Appeal No. UKEAT/0382/13/DXA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 May 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

L APPELLANT

M RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM POOLE (of Counsel)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

UNFAIR DIMISSAL - Reasonableness of dismissal

The Employment Tribunal did not err in law in finding that the Claimant was unfairly dismissed. **McAdie v Royal Bank of Scotland** [2008] ICR 1087 considered.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by L ("the Respondent") against a Judgment of the Employment Tribunal, sitting in Bury St Edmunds (Employment Judge James presiding), dated 23 May 2013. By its Judgment the Employment Tribunal upheld a claim of unfair dismissal brought by M ("the Claimant").

2. Today the Respondent is represented, as it was represented by below, by Mr Tom Poole. The Claimant has not attended and is not represented. She has explained the circumstances in a note received by the Employment Tribunal on 1 May. She and her partner are currently in poor health. She has asked the Appeal Tribunal, in determining the appeal today, to take account of two matters put in by her and statements from herself and her partner, as well of course as what she has said in the Answer and her skeleton argument. I confirm that I have read those documents as well as the bundle and supplemental bundle put forward by the Respondent.

The Background Facts

3. The Claimant's employment with the Respondent commenced on 8 February 1998. By 2009 she was an Executive Officer, working as a Crisis Loans Manager. She was regarded as a good employee. In order to understand the Employment Tribunal's Reasons and the grounds of appeal it is helpful to summarise separately two aspects of the story which are in fact closely linked with each other.

P

4. By 2009 there was major trouble outside work between the Claimant and a woman called P. There were complaints and counter-complaints of harassment. The Claimant

instructed solicitors, who wrote to P telling her to desist. P, however, made a number of complaints of harassment to the police, leading to arrest on a number of occasions. There came a time when P began to make complaints to the Respondent. The first complaint in November 2009 included a suggestion that the Claimant was using her position to publish or threaten to publish person information held by the Respondent about people who had helped P. The Respondent's in-house security team checked the matter. Mr Plaxton from that team wrote to say that there was no evidence of non-business accesses by the Claimant into the accounts of any of the people whom P had known.

5. By letter and email dated 12 April 2010 P made a further complaint. She alleged that the Claimant had anonymously published personal information concerning her including a former address, which she said could only have been obtained from the Respondent's database by the Claimant because otherwise, she said, the only persons who knew that information were herself and her father. Again, the matter was referred to the Respondent's in-house security team. Mr Plaxton responded on 28 April 2010. He said there was no evidence that the Claimant had accessed P's account and moreover there was no evidence of any other non-business accesses to P's account. On 30 April 2010 P was told this in an email.

6. There was a third complaint in July 2010 with the same result. No foundation was found for the complaint.

7. The Claimant was not informed of these complaints or of the results of the investigation. Mr Plaxton recommended that consideration should be given to the Human Resources team investigating the allegations of harassment. This was not done. In August 2010, however, the Claimant received an anonymous telephone call informing her that there was evidence with the

Respondent which would clear her of stalking. The caller had evidently seen the email dated 30 April 2010 and informed the Claimant of its contents. The Claimant asked for full details of the emails. The Respondent sent her the email dated 30 April 2010 but nothing earlier that made reference to either the first or third complaints. The Claimant therefore did not know that P had said there was no other possible source for the old address except the database, herself and her father.

8. In the succeeding months the Claimant continued to ask for full details of the emails. There were not forthcoming. Eventually an anonymous source gave the emails in December 2010. The Employment Tribunal summarised what then happened as follows (paragraph 8.40):

> **"8.40. … It is important to note that when the Claimant eventually obtained copies of the e-mails from her anonymous source in December and was able to provide them to the police, it took very few days for the police to understand the true position and accept that the Claimant was not harassing [P]. The key piece of information was the assertion by [P] in April that only [P], her father and the Respondent could know a particular address. As the investigation had shown that the Claimant had not accessed the information held by the Respondent, the police looked to the only other possible sources of the information and concluded that the address and other information was being published by [P] herself. The Tribunal has been informed by the Claimant that [P] has now been formally cautioned by the police. The Tribunal is satisfied that from the beginning of September 2010 onwards the Claimant was increasingly frustrated and angered by her perception that the Respondent was refusing to assist her by releasing the e-mails. This frustration and anger did not assist in maintaining the Claimant's health."**

The Claimant's ill-health, absence and dismissal

9. Until the end of October 2009 the Claimant had occasional periods of sick leave. She had a single day off for stress in November 2009. On 6 January she had an operation on her jaw involving the removal of teeth. There were post-operative complications. She was off work for 65 days with a reactive depression. The Employment Tribunal found that during this period the reactive depression was caused partly by a reaction to the operation and partly by her personal problems arising out of P's allegations of harassment.

10. The Claimant returned on work on 12 April 2010. From 21 April, however, there were frequent periods of absence due to reactive depression. From this point onwards, the Employment Tribunal found that the reactive depression was exclusively caused by her personal problems arising from the allegation of harassment. The Tribunal was also to find, as I shall show later, that to some degree the exacerbation of these was the responsibility of the Respondent. When the Claimant was at work she made it plain that her problems were with P. In the result, by January 2011 the Claimant had been absent for 162 days in the previous year, mainly for depression and continuously absent for over 50 working days.

11. The Respondent operated an attendance management procedure. The Claimant passed through the stages of that procedure until she was considered for dismissal or demotion. A meeting was held with Mr Whitwell, the designated decision maker on 15 December 2010. The Claimant explained that the reason for her absence was personal problems with P and the failure of the Respondent to provide information regarding emails with P. She gave him a 19-page statement of her position and a bundle of emails. Mr Whitwell decided to take time to consider his decision and investigate further.

12. The minutes of the attendance management meeting include the following passage:

> **"[M] told John in September this year there were various emails between the woman she was accused of harassing and Caroline Silliss. [M] said these emails were clearing her of the stalking but Caroline refused to give her a copy of the email. If she had a copy at the time she could have passed them to the police, who would [have] cleared her and dropped the case. [M] told John she now has the emails and the case has been dropped. [M] continued by saying she found out the senior management team were aware of these emails and she feels they have been mocking her. She said they could [have] taken them to the police and cleared her but they wouldn't. [M] said she has found the whole thing very disturbing and stressful."**

13. The Employment Tribunal summarised what Mr Whitwell then did and did not do in paragraph 8.58 of its Reasons:

> **"8.58. Mr Whitwell asked for further information regarding the legal proceedings that had been referred to by the Claimant and these were provided through her trade union**

> **representative on 4 January 2011. The Tribunal has seen the notes prepared by Mr Whitwell prior to making his decision. He noted that he had received 19 pages of written submissions from the Claimant together with a bundle of e-mails. He decided that it was not necessary to read them or consider them beyond having negligible additional value. He decided that the real cause of the [Claimant's] condition was her own lifestyle choice of engaging in a social network and that the Respondent could not be responsible for any consequences. Mr Whitwell took the case number of the legal proceedings provided by the Claimant and made inquiries at the Royal Courts of Justice. He was told that the proceedings were brought by someone called Deeming and without seeking to obtain any clarification from the Claimant, assumed that she had been lying. The proceedings were in the name of Deeming but if Mr Whitwell had inquired with the Claimant he would have been told that the proceedings involved her as well. Mr Whitwell decided to dismiss the Claimant. The decision was notified to the Claimant by a letter dated 6 January 2011."**

14. There was an internal appeal against Mr Whitwell's dismissal decision. The Claimant raised again the issue about P and the failure of the Respondent to provide information concerning her complaints. The Claimant's appeal was dismissed in a letter dated 18 February 2011, which did not directly address the points she made.

The Employment Tribunal proceedings and Reasons

15. The Employment Tribunal hearing took place over five days in February 2013. The Claimant was in person. The Employment Tribunal said this about her:

> **"8.65. Throughout the proceedings the Tribunal found that the Claimant was emotional and prone to overreaction to facts and matters given in evidence. The Tribunal noted that throughout the relevant time the Claimant was under a great deal of stress arising from what turned out to be unjust accusations that she was stalking [P]. In all she was arrested by the police on 31 occasions although she was never charged with any offence. She was persistently under suspicion. The Claimant believes that members of the Respondents staff, and in particular CS, believed that she was stalking [P] and there is some justification for the Claimant holding this belief. The Claimant believed that the Respondent was either unable or unwilling to assist her in establishing that she was innocent of the allegations being made against her and as a result the Claimant lost all faith in the Respondent. She distrusted almost everything the Respondent did and would place unjustified interpretations on its actions. It is for that reason on numerous occasions relatively insignificant facts or matters were described by the Claimant as goading her or mocking her."**

16. Three heads of claim had been identified. One related to public interest disclosure. This claim was rejected by the Employment Tribunal and I need say no more about it.

17. A second head related to disability discrimination. The only claim under this head related to alleged failures to make reasonable adjustments. It had already been determined that

the Claimant was a disabled person by reason of her depression. The Employment Tribunal found that the Respondent ought to have known of that disability at the relevant time. It found, however, that the adjustments sought by the Claimant were not reasonable adjustments. These were: allowing the Claimant to undertake filing quietly; allowing her a period of unpaid leave; allowing her a request to transfer to another office; and, at the time of dismissal, considering employment elsewhere in the organisation. The cross-appeal against this part of the Employment Tribunal's decision has been rejected under Rule 6(3).

18. As to unfair dismissal, the Employment Tribunal dealt only with the question of liability. There appears to have been no discussion of the question whether it would be just and convenient to deal with issues of **Polkey** and possibly contributory fault at the same time. The key part of the Employment Tribunal's reasoning is contained in paragraphs 9 to 12. These build on earlier findings of fact, which I have drawn on in my judgment already.

19. In paragraph 9 the Employment Tribunal set out section 98(4) of the **1996 Act** and then continued as follows:

> **"10. The Tribunal finds that the Respondent has acted unreasonably in treating the reason for the dismissal as sufficient reason. The size and resources of the Respondent are sufficient to have an expectation that all resources and procedures were available to it. The Respondent dismissed the Claimant because of her sickness absence record. The Respondent did not cause the illness that caused the Claimant to be absent from work. She suffered from reactive depression at the relevant time and it has previously been determined that this was a disability. The reactive depression was caused by two factors. Between January and April 2010 it was partly caused by a reaction to an operation on the Claimant's mouth and partly caused by her personal problems arising out of allegations from [P] that the Claimant was harassing her. After April 2010 the reactive depression was caused exclusively by her personal problems. However, the Claimant continued to suffer reactive depression and to have it aggravated by reason of the Respondents failure to release information in its possession that would have removed the cause of the Claimant's reactive depression. This has been clearly established because when the information in question was eventually available to the police (and not from the Respondent) the Claimant's innocence was established. The Tribunal has been referred to the decision in *London Fire and Civil Defence Authority v Betty* [1994] IRLR 384. The Respondent asserts that in accordance with that case the question of whether the Respondent was responsible for the Claimants illness was 'tangential' to the question of fairness. The Tribunal is mindful of the decision in *Royal Bank of Scotland v McAdie* [2008] ICR 1087 CA which makes it clear that the responsibility of the employer in causing an employee's illness may be a factor that can be taken into account when deciding on the fairness of the dismissal. The case overruled *Betty* in so far as it held that the employers responsibility for the incapacity of the Claimant was irrelevant to the issue of fairness. The**

Court accepted that in such circumstances it might be necessary to go the extra mile by being more proactive including putting up with a longer period of the sickness absence.

11. In the present case the Tribunal cannot ignore the fact that the Respondent held information that was clearly vital in clearing the Claimant of allegations of stalking [P]. Those allegations had caused the Claimant very considerable distress. The Tribunal is unaware of anything that would have restricted the Claimant from releasing the information. The Tribunal was made aware that as a matter of policy the Respondent would not notify employees of complaints when preliminary inquiries had exonerated the employee as happened with the Claimant. But this did not operate to prevent disclosure and in the event that a formal investigation was taken forward the Tribunal assumes that any affected employee would be provided with full details of the complaint so that a full response could be made.

12. Further, once the Claimant became aware that e-mails existed, she persistently asked for them to be released or taken into account. Her requests, albeit made in emotional terms on many occasions, appear to have been ignored. Worse, when she sought to bring them to the attention of Mr Whitwell who had the responsibility to decide whether the Claimant should be dismissed, he ignored the information provided to him and decided the question purely on the basis that the Claimant had been absent. He dismissed her personal problems as being the Claimant's own fault for being involved in a social networking website. Further, Mr Whitwell undertook further inquiries into the legal proceedings that had been referred to by the Claimant and obtained information from the Royal Courts of Justice. When the information he received did not appear to accord with what he had been told by the Claimant, rather than check the issue with the Claimant he simply determined that the Claimant had been lying. In the view of the Tribunal his actions make the dismissal procedurally unfair as well as substantively unfair."

Submissions

20. On behalf of the Respondent Mr Poole puts forward the following submissions, very largely following the grounds in the Respondent's Notice of Appeal.

21. Firstly, he submits that the Employment Tribunal erred in law in its approach to the question of substantive fairness by considering and taking into account the decisions in **London Fire and Civil Defence Authority v Betty** [1994] IRLR 384 and **McAdie v Royal Bank of Scotland** [2008] ICR 1087. He emphasises that the Employment Tribunal found, within paragraph 10 of its Reasons, that the Respondent was not responsible for the illness which caused the Claimant to be absent from work. Developing this submission, he argued that the Employment Tribunal erred in law by undertaking a detailed inquiry into the Respondent's alleged responsibility for the Claimant's depressive illness whereas it should have focused on the question whether the Respondent reached a reasonable decision to dismiss. He submits that the questions for the Employment Tribunal to review were whether the dismissing officer

properly informed himself of the Claimant's sickness record, health and prognosis, considered her ability to return to work and provide effective service, considered the requirement of the Respondent's business and considered whether she could be offered a position elsewhere (see **Spencer v Paragon Wallpapers Ltd** [1977] ICR 301).

22. Mr Poole argues that the Employment Tribunal entirely left out of account an important feature of the case, namely that the Claimant was not prepared to work with her colleagues in the same office and required a transfer, apparently at the Respondent's expense. He argues that, in determining whether the Respondent acted reasonably in treating absence as sufficient reason for dismissal, the decision-maker was fully entitled to have regard to the fact that she was unlikely to return to work except on these conditions.

23. Secondly, Mr Poole argues that, in deciding that the Respondent held information which was "clearly vital" in clearing the Claimant, the Employment Tribunal applied hindsight. He submits that the Respondent could not have been expected to know or even reasonably suspect that the contents of P's second complaint would lead the police to find the Claimant innocent of harassment. Within the Notice of Appeal concerning this ground, there is a further ground, which is logically separate from any question of whether the Employment Tribunal used hindsight. It is argued that, under the Respondent's policy, the email from P could only have been provided to the police, not the Claimant.

24. Thirdly, Mr Poole argues that the Employment Tribunal's findings of procedural unfairness at paragraph 12 of its Reasons were not open to it. He argues that the Claimant conceded that there was no procedural unfairness, alternatively that the Employment Tribunal ignored evidence from Mr Whitwell that his inquiry of the Royal Courts of Justice had played

no part in his reasoning. In his argument today, Mr Poole has referred, in particular, to the absence of any reference to procedural unfairness in the list of issues for the Tribunal.

Discussion and Conclusions

25. As I turn to consider the various grounds of appeal, I emphasise that 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 correctly the principles in reaching its decision. So long as the Tribunal has applied correctly the legal principles, then subject to questions of perversity or failure to give proper reasons, which are not argued here, Parliament has made Employment Tribunals the arbiters of all questions of fact. It is also well established that the Employment Appeal Tribunal must read the Employment Tribunal's Decision in the round, not being pernickety or over-critical of individual passages.

26. The unfair dismissal claim is a statutory claim under Part X of the **Employment Rights Act 1996**, in practice governed by section 98. The task of the Employment Tribunal, once the employer has established the reason for dismissal (section 98(1)) is to decide whether, in the circumstances, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal having regard to equity and the substantial merits of the case (section 98(4)).

27. Essentially the statute requires the Employment Tribunal to review every aspect of the dismissal to see whether the employer acted reasonably rather than to reach primary findings or the underlying facts. In reaching its decision the Employment Tribunal must keep carefully in mind that there may be more than one reasonable way for an employer to deal with the

situation. The Employment Tribunal does not have to go so far as to conclude that an employer was perverse or wholly irrational. The question is whether the employer acted reasonably, applying the standards of a reasonable employer.

28. Against that background, I turn to consider Mr Poole's submissions. It is convenient to begin with **Royal Bank of Scotland v McAdie**. In that case the Court of Appeal discussed the application of section 98(4) of **the Employment Rights Act 1996** in the context of an employer who has caused or contributed to the incapacity of an employee. Wall LJ, with whom Buxton and Rix LJJ agreed, specifically approved passages in the Judgment of the Employment Appeal Tribunal (Underhill J presiding). It will, I think, suffice to cite the following passages:

> **"… It seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to 'go the extra mile' in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable. … Thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree with Morison J in sounding a note of caution about how often it will be necessary or appropriate for a tribunal to undertake an inquiry into the employer's responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definitive decision on culpability or causation may be unnecessary.**
>
> **… it is important to focus not, as such, on the question of that responsibility but on the statutory question of whether it was reasonable for the bank, 'in the circumstances' (which of course include the bank's responsibility for her illness), to dismiss her for that reason. On ordinary principles, that question falls to be answered by reference to the situation as it was at the date that the decision was taken. Thus the question which the Tribunal should have asked itself was 'was it reasonable for the bank to dismiss Mrs McAdie on 22 December 2004, in the circumstances as they then were, including the fact that their mishandling of the situation had led to her illness?' "**

29. It is true, as Mr Poole argues, that the Employment Tribunal did not find that the Respondent caused the Claimant's condition. It did, however, find that the Claimant continued to suffer reactive depression and that the reactive depression was aggravated by reason of the

Respondent's failure to release information in its possession which would have removed the cause of that reactive depression (paragraph 10 of its Reasons).

30. Given this finding, it was not, in my judgment, an error of law for the Employment Tribunal to consider the decision in **McAdie**. That decision gives useful guidance applicable where the employer is "in some sense responsible for their employee's incapacity". It does not only apply where the employer has caused the employee's incapacity. Informed by this guidance the Employment Tribunal correctly took the view that the degree of responsibility the Respondent bore for the Claimant's condition was a relevant factor for the purposes of section 98(4).

31. It is, I think, plain from the Employment Tribunal's Reasons that it decided it was unreasonable for the Respondent to dismiss in reliance on the attendance policy as at January 2011. Hence the reference to "going the extra mile", which echoes without quite quoting the words of Underhill J in **McAdie**. I see no error of law in this conclusion. In December 2010 the Claimant had raised fairly and squarely for the decision-maker's consideration the fact, as she said, and the Employment Tribunal found, she had been vindicated by the police on the basis of the emails which the Respondent could have disclosed earlier. The harassment which led to the bulk of the reactive depression was not her fault and might have come to an end sooner if the Respondent had disclosed its material earlier. She might not have been the upset and angry person she was in December. The Employment Tribunal was entitled to find that simply to proceed straight to dismissal in January on the basis of the attendance policy in these circumstances was unreasonable.

32. I emphasise, as **McAdie** itself emphasises, that the focus in section 98(4) is upon the date of dismissal. It does not follow that, if the Claimant persisted in her unwillingness to work at Lowestoft or apply for a transfer without imposing conditions of her own, it would not be fair and reasonable for the Respondent to dismiss her at some stage after January.

33. There was evidence before the Tribunal as to the Claimant's position in December 2010. It is sufficient to refer to the minutes of the meeting of 15 December 2010. The Claimant's position was that she would return to work tomorrow if it were at a different office. She said she could not sit and work with the managers who had put her through the recent problems. Mr Whitwell had asked her if she had put in a request for a transfer. The Claimant said she had not. The minutes record her as agreeing that she was unwilling to pay costs associated with a transfer because the transfer had not been her fault. The minutes also record her as saying that she would put in a formal request for a transfer.

34. I do not read the Tribunal as deciding that the Claimant was entitled forever and a day to maintain the stance that she should be transferred at her own expense to work elsewhere. I simply read the Tribunal as deciding that it was unfair and unreasonable to dismiss her in January in the light of her very recent discovery of the full picture of P's complaints and her vindication by the police.

35. When the Employment Tribunal comes to consider remedy, **Polkey** will be an important issue. The **Polkey** principle, in summary, is that an employer may call evidence to show that, even if it had behaved fairly and reasonably, a time would have come when it could have dismissed the Claimant in any event. That is an issue to be decided not on the balance of probabilities but by an estimation of chances. Given my reading of the Employment Tribunal's

decision, **Polkey** will be an issue for remedy. But, given that it was deciding whether it was reasonable to dismiss in January, I do not think that its failure to refer to the Claimant's stance in December is indicative of any error of law.

36. I turn, then, to the hindsight argument. To my mind the Employment Tribunal did not fall into any error of law of the kind which Mr Poole suggests. I quite agree that the significance of P's email in April may not have been apparent at first; but by September there had been three unfounded complaints, each investigated and rejected by the Respondent. The Claimant was suffering depression. Her job was on the line and, to the Respondent's knowledge, she attributed her depression to unlawful harassment by P. The Respondent showed her only one email, telling her nothing about the other two unfounded complaints. Moreover only a little thought was required in order to see that the April complaint, if unfounded, pointed back to P or her father. Quite apart from the position in September, by December this point was, in essence, made before Mr Whitwell for his consideration. The Employment Tribunal was entitled to find that the Respondent ought to have disclosed the material relating to P. I see no error of law in that conclusion. If, as Mr Poole suggests, the policy required that a request came from the police for P's email, the Respondent would be expected to tell the Claimant this.

37. I turn next to Mr Poole's argument that there was a concession by the Claimant on the question of procedural fairness. The Claimant has strenuously denied making any such concession. Today Mr Poole has rested his argument on the absence of any reference to procedural fairness in the list of issues. Having looked at the list of issues, as set out by the Employment Tribunal, I do not think it carries with it any implication that the Claimant conceded procedural fairness. The Employment Tribunal plainly regarded procedural fairness

as an issue. It is an integral aspect of the Tribunal's consideration under section 98(4) in every case. I see no basis for holding that the Claimant conceded the point. To my mind the Employment Tribunal was fully entitled to the conclusions on procedural fairness which it reached in paragraph 12 of its Reasons. In particular, the Employment Tribunal had ample material for its conclusion that the Royal Courts of Justice point played a part in Mr Whitwell's deliberations. It is indeed difficult to read the decision-maker's note, which is in my bundle of papers, in any other way.

38. It follows that the appeal will be dismissed. The matter will now continue in the Employment Tribunal, where remedy remains to be determined. This, as I have said, includes a **Polkey** issue. For the Claimant's benefit the key principles relating to **Polkey** can be found in the case of **Software 2000 Ltd v Andrews** [2007] IRLR 568 and in **Hill v Governing Body of Great Tey Primary School** UKEAT/0237/12/SM

39. I mention one final point in leaving the case. I quite understand why the Employment Tribunal did not address **Polkey** as part of its unfair dismissal conclusions. It had a number of issues before it. All the other issues related strictly to liability. They included questions of disability discrimination and whistleblowing. Nevertheless it would have probably, with hindsight, been better if the Employment Tribunal had considered **Polkey**. The Court of Appeal has said that advisers should raise with the Employment Tribunal the question of **Polkey**. Again I quite consider in this case why that did not happen. But I would add one further thing. I think it is helpful if Employment Judges stand somewhat above the fray when proceedings at an Employment Tribunal are actually starting and themselves raise with advocates the question whether, as will often be convenient, issues relating to **Polkey** and

perhaps contributory fault are decided at the same time as unfair dismissal, leaving only questions of remedy and calculation of compensation to be determined.