Appeal No. UKEAT/0502/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 August 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MRS B HAMER APPELLANT

KALTZ LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

Revised

APPEARANCES

For the Appellant	MR MILLER (Solicitor) Fielding Porter Solicitors Silverwell House 32 Silverwell Street Bolton BL1 1PT
For the Respondent	MR SIMON GORTON QC (One of Her Majesty's Counsel) Instructed by: Messrs DWF Solicitors 5 St Paul's Square Old Hall Street Liverpool Merseyside L3 9AE

SUMMARY

UNFAIR DISMISSAL

Contributory fault

Polkey deduction

The Employment Tribunal found the Claimant's dismissal to be unfair because the principal reason was that the employee made a protected disclosure (section 103A of the **Employment Rights Act 1996**). Initially it made a basic award of £3,325 and a compensatory award of £30,616. The matter was remitted to it by the Employment Appeal Tribunal to consider and give reasons in respect of **Polkey** and conduct. On remission it made no compensatory award, holding by way of **Polkey** finding that the Claimant would inevitably have been dismissed on the same date. It found that there should be a 10% reduction in the basic award for conduct. On appeal again, it was held that it was impossible to see how the Employment Tribunal reconciled its **Polkey** finding with other findings in its original Liability Reasons and in the reasons it gave for reducing the award for conduct by just 10%. The Employment Tribunal's Reasons did not meet the minimum requisite standard. The appeal was accordingly allowed. A cross-appeal on the conduct issue was dismissed. The parties invited the Employment Appeal Tribunal to make its own assessment on the **Polkey** issue: the assessment was that there should be a 40% reduction.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mrs Beverley Hamer ("the Claimant") against a Judgment of the Employment Tribunal sitting in Manchester dated 8 February 2013. It was the third Judgment in proceedings which Mrs Hamer had brought against her former employer, Kaltz Limited ("the Respondent").

2. The Claimant brought proceedings alleging: (1) unfair dismissal pursuant to section 103A of the **Employment Rights Act 1996** because the reason for dismissal was the making of a protected disclosure, whistleblowing; (2) unfair dismissal in any event on ordinary unfair dismissal principles; (3) wrongful dismissal; and (4) sex discrimination. By its first Judgment, dated 9 November 2010, the Employment Tribunal upheld the complaint of whistleblowing unfair dismissal but rejected the other complaints. I will call this "the Liability Judgment". By its next Judgment, dated 13 December 2010, the Employment Tribunal awarded compensation in the total sum of £33,941, comprising a basic award of £3,325 and a compensatory award of £30,616. I will call this "the first Remedy Judgment". The Respondent appealed against this Judgment.

3. On 24 February 2012 the Employment Appeal Tribunal allowed the appeal, remitting the case because the Employment Tribunal had not dealt with a **Polkey** issue at all and had given insufficient reasons in respect of contributory fault. This led to the Judgment now under appeal, dated 8 February 2013. By this Judgment the Employment Tribunal awarded the Claimant only £2,992.50, a basic award reduced by 10% for blameworthy conduct. The Employment Tribunal made no compensatory award at all because it found that it was "100% inevitable that the Claimant would have been dismissed by the Respondent on the date of

dismissal, 16 July 2009". Against this Judgment, which I will call "the second Remedy Judgment" the Claimant appeals, and there is a cross-appeal by the Respondent, seeking an increased finding of contributory fault.

Statutory Provisions

4. The provisions which the Tribunal had to apply are found in Part 10 of the **Employment Rights Act 1996**. Section 98(1) provides that it is for the employer to establish the principal reason for dismissal and it is of a kind specified in section 98(2). Section 98(2) specifies conduct as such a reason. Section 98(4) then provides that, where the employer has fulfilled the requirements of section 98(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."**

5. These provisions govern most unfair dismissal claims and are sometimes termed "ordinary unfair dismissal" as a form of convenient shorthand. But there is a further group of sections between section 98B and section 104G, which provide for an employee to be regarded as unfairly dismissed if the reason or principal reason for dismissal is of a certain kind. These provisions are sometimes termed "automatic unfair dismissal", but it should be kept in mind that there is a single right not to be unfairly dismissed (see section 94(1)) and a single remedy for unfair dismissal (see section 111 of the **1996 Act**). All the provisions are concerned with and feed into the single right and remedy.

6. Section 103A provides as follows:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

7. An award of compensation for unfair dismissal is governed by sections 118-126. There are two elements to consider. The first is a basic award, calculated by reference to the length of service and consisting of a number of weeks' pay as defined by the legislation. This basic award may be reduced for conduct. Section 122(2) provides:

> **"Where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent the Tribunal shall reduce or further reduce that amount accordingly."**

8. The second is a compensatory award. It is sufficient, for the purposes of this appeal, to quote section 123(1) and (6). The former sets out the basic principle applicable to compensation; the latter makes specific provision for contributory action:

> **"(1) Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**
>
> **...**
>
> **(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

The Background Facts

9. The Respondent is a business in Bolton publishing specialist directories to organisations in the public sector. In 2009 it employed about 30 people. The Claimant was taken on as its Administration Manager from 23 November 2001. She was, as the Employment Tribunal said, good at her job and a valued employee. Indeed Mr Grundy, one of the Respondent's two working directors, said in his statement that she was very conscientious and hard-working, often beyond her contractual hours. The Employment Tribunal described her as a direct and

honest witness. She was also, as the Employment Tribunal found, plain-spoken. She would tell colleagues if she felt their work was of an insufficient standard. It is also part of the background to this case that she had complained of her pay relative to that of other employees, particularly the sales force.

10. The Claimant was suspended on 6 July 2009. On 9 July 2009 she was invited to a disciplinary hearing to answer the following three matters:

> **"Misconduct for attitude towards staff**
>
> **Misconduct for your attitude and disrespect towards a Director(s)**
>
> **Gross misconduct for alleged disclosure of confidential payroll information"**

11. On 16 July the disciplinary hearing took place. The Claimant was dismissed. The Respondent's letter of confirmation dated 17 July said:

> **"Your conduct was unsatisfactory and the collation of all three points is classed as gross misconduct."**

The subsequent appeal was dismissed.

The Charges and the ET's Findings

12. It is necessary to analyse with some care the charges which the Claimant faced and the findings which the Employment Tribunal made about them.

13. Under the heading of "gross misconduct for disclosure of confidential matters relating to payroll" the Respondent relied on three separate instances. The most significant of these instances related to the disclosure of information about Mr Joe White to her line manager, the Production Manager, Mr Alan Hall. Mr White was contractually entitled to statutory paternity pay at the time in question, but the Respondent had said in correspondence that it would for a

period pay him full pay. Mr White had suffered bereavement and was coping with the illness of a loved one. On 25 June the Claimant had seen Mr White's upturned payslip, which had been left on her desk for her to post out. It showed Mr White's pay reduced to statutory sick pay. The Claimant reasonably believed the Respondent to be in breach of its legal obligation to pay Mr White. The Employment Tribunal found that she was genuinely concerned that a colleague in difficult circumstances was being paid less than he had been promised. She mentioned the matter to Mr Hall. She also mentioned it to Mr Grundy and his co-director, Mr Richards. The Employment Tribunal found that the principal reason why the Claimant was dismissed was that the disclosed this information about Mr White to her line manager, Mr Hall. On this basis, the Employment Tribunal found that the Claimant was unfairly dismissed by virtue of section 123A of the **1996 Act**. The disclosure was of information which she honestly and reasonably believed to be a breach of legal obligation. She disclosed the information to her employer and acted in good faith, only to be dismissed for it.

14. There were, however, two other instances of disclosure of confidential information, which the Respondent discovered and included in the charge of gross misconduct. One related to discussing the bonus of an employee with Mr Hall some months earlier. The other related to a discussion of the pay of an employee, Mr Southern, again some months previously. The Employment Tribunal said about these instances, in paragraph 55 of the Reasons for its Liability Judgment:

> **"Neither of these matters had been raised with the claimant at the time, despite the very small size of the respondent's business and the open plan area in which the claimant worked which causes us to find that they had not been regarded as serious by the respondent."**

15. In the reasons for its second Remedy Judgment, the Employment Tribunal considered these disclosures in the context of contributory fault. It said:

> **"We are satisfied that there was no blameworthy conduct in relation to the disclosures of information of two other employees. We rely on paragraph 55 of our liability judgment that**

those matters occurred some time considerably previously before the claimant was taken to task for them. We consider this is relevant because it suggests that any culpable behaviour by the claimant was not regarded as serious by the respondent at the time it occurred or they would have acted sooner to use the disciplinary procedure. In the alternative, if it was culpable conduct, the length of time which elapsed from the conduct occurring and the claimant being notified that the conduct would lead to disciplinary action means we find it is not just and equitable to further reduce the award of compensation."

16. I now turn to the charges which were laid as misconduct. The first was "misconduct for attitude to and disrespect for a director." This relates to an incident on 2 July 2009. It was said that the Claimant was rude to Mr Richards and hung up upon him when he telephoned to find out where she was. It was also said that, in a conversation with Mr Grundy later that evening, a conversation at least in part about the treatment of Mr Joe White, she said that Mr Grundy was a "twat". The second was "misconduct for your attitude towards staff". In the days between the Claimant's suspension and disciplinary hearing the Respondent interviewed a number of members of staff. There were numerous comments to the effect that she had a sharp attitude and was difficult to approach.

17. In its Reasons for the Liability Judgment the Employment Tribunal found that the Respondent had a genuine and reasonable belief in these two types of misconduct.

18. In its Reasons for the second Remedy Judgment the Employment Tribunal considered the question of contributory fault in the context of a reduction to the basic award. It said the following:

"15. We are not satisfied there was culpable or blameworthy conduct in relation to the allegation concerning staff. We rely on our findings at paragraph 47 that the claimant is a plain speaking individual.

16. We then turned finally to the claimant's conduct in relation to insubordination of a director and we remind ourselves that we must take into account whether there was any blameworthy conduct and what is just and equitable. We find that there was insubordination to a company director, Mr Richards as set out in his statement and that does amount to culpable or blameworthy conduct. The claimant held the responsible position of administration manager in a small company (paragraph 35). We find in those circumstances insubordination to a company director this amount to culpable conduct. However this conduct was just one of several allegations of misconduct and was not the primary reason for dismissal. We therefore find that it is just and equitable to reduce the basic award for that conduct by 10%."

Wrongful and Unfair Dismissal

19. I should note two other features of the Liability Judgment. Firstly, the Employment Tribunal dismissed the Claimant's claim for wrongful dismissal. The basis upon which it did so was set out in paragraph 57 of its Reasons:

> **"We turned to the breach of contract claim. A claim for breach of contract is a claim that the claimant was wrongfully dismissed in breach of the notice provisions in a contract of employment. In this case we have found unanimously the principal reason for dismissal was the disclosure of confidential payroll information concerning an employee...Joe White to Alan Hall. We have found that the employer's disciplinary rules classed this as gross misconduct. Accordingly, the claimant's claim for notice pay must fail because she was lawfully summarily dismissed according to the terms of her contract."**

20. This finding was not appealed by the Claimant. The reasoning was, however, called into question, both by the first Employment Appeal Tribunal and by Langstaff P, at a Rule 3(10) Hearing in this appeal. I share their doubts. The Employment Tribunal had found that the disclosure in question was a protected public interest disclosure made honestly and in good faith. Any contractual provision purporting to preclude a worker from making such a disclosure would be void (see section 43J(1) of the **1996 Act**). In any event it is not obvious why an honest, reasonable disclosure of a matter of concern to a line manager would be a repudiatory breach of contract in itself.

21. Secondly, the Employment Tribunal found, by a majority, applying ordinary unfair dismissal principles, that the dismissal was fair. They appear to have left out of account at this part of their reasoning the finding they made, actually set out later in the Reasons, that the principal reason for dismissal was the making of a protected disclosure. This aspect of the Employment Tribunal's reasoning for its Liability Judgment is also questionable. Employment Tribunals are frequently faced with claims of unfair dismissal which rely on a provision such as section 103A and also on ordinary unfair dismissal. In such a case it makes sense to consider the section 103A issue first for if the principal reason for dismissal is

proscribed by section 103A the dismissal will be unfair. If the Employment Tribunal finds the principal reason is not proscribed, it will go on to consider the ordinary unfair dismissal claim. But if it finds the principal reason is proscribed, it makes no sense to rule separately on ordinary unfair dismissal unless it is done expressly on an alternative basis in case the Employment Tribunal is wrong about section 103A. In this case, the Employment Tribunal expressed its conclusions on ordinary unfair dismissal first and it is unclear on precisely what basis it made its finding on ordinary unfair dismissal.

The Employment Tribunal's Second Remedy Reasons

22. The Employment Tribunal recognised that the case had been remitted to it to consider the issue of **Polkey** and contributory fault. On the question of **Polkey** the Employment Tribunal said there was a distinction between "classic **Polkey**", which applied where there had been a procedural failing prior to the dismissal and what it described as "causation **Polkey**". It defined the latter in the following terms:

> **"4. There is also what perhaps could be referred to as a 'causation'** *Polkey* **case which can be described as a consideration of whether or not, given a certain set of factual circumstances unrelated to any procedural failings, there is evidence to suggest that it was inevitable that the claimant's employment with the respondent would end in any event, or a percentage likelihood that it would do so."**

23. The Employment Tribunal, after commenting that, to the best of its notes and recollections, no submissions have made on "causation **Polkey**" at the first Remedy Hearing, continued as follows:

> **"7. However the issue of a 'causation' Polkey reduction is clearly relevant to this case and we failed to consider it. We do so now that we are seized of the issue. The EAT requires us to address it, and of course we do so now based on the original evidence that we heard. The majority find, now that we have turned our mind to the issue that it was inevitable that the claimant was going to be dismissed lawfully in any event.**
>
> **8. In reaching this finding we have considered what the outcome would have been if the claimant had not made and had not been dismissed for making the protected disclosure concerning Mr White. We find that given the small size of the employer and the nature of the remaining allegations, which included an allegation of disrespect to a company director with whom the claimant had regular contact because of the small size of the firm, it was inevitable that she would have been dismissed in any event.**

9. We have also taken into account that she faced three allegations of misconduct and they were towards staff, a director and in relation to disclosure of confidential information. We have reminded ourselves that the disclosure of Mr White's confidential information, the protected disclosure, was only one of three payroll information disclosures.

10. We have also reminded ourselves that although the payroll information disclosure was categorised as misconduct, section 98(2)(b) ERA 1996 does not refer to gross misconduct; it refers only to conduct. We are satisfied that given the totality of the allegations against the claimant [it] is inevitable she would have been dismissed.

11. Finally, we have also taken into account that the majority of the panel found that, certainly with regard to all of the allegations, they were capable of amounting to a fair dismissal. For all these reasons, now we have turned our minds to address the *Polkey* causation point, the majority finds it 100% inevitable that the claimant would have been lawfully dismissed by the respondent on the date of dismissal, 16 July 2009, in any event, even if she had not been dismissed for making a protected disclosure. Accordingly the compensatory award is extinguished."

24. On the question of contributory fault, the Employment Tribunal noted that it remained relevant to make a finding because, even though there was to be no compensatory award, the Claimant remained entitled to a basic award. As regards the disclosure relating to Joe White, the Employment Tribunal said there was no culpable or blameworthy conduct. I have already quoted the Employment Tribunal's Reasons as regards the other aspects of the Claimant's conduct. In the result, the deduction was 10%.

Submissions

25. On behalf of the Claimant Mr Miller submits that the Employment Tribunal's conclusions on the **Polkey** issue cannot be reconciled with its findings about the different aspects of the charges which the Claimant faced. He submits that it is impossible to see why the Employment Tribunal, having held that the other breaches of confidential information were not regarded as serious, and having found that in totality a reduction of only 10% would be made for contributory fault, thought that the Claimant inevitably would have been dismissed summarily at the very same moment. Therefore, he submits, the Employment Tribunal's reasons on the **Polkey** issue are inadequate. He submits that the Employment Tribunal should have explained its reasoning. He argued that it should have addressed the question whether there would have been disciplinary proceedings at all absent the Joe White disclosure and

whether the disciplinary charges would have led to immediate dismissal. He submits that, since the Claimant was a good and conscientious employee, there was every reason to suppose that, even if she had been disciplined, she would have been reproved or warned rather than dismissed. Further, he submits that when these questions are properly asked and answered, it can be seen that the Employment Tribunal's conclusion was perverse.

26. On behalf of the Respondent Mr Simon Gorton QC submits that the Employment Tribunal's apparently divergent findings on the question of **Polkey** and contributory fault are explicable and that there was no error in the **Polkey** finding. He submits that, in the first part of its Reasons, where it dealt with **Polkey**, the Employment Tribunal plainly applied the correct approach, recognising that it was expected to make a percentage assessment and reaching a permissible conclusion in the light of all its findings. He submits that its reasoning was sufficient and its conclusion cannot be described as perverse. He submits that the Employment Tribunal sufficiently considered the different aspects of the **Polkey** question and that there was in truth every reason to suppose that there would have been disciplinary charges and dismissal in any event.

27. Mr Gorton took me in detail through the Employment Tribunal's Reasons, both in the Liability Judgment and for the second Remedy Judgment. He submitted that, correctly understood, there was no conflict between the **Polkey** finding and the findings relating to fault. Rather, Mr Gorton submitted that there was an error of law in the assessment of a reduction of just 10%. He submitted that there had plainly been misconduct in respect of the other two confidential information charges; there was no delay, as the Employment Tribunal seems to have thought in paragraph 14, because matters had just come to light. He submitted that the Employment Tribunal applied a causation test, which was inapplicable to the basic award; that

the Claimant's attitude to staff was plainly unacceptable and could not be excused on the basis that she was "plain-speaking"; and that its findings could not be reconciled with its **Polkey** finding that the Respondent would inevitably have dismissed the Claimant on the very same day. Mr Gorton also pointed out that, if the **Polkey** award were allowed, contributory fault would be an issue as regards the compensatory award.

28. I was referred by Counsel to recent authorities on the question of Polkey, most particularly to **Software 2000 Ltd v Andrews** [2007] IRLR 568 and **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691.

Discussion and Conclusions

29. The Employment Appeal Tribunal's role is a limited one. It is concerned only with questions of law. In practice, this means that the Employment Appeal Tribunal is concerned to see whether the Employment Tribunal applied the correct approach, gave reasons which were sufficient to comply with its legal duty so that the parties understand why they have won and loss on the critical issues, and reached conclusions which were not perverse. A conclusion is perverse only if there is an overwhelming case that no reasonable Employment Tribunal, directing itself properly in law, would have reached the conclusion in question.

30. It is convenient to begin with the **Polkey** issue, which arises by virtue of the Employment Tribunal's duty under section 123(1) to award such amount as the Tribunal considers just and equitable, having regard to the loss sustained by the complainant in consequence of the dismissal insofar as it is attributable to action taken by the employer. Section 123(1) requires the Employment Tribunal to have regard to what the employee has lost in consequence of the

dismissal. This will require findings as to what would have occurred but for the dismissal. It may require an assessment as to whether the employment would have ended but for dismissal.

31. The assessment as to what would have occurred but for the dismissal will arise in many types of case. **Polkey v AE Dayton Services** [1987] IRLR 503 was a case where the dismissal had been rendered unfair purely by procedural failure. Hence the reference in this case to "classic **Polkey**". But the assessment is not limited to such cases. The Employment Tribunal called the wider range of cases "causation **Polkey**". I do not myself find that label useful, for the assessment, whether or not it is concerned with a procedurally unfair dismissal, is always concerned with what would have occurred but for the dismissal.

32. The key point established by the House of Lords in **Polkey** was that the exercise is not an "all or nothing" exercise. It is one where the Employment Tribunal is required to take into account chances or prospects. It may express its view in percentage terms or even by alighting upon a date, taking into account the chances on either side by which the employment might have ended. It may of course conclude that the employment would still have ended on the same date as the unfair dismissal, but if it does so it is making the strong finding that there was no chance that the employment would continue.

33. Two passages in the recent authorities are particularly helpful in describing the nature of the exercise.

34. In **Software 2000** Elias P said the following (paragraph 54):

> **"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role."

35. These five principles remain fully applicable. Some further principles, which the President laid down in that case, have to be read with care because they rest in part on section 98A(2) of the **1996 Act**, now repealed.

36. In **Great Tey** Langstaff P said:

"A 'Polkey deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

37. I have found it impossible to understand, from the Employment Tribunal's Reasons, how it concluded that it was inevitable that the Respondent, if it acted fairly, would have dismissed the Claimant on the very same day absent the principal reason for dismissal. The Respondent, it is true, had alleged gross misconduct in two other respects. These events had occurred some time before. Mr Hall, her line manager, plainly knew about one of them. He was the recipient

of the information. If he reported, his report was not acted on. If he did not report it, and the Respondent considered the matter serious, it is difficult to see why he was not disciplined. The Employment Tribunal concluded, in its Liability Reasons, that the Respondent had not regarded these matters as serious. It maintained this finding when it came to assess contributory conduct.

38. How has the Employment Tribunal reached the conclusion that the Respondent would inevitably have dismissed the Claimant summarily and fairly on the same day for matters which, on the Employment Tribunal's own findings, it did not regard as serious? It is impossible to see how the Employment Tribunal reached this conclusion. On the face of it, the conclusion appears perverse. At the very least, it is not properly reasoned. The Employment Tribunal has not addressed and explained its **Polkey** finding in the light of other findings which it made.

39. It is, of course, also true that the Respondent laid charges of misconduct. These were, on any view, lesser matters of a kind which can be dealt with by a written warning of greater or lesser severity. On their own charges, the Respondent had not put them forward as gross misconduct. While it is true that the Claimant was disrespectful towards a director, the Respondent would have had to take into account that she was generally a good and conscientious employee. It is impossible to see how the Employment Tribunal reached the conclusion that there was no chance at all that the Claimant would have kept her job.

40. Some of the Employment Tribunal's reasoning for its conclusion is beside the point. It is true, as the Employment Tribunal said in paragraph 10, that section 98(2)(b) does not refer to gross misconduct. In this case, however, the Claimant had been summarily dismissed for gross misconduct and the Employment Tribunal was required to consider whether that result was

inevitable. Further, if it had thought that the Claimant could have been dismissed other than for gross misconduct, it would at the very least have to factor in the lost period of notice. I would add that there is an error in paragraph 10 of the Reasons. The payroll information was categorised as gross misconduct, not misconduct, but this I take to be a slip of the tongue or typing error.

41. It is also true that the Employment Tribunal said, in paragraph 11, that the majority have found the allegations as a whole were "capable of amounting to a fair dismissal". But in making its **Polkey** assessment, it was not concerned with the allegations as a whole, for the principal charge was proscribed by section 103A.

42. For these reasons, I conclude that the appeal must be allowed on the **Polkey** issue.

43. I turn then to the question of section 122(2) where the Employment Tribunal made an assessment of 10%. I do not accept Mr Gorton's submission that the Employment Tribunal erred in law in confusing its task under section 122(2) with the test under section 123(6) or otherwise took into account causation when it should not have done so. The Employment Tribunal correctly set out, in paragraph 12 of its Reasons, the provision of section 122(2) which it had to apply. It correctly asked itself whether the Claimant was responsible for any culpable or blameworthy conduct which made it just and equitable to reduce or further reduce the amount of the award. I see nothing in the Employment Tribunal's Reasons, in paragraphs 13 onwards, which suggest that, having stated the correct test, it applied an incorrect test.

44. I have been a little more troubled by the Employment Tribunal's finding that the earlier disclosures of confidential information was not regarded as serious by the Respondent.

Mr Gorton's point is that the directors of the Respondent appear only to have learnt of those earlier disclosures at the time when disciplinary proceedings were under consideration. In the end, however, I do not think that the Employment Tribunal's conclusion can be described as perverse. As I have said, Mr Hall had known of at least one allegation for some time. He had not acted on it. The matter was a stale one by the time of the disciplinary hearing. The Employment Tribunal, to my mind, reached a permissible conclusion.

45. To my mind, the assessment of 10% for the disrespect shown to a director by an otherwise honest and capable employee on a single occasion can properly be made subject to a 10% finding. The Employment Tribunal did not err in law and was not perverse in finding that the Claimant, although sharp with other employees, was not culpable or blameworthy. I therefore reject the cross-appeal.

Outcome

46. It follows that the appeal will be allowed. The Employment Tribunal's decision to make no compensatory award at all cannot stand, and the issue must be revisited. Counsel were in agreement that, if the appeal was allowed, I should exercise the Employment Tribunal's power under section 35 to reach a conclusion myself as to what the compensatory award should be. It is plain that I have such a power (see **Jafri v Lincoln College** [2014] IRLR 544 (paragraphs 47 and 48) and **Burrell v Micheldever Tyre Services** [2014] IRLR 630 (paragraph 20)). Inevitably, my assessment must be a broad one, but it is infinitely preferable to the alternative of remitting the matter either to the same Employment Tribunal for a third time, or to a freshly constituted Tribunal five years after the event.

47. I have directed myself in accordance with the authorities to which I have referred already. I have kept the following questions in mind. Would there have been disciplinary proceedings at all, absent the charge relating to the Joe White information? If there had been disciplinary proceedings, would they have resulted in either summary dismissal or dismissal with notice? If they had not resulted in dismissal, would they have resulted in a warning or final written warning? And if so, would dismissal have occurred in any event up to the time over which the Claimant was compensated, which was until May 2011? These questions are to be assessed in the round, bearing in mind that I am assessing chances.

48. I have reached the conclusion that it is virtually inevitable that there would have been disciplinary proceedings in any event. The Claimant was disrespectful to a fellow director. The Respondent learned not only about the Joe White dismissal but also about the earlier disclosures and they learned also about the Claimant's sharp language to other employees.

49. I do not, however, think that it was by any means inevitable that the Claimant would have been dismissed. The Respondent's directors acknowledged that she was generally hard-working and conscientious. The witness statement of Mr Grundy indicates that the Respondent thought long and hard before dismissing her. If it had acted fairly, it would have recognised that her concerns about Joe White were honest and reasonable. It is far from certain that it would have dismissed for the other matters. The Claimant would, to my mind, in all probability have been given a final written warning. There is a significant chance that she would have been dismissed, but I regard that as less than probable.

50. There remains, even if she was given a final written warning, the need to assess the chance that, during the remaining time over which she was compensated, she would in any

event have been dismissed, having failed to respond to the final written warning. This too is a significant chance, given that the Employment Tribunal found that she was plain-speaking and had been disrespectful to directors. I factor that into account as well. On the other hand, she had been regarded as generally hard working and conscientious.

51. Having factored all these matters into account, I have reached the conclusion that an appropriate reduction to the compensatory award is 40%.

52. This leaves the question of contributory fault under section 123(6). I see no reason in this case to apply a different percentage to that which the Tribunal found. See for the general approach **Parker Foundry Ltd v Slack** [1992] IRLR 11. It follows that, after the 40% has been deducted, there will be a further deduction of 10% for contributory fault.