Appeal No. UKEAT/0507/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 May 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MS L GEORGE APPELLANT

LONDON BOROUGH OF BRENT RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS LINDA GEORGE (The Appellant in person)
For the Respondent	MR EDWARD KEMP (of Counsel) Instructed by: Mr A R Potts London Borough of Brent Legal Services Town Hall Annex Forty Lane Wembley Middlesex HA9 9HD

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

It was part of the Claimant's case that she was entitled, by virtue of the Respondent's Redeployment Policy and Procedure, to a trial period in a job which she was offered in the course of a redundancy exercise. The ET found that she was not entitled to a trial period, but its reasoning was not **Meek** compliant. Issue remitted to the same Employment Tribunal for reconsideration.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Miss Linda George ("the Claimant") against a Judgment of the Employment Tribunal sitting in Watford (Employment Judge Liddington presiding) dated 3 January 2013. By its Judgment the Employment Tribunal dismissed claims of unfair dismissal and race discrimination which she had brought against the London Borough of Brent, ("the Respondent").

2. The appeal was originally brought on wide-ranging grounds. However, at a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993** Langstaff P permitted only two grounds set out in an Amended Notice of Appeal to proceed to a Full Hearing. Both grounds relate to the refusal of the Respondent to allow the Claimant a trial period in a post which it offered her in the course of a redundancy exercise.

The background facts

3. The Claimant was employed by the Respondent with effect from 5 June 2003 as a library manager. Originally there were 12 libraries and six library managers, each responsible for two libraries. As a result of funding cuts, the Respondent decided to close six libraries and appoint two library managers at a higher grade, each responsible for three libraries. The Respondent applied for one of those roles. She was unsuccessful. By November 2011 she and three other library managers were potentially redundant. The Respondent had two documents governing redeployment within the organisation. One was called a Redeployment Policy, the other a Redeployment Procedure.

4. The copy of the Policy in my papers is dated 2012 but no doubt there was an earlier version. The Policy stated that an employee falling within its remit would be included in the

Respondent's redeployment pool. Various categories of employee fell within the remit. These included employees who were potentially redundant. The Policy provided for them to have special consideration in respect of positions which were one or two grades up or one grade down from an employee's existing role. It said specifically:

> **"An Employee falling within the remit of this policy will be included in the council's Redeployment Pool and the council's Redeployment Procedure will apply."**

5. The copy of the Procedure in my papers is dated July 2010. It provides that, after the employee had completed a form setting out skills and experience:

> **"...a job search process starts that considers a redeployee's skills and experience against all available council vacancies and gives priority consideration and preferential interviews to posts of 1 or 2 grades up or 1 grade down from their existing grade throughout the redeployment period..." (clause 3.4)**

(See also clause 4.2).

6. The Procedure went on to provide what was to happen if suitable alternative employment was found. Posts were, in effect, ring-fenced until a redeployment process including an interview was completed.

7. As to a trial period, the following provisions are of importance. Paragraph 6.1 of the Procedure provided:

> **"In all cases of redeployment there will be a 4 week trial period (noting specific additional criteria attached to redundancy situations below)..."**

8. Paragraph 6.2 made specific provision for a redundancy situation. Unreasonable refusal of an offer of suitable alternative employment meant that the employee would lose her right to a redundancy payment. Refusal of an offer of employment in a post which would require a period of development would result in the grant of a redundancy payment limited to the statutory ceiling. If the offer was not entirely suitable or the refusal of the offer was reasonable,

the employee would be treated as dismissed for redundancy and would retain the right to full redundancy payment.

9. There were other provisions relating to the right to a four week trial period. Paragraph 6.2(iv), applicable to redundancy situations, confirmed that where alternative employment was offered and accepted in a redundancy situation, a four-week trial period would ensue. Paragraph 9.1, applicable to redeployees successful at interview for a new post, said they would be "entitled to a four week trial period in the new post". This paragraph stated clearly the value of a trial period:

> **"The trial period gives both employee and the appointing manager the opportunity to try out the new job before making the final decision on its suitability."**

10. As we have seen the Policy and Procedure applied in terms only to a band where the new post was up to two grades above or one grade below the substantive post. But a different provision was made for the reorganisation in which the Claimant was involved. The Tribunal put it in the following way in its findings of fact, paragraph 10:

> **"...in agreement with the trade unions and in an attempt to minimise the number of compulsory redundancies, that band was for the purposes of this re-organisation extended to two grades below."**

I will cite the full paragraph later in this judgment.

11. A post of Customer Services Officer ("CSO") was available at grade 1, two grades below the library manager post which the Claimant had held. She was the only one of the redundant library managers who applied for it. She was successful. She was offered the post with pay protection for a year. On 15 November 2011 she specifically requested a four-week trial period in order, as she put it in her witness statement, to "get to grips with a lower position in the same service area". Her request was refused. An e-mail to her on that date indeed confirms

that the Respondent discussed with her "your status for four weeks' trial period and the details of why this is not applicable in your case".

12. On 2 December 2011 the Respondent wrote to the Claimant confirming that she was appointed to the CSO post and telling her that she would be "based in the South", which effectively meant a move from the town hall where she was then based to a location in Kilburn. The Claimant's case was that she wrote requesting to remain at the town hall and that this request was unreasonably refused. At all events she declined the CSO post on 9 December, citing simply "on-going associated problems". Her employment was terminated by letter dated 16 December 2011. A subsequent appeal was rejected without, as I understand it, a hearing.

The Employment Tribunal hearing

13. The Employment Tribunal heard the Claimant's claims over three days in December 2012. The Claimant represented herself. Mr Edward Kemp represented the Respondent as he has done today. There was a range of issues concerned with unfair dismissal, direct race discrimination, and discrimination by way of victimisation. The Claimant's witness statement therefore covered many issues, but it contained material supporting her case that she was entitled to the four-week trial period.

14. I have today been shown the witness statement of Miss McKenzie, who dealt with that issue in the following way on the Respondent's behalf:

> **"Miss George alleges that she should have been given a trial period of four weeks and this was unreasonably refused. The trial period only applies if you go to work for another service. So as we offered Miss George a post in the same service this did not apply."**

15. In the Respondent's written closing submissions Mr Kemp adopted and mentioned this point, although he tells me that in fact he could not support it in his oral submissions. He went on, however, to take another point in his closing submissions. He argued:

> **"The CSO role was two grades down from the Claimant's previous role and as such was out-with the Redeployment Policy/Procedure."**

The Employment Tribunal's reasons

16. The Employment Tribunal dealt with the trial period issue in two places within its findings of fact:

> **"10. The four unsuccessful candidates were invited to apply for the post of Customer Services Officer (CSO) a grade 1 post, ie two grades down from their Library Manager post. Normally, under the respondent's policy, redeployment was considered only where the new post was up to two grades above or one grade below the applicant's substantive post but, in agreement with the trade unions and in an attempt to minimise the number of compulsory redundancies, that band was for the purposes of this re-organisation extended to two grades below. This change may have resulted in some confusion in the claimant's mind as to whether or not an offer of a position two grades down was a redeployment or not. Our understanding is that redeployment did not attract a trial period and in this re-organisation only (as opposed to the normal practice) a move to a grade two levels down was to be dealt with as a deployment. This refusal of a trial period as well as the offer of a low grade job was not related to the claimant's race. She was the only one of the unsuccessful applicants for the Library Manager positions who applied for the CSO position. The others were made redundant.**
>
> **...**
>
> **16. On 9 December 2011, the claimant declined the offer of the CSO position '...due to on-going associated problems.' [doc 515]. We note that on 15 November 2011 the claimant had met with her Line Manager, Rashmi Agarwar and Ms Williams of the respondent's legal department [doc 545] where the terms of the offer were discussed including '...your status for 4 weeks' trial period and the details of why this is not applicable in your case.'**
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> **17. In her appeal against redundancy the claimant's main concern about the new job was not the absence of a trial period but the fact that she would no longer be based at the Town Hall library. The claimant had declined the offer on 9 November even though she had been assured in a letter dated 7 December that the question of location was being considered. We accept Ms McKenzie's evidence that many employees were being re-located and that negotiations were going on with them where the proposed re-locations would cause undue difficulty."**

17. The Employment Tribunal summarised the law in relation to unfair dismissal, saying correctly that redundancy was a potentially fair reason for dismissal and that the question was whether the dismissal was within a range or band of reasonable responses. The Employment Tribunal's key conclusion on the question of unfair dismissal was the following:

> **"34.1 The respondent acted fairly and reasonably in dismissing the claimant for the reason of redundancy. There is no dispute that the reason for dismissal was redundancy. The selection process for the new Library Manager positions was transparent, appropriate and objective.**

There was no evidence of favouritism or bias. The claimant applied for alternative employment and was offered the position of CSO on a protected salary. She rejected that offer and it is not necessary for us in these circumstances to determine whether or not her refusal was reasonable as she received the redundancy payment to which she was entitled. The question for the Tribunal is whether taken in the round the offer of the CSO job was a reasonable one. We find that it was. The refusal to allow the claimant a trial period was, in the circumstances set out above, not sufficient to render the offer unreasonable and the dismissal unfair. In any event, that refusal was not the reason for the claimant's rejection of the CSO job. Rather it was because she preferred to be based at Town Hall and the proposal that she should be based elsewhere is what led her to reject the offer. It was not unreasonable for the respondent to propose that move as there is a mobility clause in the contract of employment and given the scope of the re-organisation, a need to have as much flexibility as possible in seeking to assign staff to new locations."

Submissions

18. The Claimant's submissions on appeal are concerned with paragraphs 10 and 34.1 of the Employment Tribunal's Reasons. I start with paragraph 10. The Claimant submits that the conclusion that she did not have the benefit of a trial period, apparently reached in paragraph 10, is plainly wrong, perverse, by reference to the Redeployment Procedure. She submits that once, as the EAT found, the redeployment policy was extended to apply to two grades below, it followed that the provision for a trial period applied in her case. The error carried over into paragraph 34.1 and the Employment Tribunal therefore reasoned incorrectly in that paragraph. Alternatively she submits that the matter is not properly reasoned by the Employment Tribunal.

19. In general support of her submission, the Claimant has relied on provisions within the **Employment Rights Act 1996**, which concern a trial period in the case of an offer of alternative employment in the event of redundancy (see section 138, especially section 138(3)). She submits that these provisions are relevant to unfair dismissal and that the refusal of a trial period will render a dismissal unfair (see **Elliot v Richard Stump Ltd** [1987] IRLR 215).

20. Mr Kemp submits, in respect of paragraph 10 of the Employment Tribunal's reasons, that the Employment Tribunal plainly accepted submissions he made to the effect that, because the CSO role was two grades down from the Claimant's previous role, it fell outside the

redeployment policy and procedure so that the trial period did not apply. What the Employment Tribunal meant by paragraph 10 was that, while the band for redeployment varied for the particular re-organisation, in effect the Claimant, by applying for a job two bands below, was applying for deployment rather than redeployment and the policy did not apply. Mr Kemp supports his submission by reference to his written Skeleton Argument, which I have quoted.

21. Quite apart from its conclusion about the Redeployment Procedure Mr Kemp emphasises to me that the Employment Tribunal set out other reasons in paragraph 34.1 which might bear on the question whether it was reasonable to dismiss notwithstanding the lack of a trial period. He argues that paragraph 34.1 could stand even if paragraph 10 was insufficiently reasoned. In particular he relies on what he described as the Employment Tribunal's "unimpeachable conclusion" that the Claimant refused the job because she preferred to work at the town hall but had been offered a job elsewhere.

22. Mr Kemp took me to well-known authorities on the grounds of perversity and insufficiency of reasons (see **Meek v City of Birmingham DC** [1987] IRLR 250, **English v Emery Reimbold and Strick Ltd** [2003] IRLR 710, **Fuller v LB Brent** [2011] ICR 806 and **Bowater v Northwest London Hospitals NHS Trust** [2011] IRLR 331).

Discussion and conclusions

23. The Appeal Tribunal hears appeals only on points of law (see section 21(1) of the **Employment Tribunals Act 1996**. In a case such as this, the Appeal Tribunal is concerned to see whether the Tribunal has applied correct legal principles, complied with its duty to give reasons and reached findings and conclusions which are supportable: that is to say not perverse if the correct legal principles are applied. It will read a Tribunal's reasons in the round without being pernickety or over-critical.

24. As to sufficiency of reasons, the law is well-known. . An Employment Tribunal is obliged to give reasons for its Judgment. Thus in **Meek v City of Birmingham DC** Bingham LJ said that, although Tribunals are not required to create "an elaborate formalistic product of refined legal draftsmanship", their reasons should:

> **"...contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises..."**

25. The scope for an appeal on grounds of perversity is very limited. A perversity appeal is essentially a complaint about the Tribunal's findings of fact or evaluation of those findings. Because Parliament has expressly provided that there is to be an appeal to the Appeal Tribunal only on a question of law, there can be very limited perversity grounds. Thus in **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93 Mummery LJ said:

> **"Such an appeal 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 para 34."**

26. The statutory provisions which the Tribunal had to apply are also well-known. Section 98(1) provides that is for the employer to establish the principal reason for dismissal and that it is of a kind specified in section 98(2) or some other substantial reason. Section 98(2) specifies redundancy. . Section 98(4) 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."**

27. It is also relevant to mention a feature of the provisions within part XI of the 1996 Act for redundancy payments. I will summarize the position briefly without describing fully the quite complicated provisions of the legislation. The right to a redundancy payment is predicated upon a dismissal. If an employee's contract of employment is renewed or the employee is re-engaged, there will generally not be a dismissal (see section 138(1)). But if the provisions of the new or renewed contract are materially different to the old, the law provides for a trial period of four weeks or longer for the purposes of training. If during that four-week period, the employee terminates that contract for any reason, there will be a dismissal (see section 138(2)-(4)). In this way the employee's right to claim a redundancy payment is preserved, although he may lose the right to a redundancy payment if the employment is suitable and he unreasonably terminates the contract during the trial period (see section 141).

28. It is convenient to begin with paragraph 10 of the Employment Tribunal's reasons. There is no doubt that the Employment Tribunal found that there was a specific decision, in agreement with the trade unions, that the band within which new posts would be considered for redeployment would be extended from one grade down to two grades down. I have found the Employment Tribunal's findings later, in paragraph 10 of its Reasons, very difficult to follow. I will quote again the specific sentence:

> **"Our understanding is that redeployment did not attract a trial period and in this re-organisation only (as opposed to the normal practice) a move to a grade two levels down was to be dealt with as a deployment."**

29. At first sight, this sentence appears to distinguish between a redeployment and a deployment. If this is its meaning, the first half of the sentence is plainly wrong. Redeployment did attract a trial period, as we have seen. Might have the Employment Tribunal have meant to refer to redeployment on both occasions in this sentence or to "deployment" on both occasions? If the Employment Tribunal meant to say "redeployment" on both occasions,

it was again plainly wrong in saying that redeployment did not attract a trial period. If the Employment Tribunal meant to refer to deployment in both halves of the sentence (ie to say that the Claimant was being deployed, not redeployed) I find it difficult to understand its reasoning. On any normal and natural reading of the concept, the Claimant was being redeployed. Indeed the Employment Tribunal had already said, in the preceding sentence, that "redeployment" was extended to two grades below. The reason accepted by the Employment Tribunal was not the reason given by Miss McKenzie, and it is not easy to see the basis for the Employment Tribunal's conclusion. Moreover, on this reading, the second half of the sentence would still be wrong insofar as it appears to say, in the passage in brackets, that the normal practice was to deal with a grade two levels down as a redeployment: as we have seen, this was not the normal practice.

30. The Employment Tribunal's reasoning is to my mind plainly unsatisfactory. It is impossible for an appellate court or for the parties to see how it reached its conclusion on a point which was argued before it and on which the parties were entitled to proper reasons. I keep carefully in mind that this was only point among a number which the Employment Tribunal had had to decide. On this point, however, I am clear that its reasons do not meet the requisite standard.

31. The question, however, then arises: should I go the further step and hold the Employment Tribunal's conclusion or apparent conclusion in paragraph 10 was perverse? I must say that the argument in favour of the trial period being applicable appears to me to have been a strong one. I have already noted that, in the witness statement of the relevant witness, the stated reason for refusing the trial period was that the Claimant was being moved to a post in the same service. This reason is insupportable, and Mr Kemp did not seek to support it before me.

32. Mr Kemp suggests that the agreement with the unions and the decision of the Respondent was that the offer of the post to the four Library Managers fell altogether outside the policy and the Procedure because it was an offer of a post two grades below. I must say this seems to me to make very little sense. The policy and the procedure did not simply apply to the trial period. They applied to the whole process of jobsearching, ringfencing, interviewing and so forth. I find it very difficult to suppose either that management proposed, or that the unions agreed, that the detailed and carefully drafted Redeployment Policy and Procedure would be entirely ignored, effectively thrown out of the window, if the post was two grades below. If the policy and procedure applied, the Claimant was entitled to the trial period.

33. My supposition seems to me consistent with the second sentence of the Employment Tribunal's Reasons in paragraph 10. It found that "redeployment" was to be extended to two grades below. To my mind, the natural meaning of this sentence is that, by agreement with the trade unions, redeployment under the policy was extended to two grades below. Once granted that this was a matter of formal discussion between management and unions, that is exactly what I would expect to have happened.

34. It is at this point also relevant to consider the statutory background. The redeployment policy and procedure were not restricted to cases of redundancy. They applied also to other cases such as incapability in role. But they were expressly designed to apply in redundancy cases. The four-week trial period in the redeployment procedure appears plainly intended to meet the statutory provision for a trial period. But the statutory provision is in no way dependent on whether the redeployment is one or two grades below. It appears to make no sense to exclude from the Redeployment Policy and Procedure a case of redeployment to which

the 1996 Act would apply merely because it is two grades below. I find it very difficult to suppose that this is what management decided or what the unions agreed.

35. Mr Kemp suggests that there was a piece of evidence in cross-examination upon which he fastened to make his submission to the Employment Tribunal. The Respondent did not use the procedure provided for in paragraph 5 of the Employment Appeal Tribunal's case management order, so the evidence is not properly before me. But I must say that, when he read it to me, it seemed to me a very slender basis for his submission.

36. I am, however, conscious at this point of the very limited circumstances in which the Employment Appeal Tribunal should make a finding of perversity. I am conscious that the Employment Tribunal may have had material which I have not seen. While I consider that the Claimant's case is a strong one on this point, I am not prepared to go so far as to say that the Employment Tribunal's conclusion was perverse in the strict sense in which those words are used (see **Yeboah v Crofton** which I have already quoted). I will therefore approach the appeal on the basis that insufficiency of reasoning is established, but not perversity.

37. To my mind, the insufficiency of reasoning in paragraph 10 has an impact on the Employment Tribunal's reasoning in paragraph 34.1. The Employment Tribunal's conclusion in paragraph 34.1 was reached "in the circumstances set out above". This plainly encompasses the Employment Tribunal's conclusion that the Claimant was not entitled to a trial period. I therefore do not think that the Tribunal's reasoning in paragraph 34.1 stands unaffected or can, on its own, support the Respondent's resistance to the appeal.

38. Nor do I accept Mr Kemp's submission that the Employment Tribunal's finding that the refusal of the trial period was not the reason for the rejection of the CSO job to be a conclusive

point in the Respondent's favour. The question for the Tribunal was whether it was reasonable to dismiss the Claimant, having regard to equity and the substantial merits of the case. It is one thing to hold that it is fair and reasonable to dismiss an employee who asked for but was not entitled to a trial period in the job; but it is another thing to say that it was fair and reasonable to dismiss an employee who asked for, was entitled to, and was refused a trial period in the new job. The new job was likely to be at a different location. Whether to accept or reject a job at a new location might well be affected by a trial period at the job.

39. As to the value of a trial period, the Employment Tribunal may derive assistance from **Elliot v Richard Stump Ltd** [1987] IRLR 215. That was a case where, as in this case, the employee was specifically refused a trial period. It was also a case where, as in this case, the employee nevertheless received a redundancy payment. Unlike this case, there appears to have been no redeployment policy. The Appeal Tribunal did not take the view that the statutory trial period provisions were irrelevant. It is helpful to quote the following passage from paragraph 13:

> **"The refusal by the employer to allow him a trial period was in our view an unreasonable attitude for the employer to adopt. That is so for two reasons. Firstly, because it is inherently likely to confuse the employee as to the nature of his redundancy payments rights. True it is that the refusal of a trial period would not in law deprive him of his redundancy payment rights, but it does not follow that the insistence on a trial period being omitted would not confuse an employee and might not for that reason cause him to reject an offer of employment which he would have otherwise been minded to accept. Secondly, Mr Elliot was being offered employment under a manager junior to himself. He had been himself a cutting manager in the factory, which was to be closed for many years. It was a step down so far as status was concerned. But whether that from his point of view or indeed the employer's view was going to work depends upon the personal relationship which was able to be built up or failed to be built up between the cross-gate drive cutting manager and Mr Elliot in refusing a trial period. In those circumstances the employers were, in our view, acting unreasonably and insensitively towards the position in which Mr Elliot found himself."**

40. In **Elliot** therefore two reasons were given by the Employment Appeal Tribunal (including its experienced lay members) for the importance of the trial period. As to the first of these reasons, Mr Kemp submitted that there was a distinction in this case. He submitted that it had been decided, and all employees were aware, that the refusal of a ringfenced job would not

mean that a redundancy payment would be lost. There is no finding to this effect in the Employment Tribunal's reasons. The Claimant said that she was not aware that this was the position. I record that this may be a matter of some significance. As to the second point, the reasoning is plain to see and tends to support the reason for a trial period set out in the Respondent's Procedure at paragraph 9.1 which I have already quoted.

41. In my judgement, therefore, the appeal must be allowed. But this is not a case where I am in any position to substitute my own view. I have to follow the reasoning of the Court of Appeal, most recently expressed in **Jafri v Lincoln College** [2014] EWCA Civ 449 at paragraph 21. I record that the Respondent did not consent to me taking any other course as I might have done with the parties' consent (see paragraph 47 of **Jafri**). Though I might be inclined to be as robust as I can, I cannot conscientiously say that this is a case where only one outcome was possible either in respect of the conclusion in paragraph 10 or in respect of the conclusion in paragraph 34.1. The case must therefore be remitted.

42. Whether to remit to the same or a different Employment Tribunal is an issue which the Employment Appeal Tribunal considers in accordance with guidance set out in **Sinclair Roche Temperley v Heard** [2004] IRLR 763. I am conscious that in most respects the Employment Tribunal applied the law correctly and gave reasons for its decision. The issue under consideration was just one aspect of a much wider task that the Employment Tribunal had to perform. I have decided that the correct course is to remit the matter to the same Employment Tribunal.

43. I wish to say a word about the Employment Tribunal's task on remission. Firstly, it must consider entirely afresh the question whether the Claimant was entitled, under the Respondent's Policy, to a trial period. Secondly, in the light of whatever conclusion it reaches in relation to

the trial period, it should revisit its conclusion on the question of section 98(4). It would plainly be convenient for it to consider questions of **Polkey** and remedy at the same hearing. A one-day hearing will suffice. Given that **Polkey** is in issue, it is not realistic to say that the Employment Tribunal can receive no further evidence but any evidence should be restricted to the issue of entitlement to the trial period, the value of the trial period to the Claimant, the reasons why no trial period was offered and, applying the **Polkey** principles, what chance if any there was that if the Respondent had acted fairly there would still have been a dismissal and of course questions as to compensation.

44. The result is that the appeal is allowed; the matter is remitted to the same Employment Tribunal.