

Appeal No. UKEAT/0597/06/DM

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 10 May 2007

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**MR I EZEKIEL**

**MR H SINGH**

---

SAGE (UK) LTD

APPELLANT

MR G BACCO

RESPONDENT

---

Transcript of Proceedings

JUDGMENT

---

## **APPEARANCES**

For the Appellant

Miss B Sunderland  
(Solicitor)  
Messrs Doyle Clayton Solicitors  
33 Blagrove Street  
Reading  
RG1 1PW

For the Respondent

Mrs P Scott  
(Consultant)  
The Employment Law Advice  
Centre Limited  
22 St Edmunds Road  
Northampton  
NN1 5EH

## **SUMMARY**

### **PRACTICE AND PROCEDURE**

#### **2002 Act and Pre-action Requirements**

### **UNFAIR DISMISSAL**

#### **Reason for dismissal including substantial other reason**

#### **Polkey deduction**

Step 1 and 2 DDP; s98A(1) unfair dismissal findings of fact unsupported by evidence. Whether employer established potentially fair reason for dismissal (Redundancy / SOSR) Polkey principle – s98A(2) and 98(4) ERA.

**HIS HONOUR JUDGE PETER CLARK**

1. This case has been proceeding in the Reading Employment Tribunal. The parties are Mr Bacco, the Claimant, and Sage UK Ltd, the Respondent. We shall so describe them. We have before us an appeal by the Respondent against the judgment of a Tribunal chaired by Mrs C M Green, promulgated with reasons on 17 October 2006 and later corrected by a certificate under the Chairman's hand dated 7 November 2006, upholding the Claimant's complaint of unfair dismissal and awarding compensation, finally, in the total sum of £10,309.20.

**Background**

2. The Respondent is a provider of business management software and related services to small and medium sized businesses.

3. The Claimant commenced employment with the Respondent on 1 July 2003, first as a Corporate and Strategic Sales Executive and later as a Solution Sales Manager (SSM).

4. He was one of two SSMs, the other being a Mr Barritt, with three solutions Sales Consultants (SSC) reporting to them. That team was principally concerned with the sale of the software solutions to the manufacturing sector of industry. The title of both the Claimant and Mr Barritt was SSM (Manu).

5. In September 2005 Mr Buckley, Head of Construction and Marketing, the Claimant's line manager, proposed a reorganisation of the allocation of duties of manufacturing and construction. It would involve one SSM (Manu) instead of two and one SSM (construction).

6. On 4 October 2005 Mr Buckley met with the Claimant and Mr Barritt. Each was handed a letter. The letter given to the Claimant informed him that because the Respondent's requirement for SSMs (Manu) had reduced his position was at risk. A consultation period of 7 days was indicated. Meanwhile both the Claimant and Mr Barritt were invited to apply for the single SSM (Manu) post which was to remain. Interviews for that post would be held as soon as possible. The possibility of redeployment for the unsuccessful candidate would be considered during the proposed 7 day consultation period.

7. The interviews were held by Mr Buckley later the same day, 4 October. Both the Claimant and Mr Barritt were interviewed. Mr Buckley, applying a point scoring matrix, marked Mr Barritt higher at 26 points than the Claimant at 25 points and he was selected for the remaining SSM (Manu) post.

8. It is convenient at this stage to reproduce paragraph 10a of the Respondent's answer to the appeal. It is there said:

**“It is common ground that the Respondent (Claimant) did not apply for the SSM manufacturing role; this supports the common ground that Mr Barritt was better suited to that role and the Respondent (Claimant) did not apply for a role he considered there was reason not to appoint him to.”**

That, says the Respondent, reflects a concession made by the Claimant in cross-examination below; that Mr Barritt was the obvious choice for the remaining SSM (Manu) role.

9. It was the Claimant's case that he ought to have been selected for the new SSM (construction) role. Mr Buckley interviewed him for that position during the extended consultation period of 17 days, but decided not to appoint him due to his lack of experience in the construction sector. It was the Claimant's contention that he was fitted for the job with retraining.

10. In the event no alternative position was offered to the Claimant and he left on 4 November 2005 with a payment of £13,881.51 to reflect his entitlement to a redundancy payment and pay in lieu of notice.

### **The Employment Tribunal's Reasons**

11. Following promulgations of the original Employment Tribunal judgment the Respondent's solicitors, by a fax dated 30 October 2006, invited the Chairman to correct the judgment in the following respects:

- (1) The Tribunal had confused on the face of their reasons (para 2.3) Mr Black, General Manager Business Intelligence, who had heard the Claimant's appeal against Mr Buckley's decision to dismiss, with the HR Manager, Kirsty Irish, who advised during the dismissal process.
- (2) The parties closing submissions, presaged at para 5, were then omitted.
- (3) The Tribunal had, having found the Claimant's dismissal automatically unfair under s.98A(1) of the **Employment Rights Act 1996** (ERA), then uplifted both the basic and compensatory awards by 40% instead of the latter award only. Those corrections were duly made and the original reasons remedied accordingly.
- (4) The Tribunal, at para 3 headed Agreed facts, had included findings on disputed factual evidence (paras 3.8 and 3.9). The Chairman, by letter dated 6 November 2006, indicated that no correction was necessary. Their findings of fact were based, it was said, on Mr Buckley's unchallenged witness statement; it was clear that the matters in paras 3.8 and 3.9 involved findings on disputed evidence.

## **The Employment Tribunal's Conclusions**

12. The principal findings by the Employment Tribunal, on the issues identified at para 1.1 of their reasons were these:

- (1) The Respondent had not shown a potentially fair reason for the Claimant's dismissal. The Respondent put forward redundancy; alternatively some other substantial reason (SOSR), that is business reorganisation, as their reason or principal reason for dismissal. Both were rejected by the Tribunal. It followed that the dismissal was unfair under s.98 ERA
- (2) It appears that the Tribunal found that the Respondent had failed to comply with both steps 1 and 2 of the statutory dismissal and disciplinary procedure (DDP). Hence the dismissal was automatically unfair under s.98A(1).
- (3) A fair selection procedure was not employed.
- (4) S.98A(2) did not assist the Respondent (even had there been no breach of s.98A(1), we infer). Applying the Polkey test a fair procedure would have resulted in the Claimant not losing his job.
- (5) The appeal before Mr Black was not a rehearing and did not cure the procedural defects at the dismissal stage.
- (6) The corrected compensation award was made up as follows:
  - (i) Basic award. 4 weeks pay totalling £2,120.

We should here observe, no point being taken in the appeal, that where a termination payment is made to the employee to include the equivalent of a redundancy payment and the Tribunal finds that redundancy was not the reason or principal reason for dismissal, the employer cannot set off that "redundancy payment" against the basic award: see **Boorman v Allmakes Ltd** [1992] ICR 842 (CA)
  - (ii) a compensatory award of £6,563.72

(iii) an uplift of 40% on the compensatory award (see s124A. ERA) read with s.118(1)(b) ERA and s.31(3) EA 2002 in the sum of £2,625.48.

### **The Appeal**

13. The following issues arise in the present appeal:

- (1) Was the Tribunal entitled to conclude that the Respondent was in breach of step 1 and/or 2 DDP leading to a finding of automatically unfair dismissal under s.98A(1)?
- (2) Did the Employment Tribunal make findings of fact which were unsupported by or contrary to the evidence (perversity: See **Piggott v Jackson** [1992] ICR 85, 92D, per Lord Donaldson MR)?
- (3) Did the Tribunal fall into error in concluding that the Respondent had failed to show that its reason or principal reason for dismissal was (a) redundancy, or (b) SOSR?
- (4) Did the Tribunal misdirect themselves as to the legal duty on an employer to offer alternative employment to an employee at risk of redundancy?
- (5) Did the Tribunal misapply the law relating to internal appeals and their effect on earlier procedural defects?
- (6) Did the Tribunal misapply the **Polkey** test?
- (7) Did the Tribunal give adequate reasons for their finding that the Claimant's dismissal was substantively unfair?

### **Authorities**

14. Before turning to the issues raised in this appeal I wish to make this statement of practice in the EAT for the attention of all parties and their representatives. I do so with the express authority of Elias P.

15. At the preliminary hearing held in this case before HHJ Burke QC and members on 9 February 2007 the EAT made the following, now standard direction at paragraph 9:-

**“The parties shall co-operate in agreeing a list of authorities and shall jointly or severally lodge a list or lists and copies of such authorities for the purposes of the appeal, not less than 7 days prior to the date fixed for the hearing of the full appeal.”**

Only Miss Sunderland chose to place a bundle of authorities before us in advance of this hearing. Mrs Scott did not seek to rely on any separate cases.

16. The bundle lodged contained a number of transcripts of judgments which were reported in the ICR and or IRLR reports.

17. I wish to make it clear that it is the responsibility of parties and their representatives to ensure that where cases are reported those reports are included in the list and copied in the bundle of authorities. The reasons are two-fold; first, it helps the EAT, when pre-reading a case, to refer to the head note of an authority. It is not a sensible use of time to read through the entire judgment in order to assimilate the basic facts and holdings in the case. Secondly, it is useful to the readers of our judgments to see precise references to passages in the earlier cases cited; this is often helped by reference to the relevant law report.

### **The Issues**

#### **(1) The Statutory DDP**

18. The relevant statutory provisions are set out and helpfully analyzed by Elias P in **Alexander v Bridgen Enterprises Ltd** [2006] IRLR 422. In short, a dismissal will be automatically unfair under s.98A(1) where the employer has failed, through his own default, to comply with the requirements of the statutory DDP set out in Part 1 Schedule 2 to the **Employment Act 2002**.

19. For present purposes, step 1 of the DDP requires the employer to set out in writing the circumstances which lead him to contemplate dismissing the employee; send a copy to the employee and invite him to a meeting to discuss the matter.

20. The step 2 meeting must take place before action is taken and the meeting must not take place unless the employer has informed the employee of the basis for the step 1 letter and the employee has a reasonable opportunity to consider his response to that information. The remaining provisions of step 2 are not presently material.

21. In the present case the Tribunal found the Claimant's dismissal automatically unfair under s.98A (judgment, paragraph 1). Their reasoning is at paragraphs 6.5 and 6.6 of the conclusion section of their reasons. They said this:

**“6.5 Turning to the procedure adopted, under the Statutory Dismissal and Dispute Resolution Regulations 2002 the employer has, as a first step, merely to set out in writing the grounds which led the employer to contemplate dismissing the employee together with an invitation to attend a meeting. The statement at that stage need not do more than state the matter in broad terms. The employee need only be told that he is at risk of redundancy and why. The respondent argued that by giving such a letter to the claimant at the first meeting to which he was called, under false pretences, was sufficient. We do not agree. The claimant thought he was attending a meeting to discuss sales forecasts for the following year. Calling the claimant to a meeting under false pretences and the handing to him of a Step 1 letter is woefully inadequate.**

**6.6 The second step is to inform the claimant at the pre-arranged meeting the basis for the grounds set out in the Step 1 statement. It is not sufficient to simply give the claimant the information that the decision to make redundancies has been taken. The second step requires that the respondent give an explanation why the respondent is considering dismissing the claimant specifically. Unless that happens, the claimant is not in a position to raise questions as to his own selection. In the present case that did not happen.”**

22. It is not entirely clear to us whether or not at paragraph 6.5 the Tribunal found that the letter of 4 October complied with the requirements of step 1. If they did so find we can move to step 2; if not, we are satisfied that they fell into error. The requirement is to set out the relevant circumstances in writing and send a copy to the employee. The fact that the letter is handed to him at a meeting billed as a discussion of sales forecasts is nothing to the point. The Tribunal do not find, nor could they in our view, that the contents of the letter did not meet the step 1

UKEAT/0597/06/DM

requirements. In these circumstances we move to step 2, satisfied that the Respondent did comply with step 1.

23. As Miss Sunderland points out, the interviews with the Claimant and Mr Barritt took place later that day. Since the Claimant does not suggest that he ought to have been selected for the SSM (Manu) post in preference to Mr Barritt no point arises on the scoring of the 2 men. As to redeployment, the Claimant was interviewed for the SSM (Construction post) on 19 October and for another post, that of BDMPS on 12 October. It seems to us that, applying the principles in Alexander, the Respondent provided sufficient information to the Claimant, telling him why redundancy was necessary, the pool for selection and what steps would be taken to attempt to redeploy him. We can see that where the employee's selection is in dispute further information as to the selection process may be necessary; however, that did not arise in the present case.

24. Accordingly we accept Miss Sunderland's submission that the Tribunal was wrong to conclude that the Respondent had failed to comply with the DDP. The dismissal was not unfair under s.98A(1) ERA.

#### (2) Perversity

25. Mrs Scott's principal submission in resisting the appeal on behalf of the Claimant is that she argued successfully below that there was no material distinction between the roles of SSM (Manu) and SSM (construction). That there was here no redundancy situation because, given that Mr Barritt was the obvious choice for the remaining (Manu) role the Claimant could, with some retraining, perform the equivalent construction role. The Tribunal was entitled so to find. In doing so they assessed the witnesses before them and were entitled to characterise

Mr Buckley as an unsatisfactory witness (reasons paragraph 3.8). That assessment, being one for the fact finding Tribunal and not this EAT, informed their ultimate conclusion.

26. We see the force of that submission when applied in many of the cases which come before us; but the present case is different. We think it significant that when asked to delete the heading ‘Agreed Facts’ at paragraph 3 of their reasons the Chairman, replying on behalf of the Tribunal in her letter of 6 November 2006, indicated that, with the exception of paragraphs 3.8 and 3.9, where the factual disputes were identified, their findings were based on the uncontested evidence of Mr Buckley.

27. That leads to Miss Sunderland’s critical challenge to the finding at paragraph 3.2 of the reasons where the Tribunal say this:-

**“In September 2005 Mr Buckley decided to reorganise the allocation of duties of Manufacturing and Construction. At the time he had a Solutions Marketing Manager Manufacturing and Construction and two SSM Manu. He proposed to retain the Solutions Marketing Manager Manufacturing and Construction and change one SSM Manu into a SSM Constructions post.”**

That finding, we think, was key to the Tribunal’s later conclusions. It suggests that there was no real difference between the SSM Manu and construction posts. However, Miss Sunderland has satisfied us that, based on Mr Buckley’s witness statement and her notes of evidence, that was not his evidence. Rather, it was that two roles, in different market sectors, required wholly different experience of those markets. Thus, it was not that the Tribunal rejected his evidence; rather they misstated it. That error; making a finding unsupported by the evidence on which they relied, materially undermined what followed.

### (3) Reason for dismissal

28. If Mr Buckley’s evidence was right, then the Tribunal had to decide whether the work of the new SSM construction was work of the particular kind performed by the SSM Manu. If

not, then a redundancy situation arose. The work of two employees was now to be performed by one. See **Murray v Foyle Meats** [1999] IRLR 562 (HL); approving **Safeway Stores Plc v Burrell** [1997] IRLR 200.

29. The Court of Appeal decision in **Shawkat v Nottingham City Hospital NHS Trust (No.2)** [2001] IRLR 555, to which the Tribunal referred the parties, is not in point if there is a material distinction between the manufacturing and construction SSM moles. In **Shawkat** the same work was being performed by the same number of employees; it was simply that the duties performed by Dr Shawkat were altered within that framework.

30. Even if, following a proper fact finding exercise, it were found that there was no redundancy situation, it is difficult to see how the new structure in this case failed to pass the low threshold for showing SOSR, clearly identified by Griffiths LJ in **Kent CC v Gilham** [1985] IRLR 18, cited by Burton J in **Scott & Co v Richardson** (EATS/0074/04 26 April 2005, paragraph 17).

31. In our judgment the Tribunal finding that neither potential fair reason for dismissal was made out in this case is fatally undermined by the lack of proper fact-finding and a failure to apply the correct legal tests.

#### (4) Alternative employment

32. This issue goes to the question of fairness, either under s.98A(2) (the reverse Polkey principle, considered in **Alexander**) or, if that defence is not made out, the question of fairness under s.98(4) ERA.

33. The short point here is that we accept Miss Sunderland's submission that, for either purpose, the Tribunal applied the wrong test. They directed themselves (para 6.9) that the Respondent had a duty to seek suitable alternative employment for the Claimant. In fact, the question as to whether the employer offered suitable alternative employment is, under the statute directed to the employer's defence to a claim for a redundancy payment. Unreasonable refusal of an offer of suitable alternative employment by an employee whose post is redundant will disentitle him to a redundancy payment.

34. The significance of alternative employment in the context of s.98(4) was considered by the Court of Appeal in **Thomas & Betts Manufacturing v Harding** [1980] IRLR 255. It is clear from that decision that where an employer puts forward cogent reasons for not offering an alternative position to the potentially redundant employee that will satisfy the duty to act reasonably. It was for the Tribunal to properly analyse the Respondent's reasons for not offering the construction SSM role to the Claimant. In our judgment they failed to carry out that analysis on the facts.

#### (5) Internal appeal

35. We have drawn the attention of the parties to the Court of Appeal decision in **Taylor v OCS Group Ltd** [2006] IRLR 613. That case disapproved the earlier line of cases, such as **Whitbread v Mills** [1988] IRLR 501 (Employment Appeal Tribunal. Wood P) which held that in order to cure earlier procedural defects an internal appeal must be by way of rehearing, not a review of the decision to dismiss.

36. It follows that the Tribunal's self direction (reasons paragraph 6.12) that the appeal before Mr Black was not a rehearing and therefore could not cure any earlier defects was itself wrong in law.

37. Further, the procedural defect found by the Tribunal (paragraph 6.7) was that the Respondent did not notify the Claimant of the selection criteria; he was not given a chance to challenge the marks given to him compared with those awarded to Mr Barritt. However, that exercise was unnecessary in circumstances where the Claimant did not challenge the Respondent's decision to retain Mr Barritt in the remaining SSM (Manu) role.

#### (6) Polkey

38. At paragraph 6.11 the Tribunal state their reasons for finding that had a proper procedure been followed the Claimant would have retained his employment; thus there was no room for Polkey reduction, treating this as a case of ordinary unfair dismissal. That reasoning is based on the factual premise that there was nothing in the construction role which the Claimant could not do with some retraining. As we have observed, that was not the evidence of Mr Buckley and his evidence on this point was apparently not rejected by the Tribunal.

#### (7) Adequacy of reasons

39. For the reasons which we have given we are not satisfied that the Tribunal has properly carried out its fact finding role so as to fully explain why the parties have won or lost.

#### **Conclusion**

40. For all these reasons we are satisfied that this decision cannot stand. The appeal is allowed and the judgment of the Employment Tribunal set aside. The case will be remitted to a fresh Tribunal for rehearing on the basis that the dismissal was not automatically unfair under s.98A(1).

41. The issues for the next Tribunal will include:-

- (1) Resolving the factual question as to whether there was a material difference between the roles of SSM (Manu) and construction.
- (2) What was the reason for dismissal? Was it (a) redundancy, or (b) SOSR, or has the Respondent failed to establish any potentially fair reason?
- (3) If a potentially fair reason is established, was dismissal for that reason substantively and/or procedurally unfair, taking into account the internal appeal?
- (4) If the latter, was there a greater than 50% chance that a fair dismissal would have occurred but for the procedural defect; if so, the dismissal is fair under s.98A(2) see **Alexander**.
- (5) Even if the dismissal was unfair, applying s.98A(2), is there any percentage reduction to be made under the Polkey principle?