Appeal No. UKEAT/0427/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 29 April 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

V APPELLANT

HERTFORDSHIRE COUNTY COUNCIL AND ANOTHER RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOSEPH ENGLAND (of Counsel) Instructed by: S A Law LLP Gladstone Place 36-38 Upper Marlborough Road St Albans Hertfordshire AL1 3UU
For the Respondents	MR RICHARD ROBERTS (of Counsel) Instructed by: Hertfordshire County Coucil (Legal Services) County Hall - CH0237 Pegs Lane Hertford Hertfordshire SG13 8DE

SUMMARY

UNFAIR DISMISSAL - Polkey deduction

An Employment Tribunal held that the question to be decided was whether an employer could have dismissed fairly in the factual circumstances it found established. It repeated this expression three times, without any indication that it understood its role was to decide what the chances of a (fair) dismissal were; and, by the use of other expressions in the text, indicated that there may have been doubt about whether there would have been a fair dismissal. In broad context, there was much to be said on either side (some of which the Employment Tribunal clearly recognised) as to whether there would or would not have been a dismissal of the Claimant. The Employment Tribunal had either fallen into the error of assessing what it thought would happen (or that it was sufficient to establish a 100% deduction that there was a possibility of a fair dismissal) or failed to articulate its reasoning sufficiently clearly.

Other grounds of appeal were dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. One of the difficulties which Employment Tribunals have to face when deciding whether to apply what is known as a **Polkey** discount is the way in which it can express its conclusions without falling foul of the trend of emphasis of recent authorities. It is recognised that the assessment called for when examining **Polkey** is necessarily predictive. It looks to the future. Since, as is obvious, the future has not yet happened, the enquiry is not into fact, which may be established on the balance of probability, but is rather an hypothetical enquiry, which owes more to assessment and judgment than it does to hard fact, which may have to be undertaken. It is sometimes not easy to express in words the result of that process in a way which demonstrates to an Appeal Tribunal that the Tribunal has not only been aware of the appropriate authorities, but has applied them correctly.

2. Those observations are true of this particular case, involving as it does an appeal from a Decision of a Tribunal at Watford before Employment Judge Southam, Mrs Thompson and Mr Moynihan in respect of a Judgment as to remedy, Reasons for which were delivered on 12 August 2014. The same Tribunal had earlier delivered its Decision as to liability by Reasons of 13 May 2014. Its Judgment in respect of liability is one which deserves tribute. It is lengthy but careful. It shows a clear analysis of the facts. It deals with situations of some delicacy with appropriate sensitivity.

The Underlying Facts

3. I need set out the facts underlying the successful claim of the Claimant briefly. He was appointed as the Site Manager of a school in Hertfordshire at the age of 60 in August 2011. The old-fashioned name for such a post is "Caretaker". Whilst there, necessarily he interacted

with the children, many of whom were quite young. A number of incidents occurred in which there was some contact between a child or children and him. Thus it was noted that, in around April 2012, the Claimant was given advice that he should beware of physical contact with children but that he should not push children away if they made physical contact with him. Shortly after that, he was working in the boys' toilet, where as it happens a number of his tools were kept. He was using those tools to repair broom handles at a time when all the children should have been in their classes. A boy happened to come into the toilet and spoke to him there. The Claimant was therefore and thereafter advised that he should not be in the toilets when children might be there, though this particular incident could not have been anticipated. He sought arrangements to put his tools elsewhere. A little while after that, in May 2012, the Head thought that he was staring intently at a particular child, known as X, when she collected an award during the course of an assembly. No advice was given on that occasion. A little after that, when the Claimant had seen a child run into the road in front of the school when a car happened to be coming, he sought advice from the Designated Governor for Child Protection as to whether it was acceptable for him to restrain children in order to protect them from doing something which might risk their health. No advice apparently was given to him on that occasion.

4. The next incident, again before 25 May, related to a bench in the school grounds. The bolts securing it had become loose; in the Claimant's view, dangerously so. It was break time. The children were playing outside and so he decided to sit on the bench to ensure that no incidents occurred. This was for the safety of the children. He intended to remove the bench and to see to it after the break was over. Whilst he was sitting there, two children, one being Child X, came up, sat on the bench and hugged him. They asked him what he was doing. He told them to go back to their playing. Again involving Child X, whilst the Claimant was

present in what was known as the Key Stage 2 area, working on the wall, the child (who should not have been there) came to see him to ask him what he was doing. There had been other interactions between him and Child X. He repaired her guitar. That was entirely appropriate, but he obtained a guitar case for her so that the guitar would be protected. In effect, he was giving the child a present, albeit from a school stock of old guitar cases. The child's parents were well aware of that, as they were when he gave the child a copy of a story which he had written and which he had been permitted by the school to read to the children.

5. On 25 May he was spoken to by the Head and her Deputy. They were concerned that he was putting himself in positions in which he might be vulnerable to adverse suggestions. It was after that that the storybook incident apparently occurred.

6. On 6 October a record of concern referred to X walking up to the Claimant and hugging him. It was said that the Claimant did nothing to push X away and it was suggested that he had kept his hand on her back as they walked into the hall and that they had then walked next to each other, touching arm to arm. The witness, in what was an anonymous report, recorded X running up to the Claimant and hugging him, asking him how he was feeling. He had not been well the day before. The Claimant said words to the effect "A hug will make me feel better". Something broadly along those lines appears to have occurred since the Claimant's approach was that, although something like those words had been said, they had not been said to the child, either generally or to the adult. It was an event which happened in public.

7. The school, acting upon the report, did what was required under the appropriate procedure. It was a community school subject therefore to local authority control insofar as provided before by the **Education Act 2002**. The Head notified the Local Authority

Designated Officer for allegations ("the LADO"). The LADO advised the Head to suspend the Claimant, which it was within the Head's power to do, and she did. Two days later, on 10 October, a strategy meeting, the first of two, was convened. Attendees at that meeting included the police, the LADO and, on this occasion, the Deputy Head of the school.

8. The attendees decided that the police should conduct an investigation, which would include the Claimant's career at his previous school. All agreed that the Claimant was not suitable to work with children currently.

9. The investigation, which involved examination of the Claimant's phone and computer, was entirely negative. The police did not proceed with any charge. Their view of the Claimant was that he was a nice person who was gentle and friendly. I should make clear at this stage of the Judgment that there was found to be no evidence whatsoever (the words of the Tribunal) that he had been guilty of any form of sexual misbehaviour.

10. Nonetheless, a second strategy meeting was held, this time with the Head Teacher as an attendee. She expressed the view that the Claimant did not appear to appreciate how serious the situation could be and she thought him naive. The LADO said (paragraph 24.42 of the Liability Decision) that professionals working with children who had accidentally overstepped the mark had a significant incentive to change their behaviour, but the Claimant had not done that and it was reasonable to question his intentions towards children and why he had not listened in order to protect himself. She thought his behaviour could easily be misinterpreted regardless of intention, which was one of the reasons why training and advice was provided, adding "This has been done on many occasions for [the claimant]."

11. The school proceeded to a disciplinary hearing on 21 May 2013. Though the Tribunal were satisfied that the Claimant was in fact dismissed for misconduct, it thought he could not reasonably have been thought guilty of any. There were no reasonable grounds for it, and the procedures adopted were flawed substantially in a very great number of respects. A theme which runs through its Decision was that some of the detail of the particular events involving the Claimant and, in particular, the Claimant and X had not been properly placed into context. One example, consistent with that, was that, when the Deputy Head spoke on the first occasion to the strategy meeting, she is recorded as describing the toilet incident as the Claimant having gone into the toilet with a pupil, thereby presenting, it might be thought, a very different picture from him legitimately working within the toilet area and the pupil, who should not have been abroad, happening upon him whilst he was there. It had no hesitation in condemning the decision as unfair dismissal. Because an allegation of discrimination on the ground of sex had also been raised, the Tribunal explored what it actually made of the facts. It did not, as was appropriate to the case in respect of unfair dismissal, restrict itself to asking what the employer might reasonably have concluded. In doing so, it not only came to the conclusion that, on the evidence before it, a woman caretaker in his position would not have been treated as he was and therefore that sex discrimination was made out, but concluded what the actual facts of the various incidents were. That led it emphatically to reject any suggestion that the Claimant had actually been guilty of misconduct as such.

12. Accordingly it came to determine the question of remedy. No issue arises as to its conclusions in respect of unlawful deductions from wages, wrongful dismissal, or the basic award in respect of unfair dismissal or in respect of the award in respect of discrimination. It should be noted that the awards included an uplift for the failure of the employer in wholesale respects to observe the provisions of the **ACAS Code**. However, it took the view that the

future loss of earnings was restricted to four weeks' loss. Standing back, that seems a somewhat surprising conclusion. The Tribunal reached it on the basis that it had to consider whether or not there "could have been a fair dismissal" (paragraph 10). It thought that the application of the **Polkey** principle, deriving from **Polkey v AE Dayton Services Ltd** [1987] IRLR 503, required it to consider:

> **"whether or not it would be unjust to the employer to compensate the claimant fully for his loss of earnings if the claimant could fairly have been dismissed in the circumstances which prevailed at the time of his dismissal"**

thereby repeating the question whether the facts were such that the employee could have been dismissed. That is a question which involves possibility and no prediction as to the actual likelihood of it occurring.

13. In the central paragraphs of the Decision, following on from that opening self-direction, the Tribunal said:

> **"13. In fact, that is our starting point for consideration of the *Polkey* argument. It seems to us that we have to assume that the school had undertaken a disciplinary process and decided that it was not appropriate to dismiss the claimant for misconduct. The school would then have had to face the fact that the strategy committee had decided that the claimant was not suitable to be working with children. We speculated whether in those circumstances the school might have asked for the strategy meeting to be reconvened. Our view was that it was more likely than not that they would not have done so or that, if they did, the result would have been the same. Our reason for thinking this is simply that the facts of the case were known to those involved.**
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> **14. We were not assisted by the parties' representatives by provision of any authorities. The tribunal has in fact considered the decisions of the Employment Appeal Tribunal in *Z v A* reported at [2014] IRLR 244 and of the Court of Appeal in *Leach v Ofcom* [2012] IRLR 839. In neither of those cases are the facts similar to the facts that we have in this case and we think that the decisions are not directly binding on us. Nevertheless we felt that the decisions provided some assistance by way of the guidance that was given.**
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> **15. In both cases allegations of child abuse were made about an employee and the employer was not in a position to carry out an investigation into the allegations, unlike the position in this case. However, in *Leach* an independent body warned the employer about continuing to employ the employee concerned. That aspect is similar to the position we had in this claim. In both cases it was envisaged that a dismissal of the employee in those circumstances may be fair, as being for "some other substantial reason". In *Leach* it was said that an employer to whom a third party discloses information or makes allegations should assess for itself as far as practicable the reliability of what it has been told. Of course in this case the school undertook its own investigation. These cases show that, in the assumed circumstances, a dismissal based on the recommendation of an outside body could be fair, for some other substantial reason."**

I note again the use of the word "could".

> **"16. In the circumstances the school would have had to take into account the following matters. First, there had been a number of incidents, which included actions taken by [the claimant]. Second, there was no evidence whatsoever that [the claimant] had committed any**

act of child abuse. Furthermore the police had resolved to take no action against him. The fourth factor that the school would have to bear in mind is the assumed position that it would not be fair to dismiss the claimant on grounds of misconduct. They would also, however, have to take into account the assumed position that it would still be the view of the strategy committee that the claimant was unsuitable to be working with children. They would further have to take into account the likelihood of "soft" information appearing on any future Disclosure and Barring Service check in relation to the claimant.

17. It seems to us, on the basis of those facts, that the respondent would continue, inevitably, to think that the claimant had not understood what steps he was required to take in order to safeguard himself. There was a risk of a perception becoming general within the school and the wider community that the claimant might be a risk to children. That in turn carries a risk to the reputation of the school. It is inevitable, we think, that those holding such a perception might think that if, in the future, there were to be any incident involving child abuse for which the claimant was thought to be responsible, the fact that there had been the opportunity to dismiss the claimant and he had not been dismissed, would have a devastating effect on the school's reputation and of those working in it. Mrs [H] said this at the liability hearing, in questions from the tribunal.

18. None of those matters in our view justified a dismissal for misconduct, but we considered that, for those reasons, there could, in the assumed circumstances following a disciplinary process that did not result in the claimant's dismissal, still have been a fair dismissal for some other substantial reason. The matters that we have set out above in our view amount to substantial reasons. This is a question of trust and confidence as well as the decision of the strategy committee and its consequences. In the circumstances which are assumed would have transpired following a decision not to dismiss the claimant for misconduct, it is our view that it would have been fair for the School to dismiss the claimant for those substantial reasons."

14. It went on to say that it thought the process of coming to that conclusion, on that basis, would have been completed some four weeks after the decision that was actually made, and the loss of earnings claim was therefore restricted to that period. This therefore amounts to a 100% reduction, on the **Polkey** basis, allowing for the fact that the decision would have taken only a further four weeks to make.

The Appeal

15. The appeal, restricting itself entirely to the **Polkey** ground, raised four issues. First, it argued that there was no sufficient basis, on the evidence before the Tribunal, for it to make a **Polkey** reduction. The Judgment relied to an erroneous degree on speculation unsupported by evidence. The second ground was that the Tribunal had applied an all or nothing approach to the question of a **Polkey** reduction despite recognising that the hypothetical events were "more likely than not to occur", a phrase which suggests the possibility they might not. The Tribunal

had erroneously equated that into a finding that the chance was 100%. That was not supported by the evidence or by the reasoning.

16. The third ground was that, in reconstructing the world as it might have been, the Tribunal failed to consider what would have been involved in a fair process, in particular what reliance would have been placed on the strategy meeting's conclusions in a fair process and in effect arguing that the Tribunal should have expected the strategy meeting to adopt a fair procedure.

17. The fourth ground argued that the parties did not have a chance to address the Tribunal about two matters: first, the particular analysis of the future which it adopted between paragraphs 13 and 19, sufficiently outlined above; and secondly, that it had not specifically put the cases of **Leach v Ofcom** [2012] IRLR 839 and **Z v A** [2014] IRLR 244 and the guidance they were said to contain to the parties for their submissions. Accordingly it had come to a conclusion without giving the parties a proper and fair opportunity to address it.

18. In developing the appeal, Mr England developed a sustained argument which considered a significant number of points of detail, seeking to argue that there was an inadequate factual basis for the model which the Tribunal proposed, and arguing that if a fair process had been carried out, since **Polkey** anticipates a fair dismissal and not an unfair one, the facts accepted by the strategy meeting and by the disciplinary body would not be the same as they had been thought to be in the dismissal which occurred. There was bound to be space for new facts and new conclusions to be reached. The employer could not simply take the conclusions of the strategy meeting blindly.

19. He took me, in the course of this, through the errors which the Tribunal had identified at paragraphs 45, 46, 48, 49, 50, 51 and 53 of its Liability Decision, argued that the Decision would have to have regard to the fact the Claimant had not been properly trained since the training was not focussed on his reaction to children approaching him, that the Tribunal appear to have accepted the facts gave no reasonable basis for the belief which the Tribunal had had as to misconduct and, by inference, the strategy meeting which could have drawn its information as to the Claimant's conduct only from that which was reported first by the Deputy Head and at the second meeting by the Head would be misinformed. He pointed out the way in which the context of the particular complaints had been seen properly by the Tribunal, which the strategy meeting had incorrectly appreciated, as in the toilet incident to which I have already referred. He drew attention to paragraphs 24.33, 24.34, paragraphs 41, 24.42, 24.64 and 24.115 and paragraphs 59 and 70 of the Liability Decision. He argued that there was no proper basis for thinking it inevitable, as in paragraph 70, that the Claimant had not understood the steps he was required to take in order to safeguard himself when there was ample evidence that he did understand the point, that he had taken it on board, for instance when he told X to go back to playing when she sat next to him on the bench on the playground, had acted on the advice given and was prepared to do so. He identified eight separate incidents in which it might be said that the Claimant had indicated a self-awareness which the Tribunal appear to have considered might be lacking.

20. It will be obvious from what I go on to say, that if this stood alone as a separate ground of appeal, I would reject it as such. I do think, however, that the points which he highlighted, taken in the round, demonstrate that there may have been room, indeed almost certainly was room, for a different view to be taken of how his behaviour might have been considered by an objective and fair appraiser. That is a matter of some importance when I turn to what is in my

view the central and significant ground in the appeal, ground 2. It is of importance because the fact that there is much to be said on one side, albeit as Mr Roberts has amply demonstrated to me in his response there is much to be said on the other, demonstrates that a decision is not necessarily so obvious that it could be said either that there was no chance that the Claimant would be fairly dismissed or no significant chance that he would not be, which appears to be the conclusion the Tribunal reached.

Ground 2

21. It has been emphasised by many authorities that it is an error of law to approach a determination of a discount for the chances of fair dismissal by approaching it as if it were a decision to be made on the balance of probability. It is worthwhile to repeat and emphasise the main points to avoid Tribunals falling into error in future. In **Polkey** itself, at paragraph 30 of the report in the IRLR, the other reports having unnumbered paragraphs but also at page 163 of the report in the ICR, [1988] ICR 142, Lord Bridge said as follows:

> **"If it is held that taking the appropriate steps which the employer failed to take before dismissing the employee would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus in *Earl v Slater & Wheeler (Airlyne) Ltd* [1972] ICR 508 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the National Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called *British Labour Pump* principle [*British Labour Pump Co Ltd v Byrne*] [1979] ICR 347 tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in *Sillifant*'s case [*Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91], if the industrial tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the *British Labour Pump* principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in *Sillifant*'s case, at p. 96:**
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> > **"There is no need for an 'all or nothing' decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment." "**

22. Though the last part is that which is most frequently cited, the whole of the citation is relevant because it demonstrates that Lord Bridge was very clearly drawing a distinction between answering a question on balance of probabilities on the one hand and on the other reducing compensation by a percentage representing the chance of loss of employment. It is that latter which has become known as the **Polkey** principle.

23. In **Ministry of Justice v Parry** [2013] ICR 311, I emphasised that **Polkey** was not about probability but about chance. A Tribunal in that case had used language which demonstrated that it was looking for probability rather than assessing prospect. The same point was made in **Stonehouse Coaches Ltd v Smith** [2014] ICR D14, following **Hill v Governing Body of Great Tey School** [2013] ICR 691, building on **Software 2000 Ltd v Andrews** [2007] IRLR 568. It emerged from **Wardle v Credit Agricole** [2011] ICR 290 per Elias LJ at paragraph 52 and was echoed by HHJ Eady QC in **Riverside Industrial Equipment Ltd v Audsley** EAT/0105/13, 31 January 2014, when she said **Polkey** is all about chance.

24. In the most recent reported case on the point, **Contract Bottling Ltd v Cave and Anr** UKEAT/0100/14/DM the Appeal Tribunal placed **Polkey** in the context of the assessment of future loss generally, in respect of which it plays a part. See, in particular, paragraphs 18 through to 21.

25. It is accepted before me by the parties that if what the Tribunal said failed to recognise that the **Polkey** exercise was one in respect of chance or risk, that it would be in error of law. In order to decide whether that is what the Tribunal was doing, regard can only be had to the words which the Tribunal used. Mr Roberts points out, in my view entirely correctly, that there

should not be an over pernickety focus on appeal as to the precise words used by a Tribunal. He relies and endorses paragraph 43 of **MoJ v Parry**:

> **"… Proper latitude must be given for the infelicity of expression to which all judgments may be subject, but perhaps particularly Tribunal decisions: an over pernickety approach should not be taken to any isolated shortcoming. We would have been inclined to overlook the statement of approach as an unintentional error if the rest of the paragraph had demonstrated that, taken overall, that is what it was. There are indications of this: the Tribunal considered how the gravity of the offence 'may have been' reduced; and how with legal representation the Claimant 'would not inevitably' have been dismissed. The use of these expressions, and the phrase 'at least a prospect' is to use the language of chance, albeit that the words 'chance' or 'risk' or 'percentage' do not appear. However, the conclusion - after language which suggests that there was some mild possibility that the Claimant would not have been dismissed - was summed up in a view which repeated the balance of probability …"**

The Judgment went on to conclude that that was what the Tribunal in that case had done. But the words are words of appropriate caution.

26. The Judgment needs to be seen as a whole. It needs to be seen in context. There should not be an over-analysis of the words which had been adopted, nor should a forensic fine-tooth comb be taken to the Decision as a whole.

27. I have borne in mind too that, although **Polkey** itself spoke of percentage, and although the recent cases to which I have referred largely adopt that, it is not an error of approach to envisage facts which of their nature demonstrate that they are a compromise between the various possibilities which might have occurred. The point was well put by Underhill LJ in **Griffin v Plymouth Hospitals NHS Trust** [2014] EWCA Civ 1240 at paragraph 9. The decision in **Thornett v Scope** [2006] EWCA Civ 1600, paragraph 41 of the Judgment of Pill LJ, reaffirms that it is open to a Tribunal to assess in accordance with the principles such a future period as their analysis of the evidence requires or, if it is necessary to achieve a just and equitable result, to adopt a different approach such as considering a percentage reduction. The judgment on this exercise, whether it is one of identifying a period or envisioning a scenario or

adopting a percentage, is nonetheless one that needs sufficiently to indicate that it is a proper balance between the various factors which might be in play.

28. Here Mr Roberts confesses that the wording used in the central paragraphs is indeed infelicitous. He acknowledges rightly that the word "could" in paragraph 10 may give rise for concern, as might the expression "more likely than not" in paragraph 13. He, however, invites me to stand back and have regard to the Decision as a whole. A fair view of the wording taken as a whole would focus upon the double use of the word "inevitable" or "inevitably" in paragraph 17. The reasoning here which led to the conclusion, he submits, was that there was a clear risk to the reputation of the school which would continue to exist on any footing if the Claimant continued to be in employment. At paragraph 18 the fair dismissal which could have occurred would have been for some other substantial reason. That would be on the basis of avoiding reputational risk and because of the trust and confidence which the employer would have lost in the Claimant. That was because, in the incidents recorded in paragraph 24 of the Liability Hearing, in particular in respect of the breakfast club and the toilet incident, advice had been given. In relation to the restraint of children threatening to run on to the road, advice had been given. The fact that the Claimant asked for it showed awareness. There was inevitable concern in the repeated involvement of X and the Claimant. He pointed out that many of the facts were not contested. It should not be overlooked that the Tribunal's recitation of facts in the Liability Decision in paragraph 1 accepted on behalf of the Claimant that he had been spoken to. Moreover it ought to be a matter of practical common sense for a man of 60, who had previous experience as a Caretaker, that he should ensure an appropriate distance was kept between children and himself, and whether he might adopt a more appropriate approach was thrown into question by the fact that in his earlier school he had twice been warned, in circumstances in which no actual misconduct was suspected, that his behaviour could be

misconstrued in respects not dissimilar to those about which this school had cause to complain in this case. Accordingly the conclusion that the Tribunal reached in the opening words of paragraph 17 was open to the Tribunal. The reasonable observer might consider that the Claimant had not understood what he needed to do in order to safeguard himself because it kept on happening. That related back to the second sentence of paragraph 16. So viewed, the Tribunal was explaining why it felt the Decision was, in its word, "inevitable"; hence the full deduction for **Polkey**.

29. I have considered those submissions. In the end I have rejected them. I do so because, reading the Judgment as a whole, it seems to me that the Tribunal thought that its role was to determine what would probably be the world of the future. In creating the scenario it hypothesised, it recognised, paragraph 13, by use of the phrase "more likely than not", that either of the two possibilities it envisaged might not have occurred yet allowed nothing for that chance. Even in paragraph 17, the word "might" crept in. In paragraph 18 the operative words in the first four lines are "there could … still have been a fair dismissal". The word "still" concerns me, since it does suggest that the Tribunal was asking whether there could, in the circumstances, have been a fair dismissal, not what the chances were that there would be such a dismissal. That reiterates the starting point it began with in setting out its self-direction of law in paragraph 10. If paragraph 10 stood on its own, the dual reference to "could" would in my view have been insufficient on its own for me to conclude that this Tribunal did not fully appreciate its role. In the end I have concluded that it has not sufficiently demonstrated, as in the case of a full deduction for **Polkey** it should, what its approach was to the chance that, being acquitted of all misconduct, the Claimant might nonetheless have been dismissed for reputational reasons and because of a somewhat vague loss of trust and confidence.

30. Accordingly, reading the Decision as I do, and thinking that those matters identified as infelicities by Mr Roberts himself are indeed such but cannot be entirely explained away by context, I uphold the appeal on ground 2.

31. I shall go on to reject each of the other grounds. But the submissions made to me in respect of ground 1, even though they were to some extent over analysis of what the Tribunal had or should have decided, provide further context for my conclusion. There was much to be said here, so it appears, on both sides. The fact that there is much to be said on both sides is very often a feature of Tribunal decisions. It does not amount to an error of law that the Tribunal should prefer one to the other. Necessarily its Judgment will not deal with every matter. But where the matter returns, as it does, to the Tribunal in respect of the application of **Polkey**, it seems to me the Tribunal should receive such further submissions as the parties may wish to give to it, on the one hand from Mr England emphasising that the chances of a fair dismissal, albeit for some other substantial reason, are not as great as the Respondent would have it and the Respondent emphasising how significant they truly are, and for the Tribunal to make its decision afresh or, if it be the case that it had considered each and every one of those points but not properly and fully expressed it in its Judgment, for it now to do so in the light of this Decision.

32. I turn briefly to the other grounds. Ground 1 I have sufficiently dealt with. Ground 3 criticises the Tribunal for its failure to consider what might have been involved in a fair process or perversity in relation to the application of what would have been a fair process. I am bound to say that, when the Tribunal considers the **Polkey** question, it will wish to have regard to the fact that the strategy meetings were not so similar in their facts to the situations described in **Z v A** and **Leach v Ofcom** that the decisions in those particular cases are of any particular guide.

That is because, in each of those cases, there was a truly outside body which was capable of drawing its own conclusions, separately and independently of the employer, bearing upon the matter. Here the employer actually is the county council, and the strategy meeting one which centrally concerned its employees and officers, even if the decisions as to dismissal are effectively taken by the disciplinary tribunal of the school. That is the effect of the **Employment Act 2002**, section 35 and the regulation which apply.

33. Secondly, the only information which the strategy meeting could have had about the Claimant and his behaviour would come from the school. Accordingly a particular focus would be required in this case upon the information given to it if there were to be a further strategy meeting by the Head Teacher or Deputy Head (if attending) just as the conclusions thus far reached would be scrutinised with the appropriate care, adopting the principle expressed in **Leach v Ofcom** by reference to that which the Deputy Head and Head were reported to have said to the previous meetings.

34. I accept Mr Roberts' approach, in which he urges that the strategy meeting here is something of a hybrid. It is external in the sense that it does not take the decision to dismiss or not to dismiss. It makes a decision if it wishes, to which the school is obliged to pay regard. Though I take from that that it does not necessarily have to follow the decision, it may usually be the expectation that it will. But being a hybrid body, and the links between the employer and it being significantly greater than in the case of **Leach**, the scrutiny would be even keener. It would be unrealistic, however, to suppose the school could simply have rejected any recommendation made by a strategy committee if one were. Those submissions I accept. I do not consider that there was any procedural irregularity in the way in which the Tribunal approached **Polkey**. Although Mr England argues that the scenario the Tribunal had in mind

should have been specifically identified to the advocates, the fact is that a central issue for the Tribunal was **Polkey**. Both parties were able to address arguments to it. Mr Roberts is recorded as having advanced the possibility that the school might have dismissed for some other substantial reason. It follows that Mr England was in the position of being able to address that if he had wished. I do not think that in these circumstances the law is so demanding that a Tribunal has to tell the parties precisely what the features are of the world it envisages when it is drawing a fair and proper balance between the various different considerations pulling one way and the other in order to make a fair and equitable assessment of future loss under section 123 of the **1996 Act**.

35. It follows that I reject the submissions that the Tribunal Judgment was reached on an inadequate basis in fact. The evidence for making a **Polkey** award will always be slim. But as Mr Roberts points out in his skeleton argument, a Tribunal should not be unduly reluctant to engage in the process (see Elias J in **Software 2000 Ltd v Andrews** [2007] ICR 825, paragraph 38). Per Lord Prosser in **King v Eaton (No 2)** [1998] IRLR 686 said at paragraph 19:

> **"… It seems to us that the matter will be one of impression and judgment, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure made no difference, or whether the failure was such that one simply cannot sensibly reconstruct the world as it might have been. …"**

He advises caution. In the words of Buxton LJ at paragraph 22 of **Gover v Propertycare Ltd** [2006] ICR 1073, the matter being one of impression and judgment:

> **"… indicates very strongly that an appellate court should tread very warily when it is being asked to substitute its own impression and judgment for that of the tribunal. …"**

36. Those words are amply borne out by this case in which Mr England was able, in the course of his submissions, to paint a convincing picture in which the facts were all one way and would argue for there being no deduction and Mr Roberts, on his part, demonstrate that the

facts could be seen as such that there was very little chance, if any, that the Claimant would actually have retained his employment. This is not, as it seems to me, a decision for me to reach. It is one for the Tribunal. Having allowed the appeal on ground 2 and opened the possibility that, in determining that ground, the Tribunal may have a fresh look at the arguments as to fact, bearing in mind the appropriate position of the strategy meeting, the case will be remitted to the Tribunal for it to determine. Mr Roberts has submitted that it should return to the same Tribunal. Mr England has advanced no submissions as to that. In my view Mr Roberts is correct. The matter will be remitted to the same Tribunal for its determination in respect of the issues arising.