2007] EWCA Civ 929, [2007] IRLR 984, [2007] ICR 1644, so that the JES itself could not be back-dated to end a material factor. As to the second point, whether the material factor *itself* lapses, the court upheld the law as set out at **K [506]**, namely that this can happen if the facts change (*Benveniste v University of Southampton* [1989] IRLR 122, [1989] ICR 617, CA), *but* only if the employer has made some subsequent, intervening pay determination (a 'triggering event'), as the EAT had held here. In the absence of that, the original material factor is likely to continue (*Secretary of State for Justice v Bowling* [2012] IRLR 382, EAT). Much of this is ultimately based on the principle that what the material factor(s) must do is *explain* the pay difference, not *justify* it. In fact, the judgment points out that it was not clear that *all* the material factors had disappeared by 2015, which weakened the claimant's case anyway.

REFERENCE UPDATE

Bulletin	Case	Reference
498	*Royal Mail Group Ltd v Communications Workers Union*	[2020] ICR 940, CA
498	*Tiplady v City of Bradford MDC*	[2020] ICR 965, CA
504	*Econ Engineering Ltd v Dixon*	[2020] IRLR 646, EAT
504	*Tabidi v BBC*	[2020] IRLR 702, CA
505	*Hill v Lloyds Bank plc*	[2020] IRLR 652, EAT

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