Unfair dismissal: progression-based performance models and Polkey pitfalls

In *Pal v Accenture (UK) Ltd*, the EAT held that Employment Tribunals must apply the correct counterfactual when assessing Polkey deductions and carefully analyse whether "up or elsewhere" (also known as "up or out") dismissals fall under capability or some other substantial reason.

What happened in this case?

Ms Pal commenced employment at Accenture in August 2009 as an Analyst. In 2011 she was promoted to Consultant, and in 2013 she was further promoted to Manager. The next promotion would have been to become a Senior Manager. Accenture operated what was a called an "up or elsewhere model". Under that model, employees are expected not only to perform competently at their current grade but also to demonstrate readiness for promotion within a typical timeframe. Failure to show such progression is treated as underperformance, which could lead to dismissal.

In August 2018, Ms Pal's performance was rated as "Not Progressing", however, this was not communicated to her until November 2018. In the meantime, in September 2018, Ms Pal informed her managers that she needed to have an urgent operation to remove two ovarian cysts. It was then discovered that she had endometriosis. Ms Pal was off work for a month after the surgery.

In October 2018, she returned to work of her own volition, and against Occupational Health advice. However, she needed a second period of sick leave from late November 2018 to early January 2019. In mid-January 2019, Ms Pal had a further Occupational Health assessment. A report was issued setting out some of the impacts on Ms Pal's daily activities. It said that Ms Pal was experiencing a poor sleep pattern, that she was completing light everyday tasks, but she was not carrying heavy shopping, and that she could only walk for periods of up to 20 minutes as anything longer was exacerbating her fatigue.

An eight-week phased return was agreed covering the period through to early March 2019. During that eight-week period, Ms Pal met with her managers to discuss her performance and Accenture's expectations. At a midyear talent discussion held on 21 March 2019, Ms Pal was again rated as "Not Progressing", however, this was not communicated to her until June 2019. In July 2019, Ms Pal attended a meeting to discuss her performance. At the end of the meeting Ms Pal was told that she was to be dismissed, which was confirmed in a brief letter sent that day. Ms Pal's appeal against that decision was dismissed.

Ms Pal brought claims for unfair dismissal and disability discrimination:

- On unfair dismissal, the Employment Tribunal found that the dismissal was procedurally unfair because Accenture had failed to comply with aspects of its own Disciplinary and Appeals Policy (i.e. by not conducting a formal investigation and by allowing individuals involved in the performance management process to sit on

the dismissal panel). However, the Tribunal applied a 100% "Polkey" reduction to compensation to reflect the fact that Ms Pal would have been dismissed in any event.

- On the question of disability, the Tribunal held that Ms Pal was not disabled on the basis that she had not shown that her endometriosis had an ongoing substantial effect on her normal day-to-day activities, nor had these effects lasted, or were likely to last, more than a year. It was also found that Accenture had no knowledge of disability, nor could it reasonably be expected to have had such knowledge.

Ms Pal appealed to the Employment Appeal Tribunal (the **EAT**).

What was decided?

The EAT (HHJ James Tayler presiding) held that the Tribunal had erred in law in several respects.

The Polkey deduction

The Tribunal had applied the wrong counterfactual when making the 100% Polkey deduction. Instead of asking what this

employer would have done had it complied with its own policy (including conducting an investigation and using independent decision-makers), the Tribunal effectively assumed the employer would have operated under a *different*, more suitable policy. Yet there was nothing in the judgment that demonstrated that Accenture led any evidence that it would have introduced such a new policy or had done so by the time of the Employment Tribunal hearing.

A Polkey assessment must consider what the actual employer would have done if it had corrected the procedural defect. The Tribunal cannot substitute its own view of what would have been fair or assume the employer would have restructured its procedures. Therefore, the Tribunal should have considered whether Ms Palwould still have been dismissed (or dismissed at the same time as she was actually dismissed) had Accenture applied its procedure correctly i.e. what would have happened if the decision been taken by independent managers following a formal investigation?

Capability and "up or elsewhere" models

The EAT provided important analysis on the potentially fair dismissal reason of capability. It said that capability must be assessed by reference to the work the employee was contractually employed to perform. Where dismissal is based on a failure to demonstrate readiness for promotion, that may not necessarily amount to a fair dismissal for capability if the employee is performing their existing contractual role competently.

Instead, such dismissals may fall within the alternative fair reason of "some other substantial reason". However, in such

cases the substantial reason must justify the dismissal of an employee holding the "position" which the employee held. A Tribunal would need to consider the reason in light of the employee's status, the nature of their work and their terms and conditions of employment.

The EAT did not determine the correct label in this case, but made clear that Tribunals must take care to analyse progression-based expectations.

Disability discrimination

The EAT also held that the Tribunal had failed properly to analyse whether Ms Pal was disabled within the meaning of the Equality Act 2010 at the material time and whether dismissal was because of something arising in consequence of disability. The Tribunal had relied heavily on an Occupational Health comment that symptoms had not lasted 12 months, without properly analysing the statutory test (including addressing likely duration and recurrence).

The case was remitted to a different Employment Tribunal.

What does this mean for employers?

This is a significant decision for employers operating structured progression or "up or out" models, particularly in professional services, consulting and law firms.

Employers cannot assume that a failure to demonstrate

promotion-readiness automatically equates to poor performance justifying a capability dismissal. Tribunals will examine what the employee was contractually employed to do, whether progression expectations are incorporated into the contract; and whether dismissal is properly characterised as capability or SOSR.

As far as Polkey is concerned, employers must be able to demonstrate what they would have done had they complied with their own policy. Tribunals will not assume employers would have redesigned their procedures to avoid unfairness. Evidence is required to support an argument that dismissal would have occurred in any event.

The impact of this decision is likely to be more keenly felt from 1 January 2027 when the statutory cap on compensation for unfair dismissal is lifted.

The decision also highlights a common pitfall: over-reliance by employers on Occupational Health advice instead of considering the legal definition of "disability".

Pal v Accenture (UK) Ltd

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