Appeal No. UKEAT/0447/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 April 2015

Before

THE HONOURABLE MR JUSTICE WILKIE

PROFESSOR K C MOHANTY JP

MR T STANWORTH

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(1) EAST LANCASHIRE MASONIC HALL CO LTD APPELLANTS
(2) MR M CALLER
(3) MR D THORNHILL

MRS D BUCKLEY RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MISS JOANNE WOODWARD (of Counsel) Instructed by: Pannone Corporate LLP 378-380 Deansgate Manchester M3 4LY
For the Respondent	No appearance of representation by or on behalf of the Respondent

<u>SUMMARY</u>

UNFAIR DISMISSAL

Reasonableness of dismissal

Polkey deduction

The Decision of the majority of the Tribunal, that a dismissal by reason of redundancy was unfair because the selection procedure and its application fell within the range of reasonable procedures, is upheld, even though a finding by the majority, that one element of the procedure was devised in bad faith, was perverse and insufficiently reasoned in the Judgment.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. This is an appeal by East Lancashire Masonic Hall Co Ltd against a decision of a majority of the Employment Tribunal that they unfairly dismissed Mrs D Buckley and that a compensatory award should be reduced by 50% in accordance with the **Polkey** principle. That decision was reached after a hearing between 31 March and 4 April 2014 and after consideration of the decision by the Tribunal members in chambers on 4 June and 26 June, the Judgment and Reasons having been sent to the parties on 2 July.

2. The grounds of appeal, which have been reflected in the skeleton argument and oral argument are fivefold: first, that the Employment Tribunal erred in law in that the majority substituted their own view for that of the employer. Second, the Employment Tribunal failed to apply, or misdirected themselves in, the application of the "band of reasonable responses" test. Third, that, in certain respects, the Tribunal failed to give any, or any adequate, reasons for the majority's conclusion. Fourth, the Tribunal made perverse findings in respect of specific matters. And fifth, the Tribunal misdirected itself in the application of the **Polkey** principle. The third ground, the failure to give any or any adequate reasons, is focussed on: a finding by the majority that the procedures which were applied by the Respondent, in the context of a selection for redundancy, were devised in bad faith, in that they were designed to secure the selection of one candidate for retention and the selection of the other candidate, the Claimant, for dismissal by reason of redundancy; and the decision on the application of **Polkey**.

The Decision on the Sift

3. The grounds of appeal were subject to the sift procedure. By an order dated 31 December 2014, HHJ Serota QC ordered that the appeal be set down for a Full Hearing before a Judge and two lay members. In his brief reasons for that decision, he said as follows:

> **"1. With some hesitation I consider that it is fairly arguable that the selection process was unfair. The particular respects in which it was found to be unfair**
>
> > **a. failure to draw up a job description in consultation with the claimant and the other candidate for redundancy**
> >
> > **b. failure to include marketing as a selection criterion**
> >
> > **c. failure to consult the claimant as to selection criteria before the initial scoring**
> >
> > **d. the manner of marking against the criteria**
> >
> > **e. these are matters of industrial practice in redundancy exercises and for that reason the experience of lay members may be helpful**
>
> **2. The reasoning and factual basis for the finding that the exercise was a sham is somewhat impoverished as is the *Polkey* finding**
>
> **3. I would accordingly refer the appeal to a full hearing."**

4. A preliminary legal issue has arisen as to the extent to which Judge Serota intended to set down all the grounds of appeal for a Full Hearing. On the face of it, his Reasons seem to suggest that he considered that the first group of grounds, in respect of the selection procedure adopted and its application, were not arguable and that the Full Hearing should be limited to the reasons grounds applicable to the finding of sham and **Polkey**. It is suggested that, perhaps, HHJ Serota misspoke in the way that he expressed himself in the first paragraph of his reasons. The time estimate for the hearing of one day suggests a wider ranging appeal hearing than would be indicated by an appeal limited to the "reasons" grounds, addressed to discrete issues in the appeal. In our judgment, it would be appropriate for us to deal with all the grounds of appeal and we have conducted the hearing accordingly.

5. The hearing before us has benefited from the written skeleton arguments from both sides and the oral submissions from Miss Woodward on behalf of the Appellant. We have been

informed that the Respondent to the appeal, the Claimant below, would neither be present nor represented because of want of financial resources. We have the benefit of a skeleton argument from counsel who appeared for her before the Employment Tribunal and we are indebted to her for that document.

The Employment Tribunal Decision

6. The Tribunal had to deal with a number of claims. There were complaints in respect of a redundancy payment, holiday pay and notice pay. In the event, they were dismissed by the Tribunal on withdrawal by the Claimant. She made complaints of direct sex discrimination and harassment related to sex. They were made, not only against the company, but also against Martin Caller and Derek Thornhill, who were board members of the First Respondent. Those complaints were dismissed as being not well founded. The Decision of the Tribunal with which we are concerned, was its finding that the dismissal of Mrs Buckley was unfair and in respect of the reduction of the compensatory award.

7. The issues which the Tribunal had to determine were whether the First Respondent could show that the reason for the dismissal was redundancy and, in respect of that, did the First Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant, taking into account all the circumstances including the size and administrative resources of the Respondent, the pool of employees for selection for redundancy identified by the First Respondent, the selection criteria applied by the First Respondent and the manner in which they were applied, whether there was genuine consultation with the Claimant, whether suitable alternative vacancies were available and offered to the Claimant or could have been offered and the procedure followed by the First Respondent. In addition, the Tribunal identified as an issue whether there should be a **Polkey** reduction. As it said in its decision at

paragraph 2(iv), if the Tribunal found that the Claimant was unfairly dismissed, what were the chances that the Claimant would have been fairly dismissed if the Respondent had gone about matters in a fair way?

8. The Decision of the Tribunal was by a majority. The majority comprised the two lay members of the Tribunal; the minority was the Employment Judge. The fully reasoned decision, made after two days of deliberation in chambers, is under the name of the Employment Judge. We infer that she bore the main responsibility for the drafting of the Decision, though the decisions recorded within it were taken, either unanimously or by a majority where identified. The decision on liability was, as we have indicated, by a majority comprising the lay members but there were certain issues of fact upon which there was a majority and a minority view within the Tribunal where the majority view was held by the Employment Judge and one of the lay members, Mr Anslow, and the minority view was held by the other lay member, Mrs Jarvis.

The Facts found by the Tribunal

9. The Decision is carefully drafted and reasoned. It sets out extensive findings of fact. We will refer to them in summary form. The Respondent is a wholly owned subsidiary of the East Lancashire Masonic Charity, providing a venue, facilities and services to Masonic Lodges and Chapters in Manchester and to the general public. It was in financial difficulties. Its main function was to hold Masonic events at the Freemasons Hall in Bridge Street. During the period in consideration, whilst a developer was being sought for that site, the marketing of the hall was reduced. The Respondent had a Board of Directors comprising 11 non-executive directors not involved in the day-to-day running of the business. Many, if not all, attended the hall frequently and some had regular close contact with staff members. Until 30 March 2012,

Mr Riedlsperger (known in the Tribunal proceedings as "Mr Reed") was the General Manager with overall responsibility for running the business. He had an Assistant Manager, John Fryer, who had been employed for some 21 years.

10. The Claimant had been employed for 29 years. She had various job titles, but latterly was employed in the role of Marketing Executive/Assistant Manager. There was a suggestion in early 2012 that the hall be sold. Collective redundancies were anticipated. The Respondent, in consideration of that possibility, invited the employees to form a sub-committee for the purposes of consultation. The Claimant was not on the sub-committee but others were. There was a proposal from that sub-committee that the redundancy pot should be divided between the full-time employees, excluding part-time employees. The Claimant did not agree with that and spoke to Mr Caller, the Chairman of the Board, about it and he supported her and informed the sub-committee that things could not be done in the way that they proposed. The Claimant and Mr Caller agreed that from that point there was friction between the Claimant and some other members of staff. In fact, that proposed sale fell through and the sub-committee was disbanded. Mr Reed was on leave between 12 and 14 March 2012. There were a number of incidents during his absence. This gave rise to a written report by way of complaint from the Claimant, initially directed to Mr Reed and then to Mr Caller, making allegations about the behaviour of other members of staff towards her.

11. One of the persons involved in that ill-feeling was Ms Casey, who on 18 March had written to Mr Caller complaining about the Claimant. Mr Caller had replied to Ms Casey on 19 March to the effect that she should not do anything rash because the matter was in hand. The Claimant alleged before the Tribunal that this was evidence of a plan then afoot to dismiss the Claimant. That argument was rejected by the Tribunal unanimously.

12. The report, to which we have referred, from the Claimant was initially sent to Mr Reed on 22 March and then, when nothing happened, to Mr Caller on 27 March. The Tribunal accepted that Mr Caller did not read the report at that time. He had looked at it briefly, but it was not immediately obvious that the Claimant was raising a grievance with him.

13. Mr Reed agreed that he would accept voluntary redundancy, which was announced on 28 March 2012 at a meeting of the Board. At that meeting it was also agreed that, in the light of the continuing financial difficulties, one of the two Assistant Managers (that is either Mr Fryer or Mrs Buckley) should be made redundant, with the remaining one carrying out the duties currently carried out by Mr Reed and the two Assistant Managers.

14. The Claimant asserted in the Tribunal proceedings that the Respondent decided to make one of the Assistant Managers redundant because she had submitted her report of complaint about members of the staff. That argument was rejected unanimously by the Tribunal, which concluded that the decision to embark on redundancies was made due to financial reasons. It also rejected her assertion that there was, at that stage, a plot to remove her. Mr Reed left his employment on 30 March 2012. There was at that stage some ill-will between Mr Reed and the Respondent, for reasons which were unclear.

15. On 30 March 2012, Mr Caller and another Board member, Mr Porter, met Mrs Buckley and Mr Fryer to notify them of the decision to make one of them redundant. There were crossed wires about that meeting. The Claimant thought it would have been about her report. She had raised it at the meeting. Mr Caller said that he had not yet read it but they would have a separate meeting to discuss it.

16. On 4 April, Mr Caller sent Mrs Buckley an email which identified some of the matters which were discussed. That included the fact that both she and Mr Fryer were at risk of redundancy. There had been a discussion that a matrix would be used to reach a final decision, though this had not yet been drawn up. Following that meeting, on 30 March, both Mr Fryer and Mrs Buckley were offered the opportunity to take voluntary redundancy, for an additional payment of £1,000, but both of them declined.

17. On 3 April, there was a meeting between the Claimant and Mr Caller, with another Board member, Mr Thornhill, to discuss her report. This was a difficult meeting, which gave rise to a degree of dispute. The Claimant alleged that Mr Caller said that he was locking them in during the meeting and that this caused her concern. That allegation was considered by the Tribunal which unanimously found that the door was not locked, though it was closed in order to secure privacy. The Tribunal concluded that this was a meeting during which the parties talked over each other and that the Claimant found the questions she was being asked uncomfortable. The Tribunal concluded that voices were raised but they rejected a specific allegation made by the Claimant that Mr Thornhill had said to her, "why don't you just go! nobody wants you here!". There was an allegation by the Claimant that Mr Caller had banged the table and waved his arms in the air. That was the subject of a split within the Tribunal: the Employment Judge and Mr Anslow found that he did not act in that way, Mrs Jarvis found that he did, based on her observation of his demeanour at the Tribunal.

18. Following that meeting the Claimant signed herself off sick, self-certified, due to stress. Her sickness was subsequently backdated to 3 April by a GP's note. On 4 April, Mr Caller wrote the Claimant a letter, as well as an email which was enclosed. That confirmed the decision of 30 March that Mr Caller would like to meet the Claimant and Mr Fryer to discuss

the situation in more detail, to consider suggestions they might have for avoiding redundancy, to consider the role that would be necessary for one of them to undertake as the sole Assistant Manager. He advised the Claimant that she could bring a colleague to that meeting and suggested 10 April as the date. He would also be meeting Mr Fryer immediately following. In fact the meeting did not take place on that date but was postponed.

19. The Claimant's response to the letter and email was to email Mr Caller on 5 April, complaining that Mr Caller's behaviour had made her ill. He had failed to investigate her report to him of having suffered bullying and harassment and had responded by threatening her with redundancy. She said she would fully engage when she was well enough to do so. Mr Caller responded on 7 April, that he would postpone the meeting. He also set out his rejection of her interpretation of events, in particular her reading of the sequence of events to which she had referred in her letter of 5 April. He expressed himself in categorical terms but nonetheless maintaining politeness.

20. The Claimant responded by a further email dated 10 April, accusing him of writing in angry terms and of feeling threatened by his recent behaviour and the tone of the email. She asked him not to contact her until she had seen her doctor. On 11 April, the GP signed an "unfit for work" note for a period of four weeks backdated to 3 April.

21. There was a Board meeting on 18 April during the Claimant's period off sick. The minutes recorded that the redundancy meetings had been put off pending legal advice and the return to work of Mrs Buckley. Reference was made to Mrs Buckley compiling a report regarding what had occurred during Mr Reed's absence and included reference to two instances between her and other members of staff, as a result of which three members of staff had

complained to Mr Caller regarding her conduct. Mr Caller had had a meeting with the three who were complaining about her management style. That too would be put in abeyance pending her return to work. It was unknown whether those members of staff wished to make a formal complaint. Reference was also made to the meeting with Mrs Buckley regarding her complaint. It was agreed that the Respondent should take legal advice in respect of the whole situation regarding potential redundancy of Mr Fryer and Mrs Buckley and the complaint from Mrs Buckley, and would act in accordance with that legal advice. It was felt necessary that a more formal arrangement should be adopted in respect of legal advice.

22. On 20 April, Mr Caller wrote to the Claimant. He indicated that, in the light of her extended period of sickness absence, the Board would like to obtain more information about her illness so that they could understand how long she was likely to be off sick and whether she would be fit enough to attend meetings about her allegations of bullying and harassment and the potential redundancy situation. They had made an appointment for her to see a Dr Strudley of Occupational Medical Limited on 3 May. He also informed her that the Board had appointed an external consultant from a firm of solicitors to investigate her allegations of bullying and harassment and that that person would need to speak to Mrs Buckley as part of the investigation.

23. The Tribunal accepted the reasons given by Mr Caller in his witness statement for asking the Claimant to attend an Occupational Health appointment, that he had taken advice on what they should do and he had followed that advice. On 23 April, the Claimant replied to Mr Caller. She was still feeling very poorly but was confident she would be able to work on expiry of her sick note. She was shocked and upset that the Respondent did not seem to accept her doctor's sick note. She described the stance of Mr Caller as high-handed and oppressive. She

would not agree to submit herself to medical examination as required, but would be prepared to do so if her illness carried on after a longer interval.

24. On 30 April, the Claimant's GP indicated she was fit for work from 1 May. On 30 April, the Claimant wrote to Mr Caller saying she wished to complain about his treatment of her. She complained that her report of bullying and threatening behaviour from two employees had not been dealt with, that, following that, Mr Caller had announced on 30 March, out of the blue, that she was facing redundancy. She did not accept that there was a genuine redundancy situation. She accused Mr Caller of behaving aggressively towards her, culminating in the meeting of 3 April when he and Mr Thornhill had locked her in a room, he was waving his arms at her and banging the table, and they both started shouting at her, accusing her of causing trouble. She accused him, by his behaviour, of making her ill and then wrote to demand that she be examined by their doctor, which was high-handed and intended to intimidate. She did not think it appropriate that Mr Caller should deal with the grievance, which was directed towards him.

25. On 2 May, Mr Caller replied by email. He denied emphatically the allegations and stated categorically that the vast majority of her letter was without foundation and bore no resemblance to the facts of the matter. He indicated he would let her have a full response to her letter the next day when he was back in the office but assured her that, notwithstanding her allegations, the matter would be properly dealt with.

26. On 3 May, he sent two letters to the Claimant by post and by email. One informed her that the complaints about him would be looked at by Mr Royle, the member of the firm of solicitors already looking into her complaints against other members of staff, and that he would

then arrange for two of the company's directors, other than himself and Mr Thornhill, to discuss her grievance and provide a response on behalf of the company. He also wrote that he proposed to consider the concerns she raised about the redundancy situation in their next redundancy consultation meeting, which was scheduled to take place on 8 May.

27. Mr Caller, notwithstanding the grievance that was now made against him, decided to continue to deal with the redundancy situation and, in so doing, was acting consistently with advice. There was then an exchange of correspondence between Mr Caller and the Claimant concerning who was going to investigate her grievance against him, she contended that an employee of the firm of solicitors of which Mr Caller was a consultant would not be appropriate. In fact Mr Caller agreed that a subcommittee of directors, not previously involved, should deal with her grievance against him but, because there was difficulty in obtaining directors who would be available to deal with the matter in a timely manner, the Claimant was informed, on 8 May, that investigation would revert to Mr Royle.

28. On 8 May, a redundancy consultation meeting took place between the Claimant, Mr Caller and three other directors. The purpose was to consult with the Claimant and report back to the Board, which would then complete a matrix, which at that time had not been prepared. Mr Caller asked the Claimant, if she lost her job as Marketing Manager, did she have any ideas as to where else within the organisation she could work and whether she had considered what she would do if Mr Fryer was made redundant. Mr Caller informed her that if she was successful in becoming the manager, it would be up to her to discuss marketing within the budget available. Mr Caller told her that the hall was possibly closing in the following March, but for the time being she must continue as if the development was not going ahead. She must not take any bookings, however, for summer 2013. It is clear, if not expressly stated, that the

development which was anticipated to take place in the summer of 2013 would result in the hall being closed for a period but that, after the redevelopment had been completed, there would continue thereafter to be a marketing element. At that stage it was unclear whether the development would go ahead. If it did not, then the future of the hall, which was being subsidised by the wider Freemasons movement, would be problematic. When asked if she had anything to say about the potential redundancy of her or Mr Fryer, she had nothing to say. She was informed that the matrix would be prepared for both her and Mr Fryer, and the unsuccessful person would be shown the results of the matrix and given an opportunity to discuss the comments made in it with the Board.

29. There was no further consultation with the Claimant or Mr Fryer prior to the adoption by the Respondent of criteria and the initial scoring, which took place on 11 May at a meeting of the Board. Mr Caller had prepared a draft matrix in conjunction with the company's lawyers. It was discussed at the Board, as well as the weighting of the various criteria. The matrix comprised six selection criteria: dealing with customers, weighted x 3; organisation skills, weighted x 3; managerial skills, weighted x 4; knowledge and use of IT systems, weighted x 2; disciplinary record, weighted x 1; and length of service, weighted x 1.

30. The scores were to be allocated between 1 and 4. There were, for all the criteria except for disciplinary record, length of service and knowledge and use of IT systems, indicative descriptions of behaviours or standards which would be used as guidance as to whether a score should be 1, 2, 3 or 4 or anything in between. There was no guidance for the criteria "dealing with knowledge and use of IT systems" or "disciplinary record". Length of service was a matter of record.

31. Each member of the Board individually made their assessments of Mr Fryer and the Claimant against the matrix and the guidelines. It was done, subjectively, on the basis of: their limited knowledge of the Claimant and Mr Fryer and their work, and on the basis of the contact they had had with them when they were using the building and attending events. Board members also relied on things that had been told to them by other members of staff and on enquiries they had made within the building. They were designed to focus on members' personal experience and impression of the candidates. There was no useful material for the Board to use in the personnel files. There were no performance appraisals and there was no-one still employed by the Respondent in a managerial role who could score the candidates. Mr Reed had left on poor terms. Mr Thornhill and Mr Caller did not think that an approach for assistance would be well received.

32. There was no separate criterion relating to marketing skills. The Board members, in carrying out their scoring, relied on complaints and concerns about the Claimant which had never been put to her and concerns about her management style which had never been raised with her. The Board was not aware of any complaints having been made about Mr Fryer. The assessment of knowledge of IT was based on certain products that they saw, such as menus and brochures provided by the Claimant. There was no investigation of the candidates' specific knowledge of particular software packages.

33. The Tribunal heard evidence from a number of Board members. They confirmed that there were limitations to individuals' knowledge. They confirmed that they had regard to certain complaints or things said by other members of staff and to direct experience of customers. One of the Board members who participated was Mr Caller, who based his observations over a long time and had also spoken to people. Another member of the Board

was a Mr Durkin, whose view appears to have been influenced by his personal experience of trying to arrange his niece's wedding. He had tried to negotiate a better financial deal from the Claimant but had been told, that because it was not a Masonic event, he would be treated like any member of the public. He did not like her attitude and neither did his niece. In fact he had raised the matter with Mr Reed, who had put Mr Fryer in charge of dealing with the wedding.

34. The individual scoring having taken place, the Board reconvened and conducted a moderation exercise, discussing each candidate section by section in the matrix. The Board minutes record those discussions. There was a considerable discussion, particularly in respect of customers and managerial skills. A number of matters of complaint were referred to as coming from customers and coming from members of staff, in particular, receptionists. Mr Durkin related the problems of his daughter's wedding. After a long discussion it was agreed to mark Mrs Buckley with a 2, whereas Mr Fryer received a 4. In relation to management skills, it was said that there was a ground swell of feeling that she did not display managerial skills. A number of Board members did not realise, or had only recently realised, that she was entitled "Assistant Manager". It was felt that she was, in fact, in charge of marketing and was employed to do the marketing. A number of members expressed the view that they were aware of issues between the Claimant and other members of staff, that she did not seem able to take the staff with her and appeared to be in conflict with them rather than leading them. Again, she received a 2; Mr Fryer received 3.5 under that section.

35. The other sections were not so much a matter of controversy or discussion. Because the Claimant had a significantly longer period of service than Mr Fryer she received 1 point in relation to that criterion; Mr Fryer received none. At the end of the moderation exercise there was a significant gap between the score achieved by Mr Fryer and the score achieved by the

Claimant. The outcome of that meeting was the subject of a further letter from Mr Caller to the Claimant on 16 May. He informed that they had undertaken a selection exercise based on a selection matrix which he then attached. He informed her that her provisional score was 12.5 points less than Mr Fryer. He asked her to meet him on the Friday of that week to discuss the situation, to give them a chance to listen to any observations or comments which she may have on the scoring system and the scores she had been given. She was entitled to have a representative or colleague present, but no decision would be taken about her continued employment following that meeting. If, as a result, the scores still identified her as being at risk of redundancy and if they were not able to identify any alternatives, a further meeting would be held to consult further.

36. That meeting took place on 18 May between the Claimant and Mr Porter; Mr Thornhill being present and taking a note. The Claimant accepted that Mr Porter approached the matter with an open mind. She thought her score for dealing with customers and managerial skills should be increased to 4, as should her score for IT skills. She accepted the financial crisis, did not see why they proposed to make an Assistant Manager redundant. She was refused sight of Mr Fryer's matrix. She asked why she had not been consulted about the selection criteria, and why the criteria were so subjective. She asked who had scored her and whether they had observed her throughout the day and on what basis it was formulated. She asserted that it looked to her that they wanted John Fryer and not her, so they had manufactured a score. She did not believe it was a bona fide selection exercise.

37. Mr Porter, following the meeting, emailed Mr Caller on 19 May, recording that the Claimant had several genuine and valid points to make which would change the matrix marking in her advantage, though he did not think sufficiently to change the overall score.

38. On 21 May, Mr Caller received a letter from two receptionists complaining about the Claimant's conduct. On 22 May, Ms Casey wrote to Mr Caller complaining that her working relationship had changed when Mrs Buckley was not part of the subcommittee to represent staff, which she took personally and began to ignore most members of staff. None of these complaints were put to the Claimant.

39. The Board revised the Claimant's scores in the light of her comments and increased her score for dealing with customers to 2.5, but decided not to increase the managerial skills scores in the light of comments and complaints from other staff. But they increased her score for IT to 3. Nonetheless, the scores as between the Claimant and Mr Fryer were still nine points apart.

40. Thereafter there were a series of meetings, which effectively changed nothing, and she was dismissed. She sought to appeal against that dismissal but in the end decided not to take that appeal through to a hearing.

The Law

41. The Tribunal, in its Decision, then turned to the law. It summarised accurately the effect of the statutory provisions and in the context of redundancy referred to the leading authority, **Williams v Compare Maxam Ltd** [1982] ICR 156, identifying that the various factors to be considered included establishing criteria for selection which, so far as possible, could be objectively checked against such things as attendance records, efficiency at the job, experience, length of service and a fair selection in accordance with these criteria. The Tribunal also referred to the decision of the Employment Appeal Tribunal in **Mitchells of Lancaster (Brewers) Ltd v Tattersall** UKEAT/0605/11 and, in particular, to paragraphs 19 and 21. In those paragraphs the Master of the Rolls said, respectively:

> **"19. … The description of the criteria as "wholly subjective" does not appear to be either helpful or accurate: of course such criteria involve a degree of judgment, but they are none the worse for that. Equally, to object to a criterion because it is "based solely on the views of the directors" does not seem to us to be a fair objection."**

And at paragraph 21:

> **"21. The Tribunal in this case also criticised the criteria adopted by the Respondent because they were not "capable of being scored or assessed or moderated in an objective and dispassionate way". Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record. The concept of a criterion only being valid if it can be "scored or assessed" causes us a little concern, as it could be invoked to limit selection procedures to box-ticking exercises."**

42. The Tribunal also referred to the Court of Appeal decision in **British Aerospace v Green** [1995] IRLR 433, in which it was said that for a Respondent to have acted reasonably it was sufficient for the employer to show that he had set up a good system of selection, that it was fairly administered and that ordinarily there was no need for the employer to justify all the assessments on which the selection for redundancy was based.

The Tribunal's Conclusions

43. The Tribunal then turned to its conclusions. There were certain unanimous decisions which it reached: first, that the Respondent had shown a potentially fair reason for dismissal, namely redundancy, based on financial reasons, that the number of managers was to be reduced to one. It then records the majority decision that the dismissal was unfair and the position of minority that the dismissal was fair.

44. The Judgment set out the reasoning of the majority between paragraphs 124 and 128. In paragraph 124 it identifies the failure to draw up a job description for the remaining job of manager and concluded that this caused the Respondent to act outside the band of reasonable

procedure. In paragraph 125 the majority considered that it acted outside the band of reasonable procedure by not including marketing as a criterion for selection, that being a strength of the Claimant and a weakness of Mr Fryer. The Tribunal majority said that:

> **"… Although the need for marketing was reduced, whilst the respondent searched for a developer, the respondent still had a requirement for this function as evidenced in the meeting of 8 May 2012 and would need it in the longer term to a greater degree."**

45. That conclusion has been attacked, notably in oral submissions. In our judgment, the criticism of those findings is not justified. It was clear from the evidence and, inferentially, from the background that, for a period of about a year, Mr Caller was saying to the Claimant that she was to continue marketing on the same basis as before, but subject to marketing within the budget available to her. She was told that she must not take any booking for the summer of 2013, when it was anticipated or hoped that the development would be taking place, but it was implicit that thereafter, if the development did take place, over the long-term there would still be a need for marketing, indeed, potentially at a higher level. In our judgment, those conclusions of the Tribunal cannot properly be characterised as being contrary to the evidence or perverse. There was a proper evidential basis for them.

46. Within paragraph 125, however, there was the following sentence:

> **"… The majority consider that the first respondent deliberately designed the criteria for selection with the aim in mind of retaining [John] Fryer and dismissing the claimant. …"**

That is the "sham" finding to which we will return in a moment.

47. At paragraph 126 the majority stated that it considered that the Respondent acted outside the band of reasonable procedure in relation to the consultation carried out. Both of the persons at risk, the majority concluded, should have been consulted in drawing up the job description and the criteria. But there had been no discussion until after the initial selection.

48. In paragraph 127 the majority considered that the Respondent had acted outside the band of reasonable procedure in the way that the Board members carried out the marking against the criteria. The majority accepted that it was within the band of reasonable procedure for the Board members to carry out that exercise given that there was no-one else who could reasonably be expected to do it. But the majority considered that the Board members were unreasonably influenced by other people in carrying out the marking at the moderation stage, if not before. They took into account matters which had never been put to the Claimant and the majority considered that was unfair. The majority concluded a more objective process could have been devised to evaluate the IT skills, but had not been. The majority also considered that Mr Durkin was unfairly influenced against the Claimant because of his failure to get a reduction for his niece's wedding and that Mr Caller was influenced by the complaint that had been made against him. The conclusion of the majority was that:

> **"128. For these reasons, the majority concludes that the dismissal was unfair."**

49. The minority decision of the Employment Judge was that fairness had to be viewed in the context of the highly unusual situation the Respondent found itself in. Both the Claimant and Mr Fryer were the highest level of employees after the departure of Mr Reed. There was nobody else, as an employee, who could carry out the selection exercise. There was no useful pre-existing material by which they could be assessed. The minority accepted that the Board members had limited knowledge of the Claimant and Mr Fryer and that it was far from desirable that they should be assessed by people with such limited knowledge of their work without documentary evidence. However, that was the context within which the Respondent had to operate.

50. On the specific issues which had been addressed by the majority, the Employment Judge accepted that it may have been desirable to start the process by drawing up a job description of

the remaining manager's role but did not consider that failure to do so took it outside the band of reasonable procedures because the Board members and candidates were familiar with the major tasks the remaining manager would have to carry out. She considered that the criteria fell within the band of criteria which could reasonably be used in those circumstances. She did not consider the absence of a marketing criterion took the procedure outside the band of a reasonable procedure. Marketing activities were reduced pending the hoped for redevelopment. The emphasis was to be on hosting Masonic events in the meantime. She also considered some of the other criteria would reflect marketing, for example dealing with customers and IT skills, and that the Claimant had not suggested that the criteria were deficient in not including a criterion related to marketing.

51. As far as the limited knowledge of the people doing the assessment was concerned, the minority limited herself to noting that it was reasonable in the absence of anyone better to do it and that it was reasonable to take the view not to consult with Mr Reed given the bad terms existing him and the Respondent. The Employment Judge noted that there was a considerable element of subjectivity but that, in the circumstances, the Respondent acted within the band of a reasonable procedure, the Board members relying on their own experience of the candidates and information provided by others. She did not consider it outside the band of a reasonable procedure to take into account complaints and adverse comments which had not been put to the Claimant prior to the redundancy procedure. It was reasonable to take into account matters suggesting difficult relationships between the Claimant and some staff, whereas there had been no such matters brought to their attention in relation to Mr Fryer. The remaining manager had to be able to work well with the staff. She agreed that it would have been possible to assess IT skills in a more objective way, but that this deficiency by itself was not enough to take the procedure outside the band of a reasonable procedure.

52. In summary she stated that the fact that the selection of the manager to be dismissed and the one to be retained could have been done in another, arguably fairer way, by interviewing the candidates against a personal specification drawn up for the remaining job, did not mean that the procedure followed fell outside the band of a reasonable procedure. The Employment Judge accepted that it would have been preferable to consult the candidates on the criteria before the initial scoring but that the Claimant had the opportunity to comment on those and other matters before a final decision was made. Thus the process of consultation followed fell within the band of a reasonable procedure.

The Appellant's Case

Substitution

53. We first deal with the first ground, namely the contention that the majority erred in law by substituting its own view of the Respondent. Our attention has very fairly been drawn to the decision of this Tribunal in the **Chief Constable of the Thames Valley Police v Kellaway** [2000] IRLR 170 and, in particular, at paragraph 45 in the Judgment of the then President, Morison J. He was dealing with a split decision and an argument that there was an error, by way of substitution of its view, by the lay members who formed the majority. He said this, at paragraph 45:

> **"… If this were a case where the two lay members were inviting the tribunal to reach an unsustainable decision, the chairman would have, and we think should have, been prepared to say so in the dissent. The chairman does not do so, although he expressed, cogently, why he had disagreed on certain facts. In many ways, the fact that the majority accepted some but not all of the applicant's evidence and some but not all of her complaints shows that they must have carried out a careful analysis of all the evidence, before upholding four of the eight complaints. Further, the fact that this was a 'split' decision is a good indicator of the care which must have been taken by all three members. The fact that the decision was split does not lead to the conclusion that it is somehow especially suspect; rather the contrary. The split in the tribunal is, no doubt, explicable on the basis that some of the evidence appeared credible to two members but which the chairman, for good reasons of his own, was unpersuaded by. This demonstrates the justification for a full panel trying a discrimination case. It is consistent with Parliament's determination that in these cases a chairman may not sit on his own, and that a decision in summary, as opposed to extended reason, form is not permissible."**

54. Miss Woodward has sought to distinguish that case on the basis that it turned on issues of credibility which, it is said, are particularly susceptible to individually different assessments and that the same consideration does not apply equally where, as here, the Tribunal is addressing the question whether procedures adopted did, or did not, fall within the reasonable bands of a reasonable procedure. She suggests that there are a number of parts of the Judgment in which the use of language exhibits or evidences a tendency on the part of the majority to substitute or to err in substituting its view for that of the Respondent.

55. In our judgment there is not a hint, in this lengthy decision, that the majority was substituting their view for that of the Respondent. It is clear that there were a number of different findings of fact, some of them unanimously, some of them by one majority and some by another majority; a number of them, particularly, unanimous decisions against the Claimant and her contentions. In our judgment, the fact that this was a split decision does tend to suggest, as Morison J indicated, that it is more likely than otherwise that the majority were punctilious in ensuring that their approach to the decisions which they were taking was not the erroneous one of substituting their own judgment for that of the Respondent. In colloquial terms, they had the Employment Judge who was in the minority "to keep them honest".

56. It is clear that the Employment Judge, in drafting the Decision and, in particular, drafting the decision of the majority makes clear that, in each of the paragraphs to which we have referred, the opening words are explicitly stated to be the majority applying the proper test, considering whether the Respondent acted outside the bands of a reasonable procedure in the various ways they have identified. It is clear that there was a difference of view. But there is nowhere, in the minority decision, any hint that the decision of the majority was more than simply one with which she disagreed but went beyond that as being inappropriate or

unsustainable. On the contrary, in respect of each of the major issues in contention: the absence of a job description; the absence of consultation; the absence of an objective criterion in respect of IT skills; the absence of a criterion for marketing skills; and in the way in which the decision was reached, there are acknowledgments on the part of the minority that there were deficiencies. Her view was that, in the context, and looking at it in the round, those deficiencies were not such, either individually or cumulatively, as to take the procedure outwith the band of reasonableness. In effect, the reasoned decisions of the majority and minority, amount to no more than different views, reasonably open to the members of the Tribunal, correctly applying the test. Accordingly, in our judgment, the argument that the majority erred by substituting its view for that of the Respondent does not succeed.

Perversity

57. In our judgment, what that leaves is effectively a perversity argument. It is well established that perversity requires the successful Appellant to surmount a substantial hurdle. It has been described in **Stewart v Cleveland Guest (Engineering) Ltd** [1994] IRLR 440 at paragraph 33 in the following terms:

> **"… An appeal should not be allowed on this ground simply because the Employment Appeal Tribunal disagrees with the Industrial Tribunal as to the justice of the result, the merits of the case or the interpretation of the facts. This Tribunal should only interfere with the decision of the Industrial Tribunal where the conclusion of that Tribunal on the evidence before it is 'irrational', 'offends reason', 'is certainly wrong' or 'is very clearly wrong' or 'must be wrong' or 'is plainly wrong' or 'is not a permissible option' or 'is fundamentally wrong' or 'is outrageous' or 'makes absolutely no sense' or 'flies in the face of properly informed logic'. This variety of phraseology is taken from a number of well-known cases which describe the circumstances in which this Tribunal (and higher courts) have characterised perversity. The result is that it is rare or exceptional for an appeal to succeed on the grounds of perversity. …"**

58. Lest it be thought that that sets the bar too high, it was made even clearer in **Yeboah v Crofton** [2002] IRLR 634 by the Court of Appeal (Mummery LJ) just how high the bar is, in the following terms, at paragraph 93, where he said that a perversity challenge to a finding ought only to succeed:

> **"… where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care':** ***British Telecommunications plc v Sheridan*** **[1990] IRLR 27 at paragraph 34."**

59. In our judgment, in this careful decision, the numerous shortcomings of the procedure identified by the majority and minority were such that the conclusion of the majority that the procedures fell outside the reasonable range of procedures was not perverse. This ground of appeal fails.

Sham

60. We now turn to a separate ground of appeal, the finding by the majority that the procedure was, in effect, a sham. This concerns the question of the inclusion, or non-inclusion, of a criterion relating to marketing skills as one of the criteria for selection. As we have already indicated, the majority of the Tribunal concluded that the Appellant acted outside the band of reasonable procedure by not including it as a criterion by reason of the continued, though reduced, need for marketing in the period up until summer 2013 and thereafter, if the redevelopment took place; the inference that marketing would be needed in the long term. In our judgment that was a conclusion which was open to the majority of the Tribunal and, as one of a number of perceived deficiencies which, cumulatively, gave rise to the conclusion to which the majority came, it cannot be faulted.

61. The majority, however, came to a conclusion of sham which, in the Decision, was set out in a single sentence in the following terms:

> **"125. … The majority consider that the first respondent deliberately designed the criteria for selection with the aim in mind of retaining [John] Fryer and dismissing the claimant. …"**

62. Miss Woodward accepts that if that had been a justifiable conclusion then that would have been determinative of the case, leave aside any of other perceived weaknesses in the selection procedure. She submits that the finding of the majority, in this respect, was perverse and that there was insufficient reasoning in the Judgment for that conclusion to stand. She points out that the finding of bad faith is an extremely serious one and particularly serious where the person the subject of it implicitly, if not explicitly, was Mr Caller, a solicitor and a consultant to the solicitors who acted as advisors and have acted in relation to these proceedings on behalf of the Respondent.

63. In that context the Court of Appeal in **The Co-Operative Group Ltd v Baddeley** [2014] EWCA Civ 658 has considered the importance of sufficient reasons being provided by an Employment Tribunal, even accepting the general strictures that decisions of Employment Tribunals should not be analysed with the same fine-tooth comb or rigour as the Judgments of other courts might be subjected to. In particular, in that decision, in the Judgment of Underhill LJ at paragraph 58, he has said this:

> **"58. I have come to the reluctant conclusion that the passages that I have quoted above do not satisfy the Tribunal's duty to give reasons. It is important to appreciate that the allegations … are very serious. The allegation against … is that he deliberately engineered the dismissal of the Claimant for an ostensible reason other than the true reason: that is an allegation of bad faith. … I believe that the Tribunal was obliged to explain the basis for such serious findings with particularity. As I have pointed out, no particulars of any kind are given. The Tribunal paints with the broadest of brushes. …**
>
> **59. I accept, of course, that there may be cases where a tribunal has to make a serious finding on the basis of circumstantial evidence. But in such a case it is important that it makes clear what the circumstances are which are said to justify the finding. The Tribunal in this case does not do so. …**
>
> **60. I have anxiously considered whether I am applying an inappropriately high standard to the Tribunal's Reasons. It is well established that the decision of an Employment Tribunal should not be overturned merely because the reasoning, or its expression, is less than perfect; and I am very alive to the hardship to the Claimant of having to re-litigate this claim from scratch … But it would be equally unjust to the Co-Op, and more particularly to the individuals so strongly criticised by the Tribunal, for a decision to be allowed to stand which does not properly explain the basis on which the Tribunal reached its conclusion. In the end I believe that that is indeed the case; and I am reinforced in that conclusion by the other criticisms of the Tribunal's Reasons made at paras. 23-27 above. In truth, the Reasons at no point inspire confidence that a cool and rational judgment has been applied to the issues."**

64. We have, in our summary of the findings of fact of this Tribunal, referred to a series of incidents in which it may be said that the Claimant reacted to what, on the face of it, were proper and legitimate communications by Mr Caller in a manner which was ill-judged and intemperate and that this culminated in the Claimant lodging a grievance directed against Mr Caller in circumstances which seems, on the face of it, to have had little merit. It is also clear from that history that Mr Caller would have been less than human if he had not considered that the Claimant was behaving badly and that the Respondent might be better off not employing somebody who was, apparently, minded to create problems and dissent rather than to co-operate. It is clear also that Mr Caller, throughout, attempted, as far as he could, to act fairly and properly, distancing himself from certain aspects of dealing with the Claimant when it was proper to do so, whilst at the same time, as Chairman, having to take a central role in setting up the arrangements for making an important selection of which of two Assistant Managers to select by way of redundancy. It may be that this Judgment was flawed in continuing to play such a role when it came to marking the criteria, bearing in mind he was somebody against whom one of the persons being marked was pursuing a grievance. But, in our judgment, the majority of the Tribunal was seriously wrong when they concluded that he must have deliberately drawn up the criteria in such a way as to secure the retention of Mr Fryer and the redundancy of Mrs Buckley. It is significant that, in this extremely well reasoned and full decision, this particular decision is devoid of any reasoning. In our judgment that evidences that there was no reasoning which could support such a decision in the light of the findings of fact to which we have referred.

65. It follows, therefore, that we make clear that the conclusion that the selection criteria were drawn up deliberately to secure a particular outcome, cannot stand as a proper decision of

the Tribunal because it is both devoid of any reasoning and, insofar as we can judge on the material to which we have referred, it would be plainly wrong.

66. However the decision that the dismissal was unfair was not simply, or even principally, reached by the majority on the basis of that aspect of the matter. It is clear from the way in which it is dealt that it related to a specific matter, but that all of the other matters, including the question of excluding marketing as one of the criteria for consideration, were the subject of proper decisions taken by the majority on evidence and that it was the cumulative effect of all these failings which resulted in the majority's conclusion that the dismissal was unfair, a conclusion which, as we have already indicated, was neither perverse nor illegitimate. In our judgment, notwithstanding the fact that the finding of sham cannot stand, this appeal against the decision that the dismissal was unfair must be dismissed.

Polkey

67. As far as the **Polkey** issue was concerned, the decision is challenged both on the sufficiency of reasons grounds and on the basis of perversity. Reference has been made to **Software 2000 Ltd v Andrews** [2007] ICR 825 and, in particular, to paragraph 54 where this Tribunal, in the Judgment of the then President, Elias J (as he then was), summarised the principles. In our judgment the reasoning of the majority on this is succinct but is clear. This is not a case where the majority has concluded that the **Polkey** exercise is so speculative that no sensible prediction could properly be made. Accordingly they concluded that this was a proper case where a **Polkey** reduction should be considered or, possibly, that a decision under section 98A(2) could be reached. However, because there was one job, with two people as candidates who had different strengths and weaknesses, and in the light of the conclusions that there were a number of shortcomings in the process, the majority was entitled to come to the view that they

were not satisfied that, on the balance of probabilities, dismissal would have occurred fairly had a fair procedure been adopted. The majority took the view, unsurprisingly, that where there are two candidates for one job and one has to be made redundant, and they have different strengths and weaknesses, then the best that they could do was to decide that it was 50/50 and to reduce the level of the compensatory award, by virtue of **Polkey,** to that extent. In our judgment there is no inadequacy in the reasoning or in the analysis, and this part of the appeal is also dismissed.