Appeal No. UKEATS/0005/15/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 4 August 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS A SHARKEY — APPELLANT

LLOYDS BANK PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant — Mr Donald Cameron (Counsel)

Solicitors:
Allan McDougall
3 Coates Crescent
Edinburgh EH3 7AL

For the Respondent — Mr Kenneth McGuire (Counsel)

Solicitors:
DLA Piper Scotland LLP
Collins House
Rutland Square
Edinburgh EH1 2AA

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

An employee was dismissed following a disciplinary hearing at which the dismissing officer formed a view of her misconduct which was not based on reasonable grounds after a reasonable investigation. She appealed. The officer who heard the appeal asked critical questions which the earlier officer had not, and had an assurance from technicians that he did not have, but which she permissibly regarded as conclusive. The email containing the advice was not before the Employment Tribunal.

There were a number of procedural shortcomings in the procedure adopted by the employer. Nonetheless, the Employment Tribunal found the dismissal not unfair.

On appeal, a ground that the Employment Tribunal had asked not whether the dismissal was fair but whether it would have happened anyway if the unfairness had not existed was rejected, as was an argument that the appeal procedure was necessarily unfair because of earlier failings, a ground that submitted it was perverse to accept the appeal officer's evidence of the contents of the critical email without producing it, and grounds arguing it was wrong of the Employment Tribunal to find dismissal fair given that there had been relevant breaches of the ACAS Code and of the employer's disciplinary policy.

Appeal dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. Employment Judge Gall at Glasgow dismissed a claim for unfair dismissal for Reasons given on 23 September 2014.

The Facts

2. The Claimant had been employed by Lloyds Bank for some 16 years before her dismissal on 20 November 2013. Latterly she had worked as a Customer Retention Consultant. Her job was to deal with phone calls from clients of the bank. She was dismissed for cutting off phone calls and avoiding answering phone calls from clients, thereby failing to do her job, potentially creating customer dissatisfaction and imposing a heavier burden on other, more conscientious Customer Retention Consultants who as a result would have to deal with a greater share of the call load.

3. The view that she might have been avoiding calls came to light in September 2013 when monitoring of calls to the Claimant's workstation recorded on a surprising number of occasions calls that had been cut off (11 occasions) and six that had been "released" by the operator (see paragraph 41 of the Tribunal Judgment). On other occasions the Claimant's phone was shown as idle. "Idle" was shown on a call trace report when a consultant such as the Claimant was unavailable to take a call but remained logged on to the system. A consultant would elect to "go into idle" when making an external call back to a customer or when undertaking a task of short duration to answer a query; such a query might be from a colleague or a team manager. If a consultant was "ready" but chose to go into "idle", taking that step would move the consultant to the back of the queue of those who were ready to take a call. Cut-off would happen

deliberately, so the Judge found, by the Claimant or an operator pressing a release button on what was called her "turret". He also mentioned that pressing button F2 on the keyboard would end a call.

4. Mr Hunter investigated the suspicion. He thought the frequency of alleged cut-offs and "idles" was excessive and referred the case for a disciplinary hearing, which took place on 6 November 2013 before a Mr Swan. Mr Swan made further enquiries. He spoke to the team that had produced the trace report. He asked the person to whom he spoke within that team whether a "Y" in the release column would show if the call had been ended by a consultant. The person to whom he spoke confirmed that that would be the case. He did not, however, go on to ask whether "Y" would also appear in the release column if the call had terminated not because the operator pressed the release button but because there had been a system error. He decided to dismiss. He had two grounds essentially for doing so: first, that the Claimant had deliberately disconnected calls mid-call; and secondly, that she had used "idle" to avoid taking calls.

5. There was an appeal from his decision to Emma Leech, who was the Senior Site Manager at Rosyth. She heard the appeal on 21 January 2014. She upheld the decision on both bases. However, in her case she asked the question of the team that had carried out the trace that Mr Swan had not. At paragraph 116 the Tribunal found:

> **"116. In line with the question which she posed herself at the appeal hearing, Ms Leech raised with the Central Support Team the entry in the management information of "y" in the release column. She asked if termination of a call due to a system fault would show as a "y". The response which she received via e-mail was that the entry in this column of "y" would only appear if the consultant had terminated the call via the turret. If a call was terminated by a system fault or error the letter "y" would not appear in this column.**

6. Paragraph 117 begins with the words, "Ms Leech regarded that information as being critical and conclusive".

The Employment Tribunal Decision

7. The Employment Tribunal applied the conventional approach to what is section 98 of the **Employment Rights Act 1996**. It is worthwhile repeating here the material terms of that section, though they are thoroughly familiar to any employment lawyer. Section 98(1) reads:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
>
> **(a) the reason … for the dismissal …"**

8. Section 98(4) provides:

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

9. The focus is thus on the employer's reason for dismissal and whether the employer's actions, focusing upon those actions, were reasonable or unreasonable. The conventional approach, derived from **British Home Stores Ltd v Burchell** [1978] IRLR 379, is that it is for the employer to show the reason (here, the reason was conduct; that is not controversial). Then there is a four-stage test in order to determine the question arising under section 98(4): does the employer have a genuine belief in the misconduct, are there reasonable grounds for that belief, do they follow a reasonable investigation, and is the decision to dismiss one that is within the band of reasonable responses?

10. The Judge here found that both Mr Swan and Ms Leech genuinely believed that there had been the misconduct alleged. As to the question of whether they had reasonable grounds for that belief following a reasonable investigation, the Judge thought that in Mr Swan's case he

did not but in Ms Leech's case she did. The reason why he thought Mr Swan did not base his conclusion on reasonable grounds as to the cutting-off of calls was because there was an essential difference between the Claimant's position and the employer's position. The Claimant claimed that cut-offs occurred often by reason of system fault. The employer therefore had to investigate that position. Mr Swan did not; he did not ask whether system fault might result in a "Y" in the release column. When it came, by contrast, to Ms Leech's investigations and hence her grounds for a conclusion on the same point, the difference was as expressed at paragraph 163: that he did not have confirmation that the entry in the trace report was definitive as to the cause of the cut-off being auctioned by the consultant but he assessed (paragraph 187) that the information that Ms Leech had obtained confirming that a "Y" would only appear in the release column if a call had been terminated by the operator was critical. She had it; he did not.

11. In Mr Swan's case the Judge thought he also had failed to ask the Claimant's immediate line manager, Rosina Ferrier, about whether the Claimant had reported cut-offs occurring and did not investigate her claims. At paragraph 187, having noted the critical difference between his approach and that of Ms Leech, he did not think it necessary to go on then and deal with whether the failures in respect of Ms Ferrier might be an additional unfairness, but he did deal with the point at paragraph 191. It was suggested to Ms Leech that the evidence from Ms Ferrier - or Ms Hughes, who was the operator sitting beside the Claimant in the centre - might have supported the position that claims at least were reported as having been cut off due to system error. He commented on that (at paragraph 192), that Ms Leech was firm and clear in her evidence that any such information would not have outweighed the call trace report. She regarded the information she had had as conclusive.

12. This led to a conclusion of fact as set out at paragraph 194:

> **"194. Had Ms Leech not obtained the information from the Call Trace team by posing the question which she did, my view would have been that there was no reasonable investigation carried out at the time of appeal. It is true that Ms Ferrier and Ms Hughes in particular were not approached by Ms Leech. Any confirmation from them however as to system error leading to cut off of calls would not have altered the position of Ms Leech given the information which she had as to the letter "y" in the release column appearing only when a consultant terminated a call and not therefore being present when the call was terminated through system fault or error. Similarly any other potential failure in the duty to carry out a reasonable investigation, would not in my view be capable altering the view taken [sic], given the critical and conclusive information from the Central Support Team."**

13. The evidence that Ms Leech had given about the answer that was so critical from the Central Support Team was that she had got it from an email. The email was not produced. Plainly, therefore, she was giving evidence from memory. She was rigorously challenged about that. The Judge, however, dealt with the challenges at paragraph 189 and said that he accepted her evidence on it.

14. Having come to the conclusion at paragraph 203 that the decision as to the cut-off of calls was one that was genuine based on reasonable grounds and after a reasonable investigation and accepting the Respondent's position that that on its own was sufficient to make the sanction of dismissal fall within the range of reasonable responses, the Judge concluded that the claim of unfair dismissal was unsuccessful. If he had had to consider also the question of the "idle", it seems plain from his decision that he would not have upheld the reasonableness of the grounds or the belief, and hence would not have thought it reasonable to dismiss on that basis, but the two were each independent of the other.

15. Having come to a conclusion, therefore, as to what might be called the substance of the fairness issues, the Judge separately dealt with a number of considerations that had been raised under the heading "Procedural Issues". He introduced this (paragraph 223) by saying that he was required to consider whether any of the procedural issues raised in relation to the handling

of the matter were such that the dismissal was rendered unfair. He highlighted the Respondent bank's own policy, which he had quoted earlier at paragraph 32, to the effect that the person hearing a disciplinary hearing should be more senior to the manager who carried out the first stage of the investigation. That was not honoured in this case, since they were of even standing. He took the view that the word was "should" and the policy had not actually been breached but in any event thought it did not prejudice the Claimant and referred back to his conclusion, echoing that of Ms Leech, that the critical point was the material from the call team that "Y" would only appear in a report if the operator had herself pressed the release button.

16. He also observed that it was unsatisfactory that statements from witnesses were not given to the Claimant until after the appeal against dismissal; they had not been available at the disciplinary stage because they had not by then been taken. He thought it would have been sensible and appropriate if Mr Swan had adjourned to do so and then given them to the Claimant for comment. What this means, therefore, is that the Claimant in dealing with both the dismissal hearing and the appeal did not have the advantage of seeing the statements that were relevant to the case against her. In many cases that might be regarded, in my view, as such a significant failing as to make the process unfair. It possibly would be contrary to the wording of the ACAS Code and, if not, to its spirit. The ACAS Code, at paragraph 9 of the 2015 procedures (but in this respect no different from those applicable at the time, the 2009 Code) suggests it would normally be appropriate to provide copies of any written evidence, which may include any witness statements. That could not have been done, as the Tribunal pointed out, at the disciplinary hearing, but it could have been done by the time of the appeal hearing and was not. The Judgment did not separately deal with this as a breach or potential breach of the ACAS Code if it was.

17. The conclusion, having considered those two principal procedural issues, at paragraph 227 was as follows:

> **"227. As indicated above however, the dismissal is fair in my view as at appeal stage there was a clear statement from the Central Support Team that the claimant had terminated calls. That is disclosed and confirmed by the letter "y" appearing in the release column. That letter appears only if a consultant terminated a call and so does not appear if a call is terminated through system error or fault. Ms Leech accepted that information in preference to the claimant's position that she had not terminated the calls. The claimant having possession of statements from witnesses would not have enabled the claimant to say anything to counter the report from the Central Support Team. It might have enabled the claimant to say more about the "going into idle" issue and to have pressed Ms Leech, for example, to obtain statements from Ms Ferrier and Ms Hughes in that regard. Given however that in my view the dismissal of the claimant is fair with the misconduct, amounting to gross misconduct, being the cutting off of calls, the position which might have developed in relation to the other ground of potential dismissal is not of significance in the case."**

18. Because it is relevant to the issues that arise in the appeal, I note that the Judge dealt in anticipation with issues that would have arisen in respect of compensation had he found otherwise. The second of those was headed "**Polkey**" (**Polkey v A E Dayton Services Ltd** [1987] IRLR 503). That he introduced with the words:

> **"229. Had I been of the view that there were procedural defects such that the dismissal was unfair, this being in relation to the issue of cut off of calls, I would have been of the view that there was a high risk or high percentage chance of the claimant being dismissed in any event through proper procedures being applied. …"**

The Appeal

19. There were originally seven grounds in the Notice of Appeal. The Claimant was not encouraged to take the sixth and seventh grounds; they fell away. The Claimant advances her appeal through Mr Cameron in an argument that is well focused, well delivered, succinct, effective and is to be commended. He argues five points. The first of those is whether the Employment Tribunal erred in law because, he submits, it fell into what he describes as the "pre-**Polkey** error". He draws attention to the wording at paragraph 194 that I have quoted above. In effect, he submits, the Tribunal here was taking the position that, whatever other information was obtained and however fair or unfair the process might be, because of this critical information that Ms Leech had it would have made no difference. He argues that the

Polkey case demonstrated that it was an error to hold that a dismissal was not unfair where the procedure was unfair and the only matter that rescued it was that if a fair procedure had been operated the decision would probably have been no different. The **Polkey** approach, as a matter of history was, in almost those terms, reversed by the **Employment Act 2002**, and for a short period of time while that Act remained in operation a dismissal would be held not unfair if despite procedural unfairness that would otherwise have resulted in that conclusion the dismissal would have been no different in any event had a proper procedure been operated.

20. In passing, I should note that there are echoes of the law as it used to be in an extract from *Harvey on Industrial Relations and Employment Law* at paragraphs 1016 to 1017 in respect of unfair dismissal, an extract that was placed in the bundle before me. The text quotes the decision of **Kelly-Madden v Manor Surgery** UKEAT/0105/06 as to the effect of section 98A(2) as it was when the **2002 Act** applied. It is perhaps unfortunate that the text puts the matter in the present tense. The last two sentences of paragraph 1017 read:

> **"1017. … This means that if the employer satisfies the tribunal on the balance of probabilities that the employee would have been dismissed even had fair procedures been adopted, then the dismissal must be held to be fair. If the tribunal finds that there would have been a chance of such a dismissal falling short of 50 per cent then the tribunal must find that the dismissal was unfair but reduce the compensation accordingly in line with the *Polkey* decision …"**

21. This is of course now reversed by the repeal of the Act. *Harvey* makes this clear in paragraph 1018, but it may be that the authors would wish to give consideration to the text, because, looked at in isolation, paragraph 1017 may lead the reader to the wrong conclusion, and it may be that the old provisions should no longer be repeated at quite the same length.

22. The submission that the Tribunal here was adopting the pre-**Polkey** heresy in the **2002 Act** approach emerges from paragraph 194, it is said, and is indicated in some of the other comments that are made, thus in paragraph 225 dealing with procedural issues in a separate

silo, as it were, the Judge thought that if there had been a breach of policy, there would have been "no prejudice to the Claimant" and at paragraph 227 that if the Claimant had possession of statements from witnesses it would not have enabled the Claimant to say anything to counter the report from the Central Support Team. Mr Cameron argues that, fairly read, those passages show that the Tribunal here was contemplating actual procedural unfairness; but it was essentially taking the approach that it made no difference given the information from the team.

23. The answer given by Mr McGuire is that there is no error of law in the Tribunal's decision. It had properly appreciated the **Polkey** test. That, I may add, may be supported by the fact that having completed his conclusions as to the fairness of dismissal and the appropriateness of the sanction the Judge continued in his last two paragraphs of his Judgment to deal in part separately with what he headed "**Polkey**", where he set out the principle entirely correctly. He thus anticipated that if the decision had been unfair because of procedural defects the question would have been the chances of a fair dismissal. This is not the approach of deciding that a dismissal is not unfair because it would have happened anyway, however unfair the process.

24. The self-direction of law from paragraphs 133 to 144 does refer to **Polkey** and says that the Tribunal is to ask itself whether if the correct procedure had been followed a fair dismissal would have resulted but goes on to show that that required the Tribunal to assess the percentage chance or risk of the Claimant being dismissed in any event. This is not the Tribunal directing itself as to whether **Polkey** makes a decision, otherwise unfair, fair because the result would have been no different; this was the Judge anticipating what he might have to say as to compensation, to which he turned at the end of the case.

25. Mr McGuire argues that the decision was one that took into account the words of section 98(4). It had to begin and end with the statutory test. That is illuminated by case law, but it remains statutory. In my view, there is a distinction to be drawn between a case in which a Judge holds that the procedure, or the dismissal substantively, is unfair, but that if the unfairness were remedied there would be a strong chance that there would be a fair dismissal. That is not the same as a case in which there are procedural defects which are acknowledged and are assessed as part and parcel of the fairness of a decision, and which, even though some may be seen to be quite significant, the overall conclusion nonetheless is that the dismissal is a fair dismissal taking all into account.

26. The question here, as it seems to me, is whether on a fair reading of the Tribunal decision the Tribunal was making the decision it did to the effect that the dismissal here was not unfair because no matter what the errors in process the dismissal would have been fair anyway or whether it was assessing what actually happened and asking whether in all those circumstances, focusing upon the employer's reasons, the dismissal was on balance fair notwithstanding the flaws. It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness, any prospect of there having been a dismissal in any event being a matter for compensation and not going to the fairness of the dismissal itself. In assessing fairness an overall approach must be taken (see **Taylor v OCS Group Ltd** [2006] ICR 1602 and **Whitbread plc v Hall** [2001] ICR 699, the former in particular emphasising that procedure and substance run together where the section 98(4) test is being applied). Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

27. Quite where some aspects of procedure fit on this analysis may not be easy for the logician to determine, as for instance if an employee were disallowed a friend at a hearing despite the provision of an employer's code that he should have such a friend, or if the constitution of the panel hearing his appeal were not provided for by his employer's code, but Tribunals are well used to dealing with these questions, which have to be taken into account in determining section 98(4) questions even if they do not fit easily or neatly within the analysis derived from **Burchell** and may be considered additional factors that a Tribunal has to examine.

28. I think that, fairly read, the Judge here was not looking at procedural issues from paragraphs 223 to 227 by divorcing them entirely from the substance of the case, but having taken into account much which was procedural in assessing the absence of unfairness which he would otherwise have been inclined to reach, he was seeing whether the procedural issues otherwise raised, not neatly falling within the **Burchell** test, should cause him to reach a different conclusion as to overall fairness. Read fairly, in my view, the Judge here was asking whether the employer acted reasonably or unreasonably in reaching the decision it did. The reason that he concentrated upon was that Ms Leech had information that she regarded as conclusive. He accepted it was capable of being conclusive, and that the other matters of procedure were not sufficient to persuade him that taken overall there was here an unfair procedure.

29. Mr Cameron says, with some force, that the Judge did not come to an overall assessment of the fairness of the dismissal. It is, however, plain to me that he did even if it was not expressed in such clear terms. He did that by the opening words of paragraph 228 and the opening words of paragraph 229, for instance. It was the general thrust of his decision. He did not say that the decision as reached was unfair but that anyway there would have been a

dismissal. He said the decision was fair taking into account everything that might be said against it. There was quite a bit that could be said against it. The unavailability of witness statements for criticism, comment, explanation or the calling of other witnesses would normally, as I have said, be a significant failing. The conclusion to which the Judge came that of two issues before the decision-makers, the decision as to one was not sustainable as being fair might have been said to infect he decision-making on the other, but the Judge would have been well aware of that possibility. The disciplinary hearing should, even if not must, have been heard by a more senior manager. The process adopted by both decision-makers was not to approach two witnesses whom the Claimant had identified as having something useful to say, Ms Ferrier and Ms Hughes. It is fair to say that Mr Swan did try but could not get hold of Ms Ferrier. These are serious failings that could have been capable of justifying a conclusion that the dismissal was unfair.

30. The question for me, however, on this appeal is whether there is an error of law; it is not for me to make the decision whether I would have held the dismissal fair or unfair; I have to ask whether the Judge was entitled, taking the approach he did, to come to that conclusion and whether he made any error of law in doing so. Since I have rejected the initial ground put forward by Mr Cameron, I cannot come to such a conclusion.

31. The second ground was whether the Employment Tribunal erred in finding the failings in the investigation by Mr Swan - that is, his failure to interview Ms Ferrier and Ms Hughes about their awareness of calls being cut off - which were not addressed on the appeal, rendered the investigation unreasonable at the appeal stage. It is arguable that they did; however, it is not obvious that they must. A decision as to what is fair or unfair is an assessment by the Employment Judge. It is given by the law to the Employment Judge in the first instance to

make. It is plain from his Judgment he was aware of the point; he raised it himself. It would have been a criticism of the decision that the employer made in respect of the "idle" claim. Accordingly, in my view, there is no force in ground 2 in showing an error of law.

32. The third ground argues it was perverse to conclude that the email of which Ms Leech gave evidence provided conclusive information. In my view, this cannot be said to be perverse. The Judge heard evidence to that effect from Ms Leech; he accepted it. She was giving evidence before him, and it was for him to assess the witnesses, but in any event the evidence was supposedly that of technicians who would be able to say what the system was capable of doing and showing and gave that material. No one appears to have raised the question before the Tribunal whether if further enquiries might have been made they might have been revealed that the technician's view was wrong because in other cases their turrets showed that a "Y" had been recorded where there had been a system error. I have to judge the Tribunal's decision by the information before it and the basis upon which it was reached.

33. The final two grounds run together: they are whether the Tribunal erred in failing to have regard to breaches of the ACAS guidelines in relation to procedural flaws and whether the Tribunal erred in failing to have regard to breaches of the Respondent's disciplinary policy. In **Stoker v Lancashire County Council** [1992] IRLR 75 the observation was made by the Court of Appeal that a reasonable employer should comply fully with its own contractual disciplinary procedure and is to be expected to honour its contractual obligations. That is plainly right. It does not necessarily have the consequence, even if normally it might do so, that a dismissal that does not accord fully with the contract in so far as the contract provides for disciplinary procedures is unfair. That question is a statutory question and not to be resolved by the law of contract.

34. To be fair, Mr Cameron accepts as much, though he does point to the emphasis placed in **Stoker**. He notes that in **Lock v Cardiff Railway** [1998] IRLR 358 Morrison J, as President of the Employment Appeal Tribunal, regarded it as an error not to take into account a provision of the ACAS Code. Tribunals are required to have regard to provisions of that Code even if they are not obliged to follow them to the letter. Thus in the particular case, which was one in which a train conductor required a young passenger to leave the train because he did not have a valid ticket, putting him in a position in which in the late afternoon and early evening he needed assistance from his family to get home from where he was left, his behaviour was held by his employer to be gross misconduct justifying immediate dismissal. There was nothing in the employer's code that told the employee in advance that that might be the case. It was not in the list of those matters that might amount to gross misconduct. In the particular circumstances of that case that was plainly critical. The Code was of relevance, and central relevance, because it provided that employees should be made aware of the likely consequences of breaking rules and given a clear indication of the type of conduct that might warrant summary dismissal and that no employee should be dismissed for a first breach of discipline except for gross misconduct.

35. The argument of Mr Cameron is that the Tribunal did not in terms identify a failure to comply with the Code. Had it done so, it would have had regard to paragraphs 9 to 12 of the 2015 Code: that it was appropriate to provide copies of any written evidence, which might include witness statements, and at paragraph 12 that the employer should explain the complaint and go through the evidence that had been gathered.

36. Mr McGuire's riposte to this is that those provisions are there to ensure that the employee knows what she is being charged with and can answer it; he submits that plainly she

did throughout these proceedings. Moreover, he submits that the Tribunal did consider the particular substance of the matters to which the ACAS Code would draw attention, thus in setting out the employer's code at length (paragraph 32) it was setting out provisions which in effect echoed and parroted the relevant parts of the ACAS Code. It recognised (paragraph 226) the unsatisfactory absence of witness statements. It therefore dealt with and took into account those aspects of unfairness to which the ACAS Code, had it been mentioned by name, would have attached importance. He argues that the ACAS Code does not have to be referred to by name.

37. He argued that last point in part by reference to a case called **Buzolli v Food Partners Ltd** UKEAT/0317/12, a decision of the EAT, HHJ Peter Clark presiding, of 7 February 2013. I do not think that case quite goes so far as he would have it in submissions, but I do accept, as indeed the relevant extracts from *Harvey* make clear, that it is not necessary for a Tribunal to state in terms that it has had regard to the ACAS Code. It may be desirable to do so, but what is important is that it looks at the substance of the matters that would have been covered by the Code. It was in essence the failure of the Tribunal in **Lock** to have regard to substance that led to the problems in that case. **Lock** was a case that on its facts could be distinguished whilst leaving the proposition untouched that a Tribunal must pay regard - and serious, not passing, regard, in my view - to the terms of the ACAS Code.

Conclusion

38. In conclusion, the Tribunal here did, as it seems to me, take into account the procedural failings. By having a separate section headed "Procedural Issues", it was not impermissibly hiving off procedure from that with which it was inextricably linked to the question of the fairness of the dismissal, from substance. It did not wrongly adopt the pre-**Polkey** or **2002 Act**

approach. The decision on fairness was one for the Judge to make, though the criticisms of his decision are fully understandable, and it might have been otherwise than it was, but he reached that decision having heard the witnesses, having considered the matter and within the entitlement that the law gave him. There is no error of law that vitiates that decision, and it follows that, despite the compelling way in which Mr Cameron advanced his case, the appeal must be, and is, dismissed.