Appeal No. UKEAT/0557/12/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 April 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MS V BRANNEY

MR P GAMMON MBE

USDAW — APPELLANT

MR M BURNS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL DRAYCOTT (of Counsel) Instructed by: USDAW Legal Services 188 Wilmslow Road Manchester M14 6LJ
For the Respondent	MR GLEN DYSON (Representative)

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Employee refused to return to work following illness if he was to remain managed by his Divisional Officer, against whom he had unsuccessfully raised grievances. He was otherwise fit to resume. At a meeting, he said he did not wish to leave the service of USDAW and would do anything. The General Secretary said he would inquire if any alternative work was available: what was in mind was a clerical job at the Manchester Central Office. Though saying he would do so (and thereby indicating it was materially relevant to the fairness of dismissal from the Claimant's current post) the GS did not make any such inquiry, but told C at a dismissal hearing 4 days later there was no alternative post. The ET thought the dismissal (agreed as being for SOSR) was itself within the range of reasonable responses, but said that the procedure was unfair, and held the dismissal unfair. An appeal on the basis that the ET had asked as two separate questions what was in fact one – whether the employer had acted fairly or unfairly having regard to the reason for the dismissal, due regard being had to equity and the substantial merits of the case – was rejected. Read fairly, that was what the ET was determining. It had separated consideration of the procedural aspects from whether a dismissal for the reason given was within the range of reasonable responses because that was the way in which the parties had asked it to view the issues, and this was not a reason for concluding it had impermissibly separated the two. An argument that it would have been futile to offer a clerical job in the Central Office because it would not have been accepted, and hence the ET could not permissibly have reached the finding it did, was rejected: the focus had to be on what the employer did, and this employer had actually thought it important to assure C that other job possibilities would be explored. It did not find that the employer explicitly or impliedly thought that C would not have accepted a job if one had been offered. Finally, a reasons challenge was rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. An Employment Tribunal at Liverpool (Employment Judge Barker, Miss Ward, and Mr Lomas) for reasons expressed in a judgment delivered on 27 February 2012 held that the Claimant had been unfairly dismissed by his employers, USDAW. USDAW appeals against that conclusion.

The facts

2. The facts, stated shortly, are these. The Claimant was a Recruitment and Development Officer, employed from 2001 at Warrington. He was dismissed for what was agreed to have been some other substantial reason on 22 October 2010. An internal appeal was rejected on 16 November. During his employment there had been a history of his complaining of bullying and harassment against a Mr Aylward, who was effectively his manager since he was his Divisional Officer. It was said, in effect, that Mr Aylward set such high targets for the Claimant to meet that he could not possibly do so. His complaints centred on four incidents following a miserable year for him, he said, in 2007. They related to the contents of phone calls in December 2008, two incidents in April 2009 and the nature of a return to work interview in June 2009. He raised a grievance about those four incidents in July 2009. That was investigated on behalf of USDAW by an officer of the union but independent of the events in a manner which the Tribunal found had been reasonable and objective and completed within a reasonable time. It found that the complaints made by the Claimant had not been unreasonably rejected.

3. The Claimant had been off sick for over a year when notwithstanding the dismissal of the grievance he refused to return to work if he was to be managed by Mr Aylward. The Tribunal

found, at paragraph 58, that a doctor had concluded that he was fit to work by October 2010. What stopped him was his refusal to do so if he was to work under Mr Aylward.

4. In the light of that, he met with Mr Hannett, the General Secretary, on 18 October. He explored the Claimant's position. Relevant for the present discussion is the fact that during the meeting the employer confirmed that there was no possibility of the Claimant returning to work except under Mr Aylward unless he were to relinquish his present post. There was no other post of a Recruitment and Development Officer elsewhere within the union which was suitable for the Claimant. He could not leave home because of his personal responsibilities for others and therefore could not work in another division.

5. The Tribunal found that he said that he would do anything. He wished to remain in the service of the union. He was therefore offering to work in some other capacity if that were available to him. The Tribunal found that Mr Hannett, the General Secretary, said he would consider whether there were alternatives to dismissal including alternative employment. In effect, since the only possible jobs, it was accepted, would have been in the central office in Manchester, a clerical vacancy if there was one, that was what he was undertaking to investigate.

6. On 22 October, four days later, there was a further meeting at which Mr Hannett told the Claimant that there was no vacancy. It was at that meeting that the Claimant was dismissed. At paragraph 52 the Tribunal examined the evidence and concluded that, contrary to the assurance which he had given, no investigation had been undertaken by USDAW as to the availability of clerical vacancies in Manchester or elsewhere. It went on to say that indeed there had been no investigation of the Claimant's skill-set, something which perhaps might have been anticipated if there had been a serious attempt to match the Claimant with a vacancy.

7. The Tribunal's finding at [52] to that effect was repeated at [60], with the Tribunal noting that the Respondent had not taken all reasonable steps to find suitable alternative employment for the Claimant, and significantly, at paragraph 78, distinguishing the facts of this case from those of **Driskel v Peninsula Business Services Limited** [2000] EAT/1220/98. It noted that this case could be distinguished "in that we do not find that the Respondent genuinely and reasonably sought to accommodate the Claimant with alternative employment." This amounts, on these facts, to a finding that the Tribunal were critical of USDAW for having acted less than genuinely, and unreasonably, in their failure to do anything about possible vacancies for the Claimant despite an assurance that that would happen.

8. That is to look, in the facts, at the actions of the employer. The actions of the employer must be seen, however, in context. The context here is set, to a large extent, by the behaviour of the Claimant. Much of the appeal rests upon this behaviour. Thus the Tribunal found, paragraph 28, that it had been the Claimant's own actions in wishing to pursue his complaints against Mr Aylward that had had an adverse effect on his health and well-being, a finding repeated in the third from last sentence of paragraph 30. At paragraph 35 it thought that the Claimant had sought to hinder the investigation into his grievance and that:

> **"...had his primary objective been to resolve the issue of bullying, harassment and return to work he would have co-operated in the investigation."**

At a meeting in September, a month before the significant meetings of 18 and 22 October to which we have already referred, the Claimant's representative stated that his goal was to return to work. Significantly the Tribunal added the Claimant did not raise that himself.

9. Despite the fact, as the Tribunal found, that the Claimant had said that he did not want to leave or retire, it held by way of inference (paragraph 61) that, when it came to the appeal, albeit that by then he had been told that there was no suitable alternative employment for him:

> **"..the only outcome that the claimant wanted from the appeal process was that Mr Aylward be either disciplined or moved and that the Claimant be allowed to return to his original role of recruitment and development officer in the North West Division. We note that the claimant did not appeal on the grounds that the respondent had taken insufficient steps to find him suitable alternative employment."**

At paragraph 64, to the same effect:

> **"We find that, at the time of his dismissal, the claimant had become so focused on the issue of [the grievance investigation] report and his perception of the failings in it, that he had wholly lost sight of the issue of returning to work or being offered suitable alternative employment with the respondent."**

10. Against the background of those facts, the Tribunal considered its decision. In a section entitled "Application of law to facts", at paragraph 72 it said this:

> **"We find that the decision of the respondent to dismiss the claimant on the grounds of some other substantial reason did fall within the range of reasonable responses, in that they acted reasonably in treating this as a sufficient reason for dismissing the claimant. Mr Hannett reasonably relied on the findings of Mr Duggan's investigation [that was the investigation into the grievance], which exonerated Mr Aylward..."**

11. At paragraph 74 the Tribunal began its (separate) discussion of the procedure adopted in these words:

> **"In relation to the procedure followed by the respondent which led to his dismissal, we find that, save for the issue of suitable alternative employment, the procedure was within the range of reasonable responses."**

12. That leads on to [78], at which the Tribunal said this:

> **"We find, however, that the respondent was obliged to take all reasonable steps to find suitable alternative employment for the claimant and that they failed to do so. We found that there was not a reasonable investigation in relation to this issue, particularly given that the claimant expressed a willingness to do anything by way of alternative work and given that he**

lived within a relatively short distance of the respondent's Central Office. The size and administrative resources of the respondent ought to have been more actively employed by them in carrying out a reasonable and thorough search for alternative work at Central Office, and they failed to do so. This case can therefore be distinguished from cases such as *Driskel*, cited above, in that we do not find that the respondent genuinely and reasonably sought to accommodate the claimant with alternative employment. Therefore we find that the actions of the respondent in dismissing the claimant were procedurally unfair and that his unfair dismissal case succeeds."

13. The grounds of appeal, as set out in the Notice of Appeal, raise first the apparent inconsistency, as it is suggested, between paragraph 72, in which it was contended by Mr Draycott for the Appellant that the Tribunal had addressed the very wording of section 98(4) of the **Employment Rights Act** and come to an apparent conclusion on it, which, had it been the overall conclusion, would have been conclusive of the appeal, and that at [78], which was to the opposite effect. He argued that there is only one test to be applied to a claim of unfair dismissal. That is the test set out at section 98, which once the reason for the dismissal is found or accepted, as it was here, is in the words of section 98(4):

"...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."

He argued that, in the House of Lords, in **West Midlands Cooperative Society v Tipton** [1986] ICR 192, Lord Bridge of Harwich had, at page 201C-D, analysed the statutory predecessor of section 98(4) in these words:

"....there are three questions which must be answered in determining whether a dismissal was fair or unfair:

(1) What was the reason (or principal reason) for the dismissal?

(2) Was that a reason falling within section 57(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held?

(3) Did the employer act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee?"

14. The focus shown there upon the statutory question to be asked and answered was reiterated in the leading judgment of Lord Mackay of Clashfern LC in **Polkey v Dayton Services Ltd** [1988] 1 AC 344, at 354H-355C:

> **"The subject matter for the tribunal's consideration is the employer's action in treating the reason as a sufficient reason for dismissing the employee. It is that action and that action only that the tribunal is required to characterise as reasonable or unreasonable. That leaves no scope for the tribunal considering whether, if the employer had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done. On the other hand, in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as the consequence of not consulting or not warning."**

15. The following passage is more relevant to subsequent grounds of appeal but it follows on and we shall cite it now:

> **"If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee."**

16. In **Taylor v OCS Group Ltd** [2006] EWCA Civ 702, [2006] ICR 1602 the court, in a judgment delivered by Smith LJ, considered a question then causing some controversy, whether in circumstances in which there had been an unfair disciplinary hearing and a subsequent appeal, the overall question of fairness was effectively to be answered by asking whether the appeal, said to remedy the unfairness, was by way of re-hearing or merely review. The conclusion was plain (paragraph 46):

> **"What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair."**

17. At paragraph 47 she explained that there was a risk that Employment Tribunals might fall into the trap of deciding whether a dismissal procedure was fair or unfair by reference to their view of whether it was a re-hearing or a review and commented:

> **"This error is avoided if ET's realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**
>
> **48. In saying this, it may appear that we are suggesting that ET's should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) [of the Employment Rights Act 1996] requires the ET to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss."**

18. As Mr Draycott pointed out in his skeleton, those words have been echoed since in this Tribunal, for instance by Cox J in **Nugent Care v Boardman** [2010] UKEAT/0277/09/JOJ 25 May 2010. He submits that in the case now before us the Tribunal had impermissibly split its decision into two parts. It had in two separate paragraphs, 72 and 78, treated substance and procedure as if they were separate questions, whereas there was one statutory question. Therefore its approach was flawed.

19. The second ground is one which might be labelled "futility". It is that, in finding as the Tribunal did in respect of a procedural failing in paragraph 78, ultimately, it did not consider whether the offering of suitable alternative employment at the Appellant's central office would have been utterly useless or futile. This echoes the citation we have quoted from Lord Mackay's speech. To emphasise the point made by Lord Mackay in **Polkey**, Mr Draycott took us to the speech of Lord Bridge, page 364 E-H.

> **"... If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is *not* permitted to ask in applying the test of**

> **reasonableness posed in s.57(3) [now section 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of s.57(3) this question is simply irrelevant."**

Thus far, the quotation might be thought to be of no assistance to Mr Draycott's argument. But what followed was this:

> **"It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.57(3) may be satisfied."**

20. We noted that those observations echoed earlier views expressed by Browne-Wilkinson J as President of this Tribunal in **Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91 (see, in particular, paragraph 41).

21. Not only is it the case, submitted Mr Draycott, where an employer consciously turns his mind to the question of futility, but equally the principle applies where he does not consider the matter at all. For this he relied on **Duffy v Yeomans & Partners Ltd** [1995] ICR 1. Balcombe LJ said, page 6E-F, that it had been suggested the speeches in **Polkey** established that, unless an employer led evidence to show that it considered the question of consultation and decided it would be useless, he could never be said to have acted reasonably. He went on to reject that proposition. Page 7, G-H.

> **"In my judgement there is no warrant for the proposition that there must be a deliberate decision by the employers that consultation would be useless, with the corollary that, in the absence of evidence that such a decision was made, a finding by an Industrial Tribunal that a dismissal for redundancy was reasonable is necessarily *wrong* in law."**

22. Against the background of those principles, Mr Draycott pointed to the factual conclusions which the Tribunal had reached as to the approach which the Claimant was taking, in particular at the dismissal hearing on 22 October and the appeal hearing which followed in

November. If the hypothetical reasonable employer was to be adopted as the standard, then such an employer could reasonably be thought to have taken the view that offering any alternative employment to the Claimant would have been utterly futile since he would simply have refused it because he was so focussed upon his dispute and relationship with Mr Aylward.

23. The futility point is developed in the grounds of appeal by reference to the appeal hearing as well, relying upon the finding by the Tribunal that the only outcome which the Claimant was seeking was that Mr Aylward be disciplined or removed and that he could return to his former employment.

24. In two further paragraphs, though not separately numbered in the Notice of Appeal, the Appellant effectively argued perversity, though it has not been put that way to us orally, submitting that the only permissible option was for the Tribunal to hold that the Respondent's disinterest in the possibility of suitable alternative employment rendered his dismissal fair and alternatively that the Tribunal erred in law in failing to provide sufficient reasons as to why the dismissal nevertheless remained unfair. The reasons challenge was not advanced before us.

25. In the event, we did not find it necessary, having read the papers and the skeleton argument submitted by Mr Dyson, representative, on behalf of the Claimant, to call upon him to argue the Claimant's side.

Discussion

26. The starting point in any employment case is the statute. In current circumstances the statute poses one unitary question. That is whether the dismissal was fair or unfair, having regard to the reason shown by the employer. Cases have repeatedly drawn attention to the fact that that is the test and that case-law, however influential, even to such familiar effect as in

Iceland Frozen Foods v Jones [1983] ICR 17, is powerful interpretation and guidance but it is not itself statute. The question for us is whether the Tribunal answered that question holistically, as Mr Draycott rightly submitted it had to be answered. He accepts that there are two principal strands to a decision under section 98(4). The section deals with a claim for unfair dismissal. By statute a dismissal (section 95(1)(a)) occurs if and only if the contract under which the Claimant is employed is terminated by the employer. It is frequently recognised, however, that whether suitable alternative employment has been considered may be relevant in determining the question arising under section 98(4). It should be noted that in most cases suitable alternative employment will involve a dismissal under section 95(1)(a) albeit immediately followed by re-engagement. The alternative, that the contract remains alive because it has been varied by consent, is we think unrealistic, particularly in circumstances in which before a Tribunal the Claimant is complaining that he has been unfairly dismissed, which is inconsistent in most cases with him having consented freely to the change. But what this indicates is that across a broad range of practice, in particular in reference to redundancy and as the Tribunal here noted often in the case of some other substantial reason (though we would observe it all depends what that reason actually is, and there is no universal rule) the question of whether alternative employment was offered or considered or made available may be relevant to deciding whether it was fair or unfair to exercise the power to dismiss from the post from which the Claimant was in fact dismissed.

27. This does not rely simply upon our experience of practice and an attempt to rationalise from it. In **Whitbread plc v Hall** [2001] ICR 699 (CA) the Court of Appeal, in a judgment of Hale LJ (as she was), with whom the other members of the court agreed, she considered the wording of section 98(4). At paragraph 16 she said this:

> **"Section 98(4) [of the 1996 Act] requires the tribunal to determine whether the employer 'acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the**

employee' and further to determine this in accordance with 'equity and the substantial merits of the case'. This suggests that there are both substantive and procedural elements to the decision to both of which the 'band of reasonable responses' test should be applied.

She drew support for that from **Polkey v Dayton Services** and **Sillifant v Powell Duffryn Timber Ltd** (see paragraph 17) and the observation, in particular, of Lord Mackay that it was not correct to draw a distinction between the reason for dismissal and the manner of dismissal as if they were mutually exclusive, with the Industrial Tribunal limited to considering only the reason for dismissal. Both have a part to play.

28. That case preceded **Taylor v OCS**. It was not adversely commented upon in **Taylor v OCS**, the relevant citations from which we have already quoted. The point addressed in **Taylor v OCS** was somewhat different: the question of when an appeal could cure the defect in a disciplinary hearing. The vice it was concerned to point out and remedy was that in some quarters that had been treated as if it were a matter of law rather than a matter which fell to be assessed as a question of fact and judgment by a Tribunal when applying section 98(4).

29. The fact that there are two strands is not disputed by Mr Draycott. The Tribunal itself made reference to **J Sainsbury plc v Hitt** [2003] ICR 111, which is often cited for the observation by Mummery LJ that the need to apply the objective standards of the reasonable employer applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason (paragraph 30). He therefore plainly saw the two strands, what might be termed "substance" on the one hand and "procedure" on the other, as both requiring the adoption of that test, but both feeding into one overall assessment which falls to be made by the Tribunal.

30. Against that background, we approach what the Tribunal made of the case. A Tribunal judgment has to be read as a whole. Allowance must be made for the fact that it may not be the finest product of legal draftsmanship. More particularly, experience shows that it is likely to be responsive to the way in which the parties themselves had argued the case. Here, the Tribunal set out, as Tribunals are enjoined to do and as indeed regulation 36 of the Tribunal Rules requires it to do, the issues which it was to determine. That was after there had been discussion between the parties and the Tribunal. That is what the Tribunal noted (see paragraph 55).

31. The issues so set out were twofold: first, whether the decision to dismiss was reasonable or unreasonable within section 98(4) and, second, whether it was procedurally fair within the range of reasonable responses. That was not inappropriate given the two strands which can be identified in the cases. When the Tribunal came to set out the law, it repeated the same approach, at paragraph 69, that it had been agreed between the parties that the scope of the Tribunal's investigation should be limited to whether the decision to dismiss and the procedure followed by the Respondent was within the range of reasonable responses as set out in section 98(4) of the **Employment Rights Act**. Throughout its findings of fact, the Tribunal had added comment as to whether a particular action was reasonable or unreasonable on the part of the employer, and generally found it reasonable, and on the part of the employee, which it often found unreasonable. It had therefore interlaced findings of reasonableness throughout its discussion. In exactly the same order as it had set out the issues, at paragraph 72 and 78, it dealt with each. The structure of the decision therefore followed exactly the structure of the issues which it had posed to it itself.

32. We ask, overall, whether this Tribunal was asking itself two separate questions, one as to range of reasonable responses for the dismissal, viewed in isolation, the other range of reasonable responses in respect of the procedure viewed in isolation, as if they were separate

questions, each of which are to be answered favourably to the employer before it could find that the dismissal was not unfair or whether it was, though in two strands, answering the questions which had been posed to it, leading to an overall determination as to fairness or unfairness.

33. Read as a whole, we have concluded that the judgment fairly seen is the latter and not the former. We do not see here that the Tribunal actually fell into the error which Mr Draycott identified; rather it answered the questions posed to it. And, in the concluding words of paragraph 78, it drew the strands together with a finding that the unfair dismissal case succeeded.

34. We turn, then, to the futility ground. The first point of principle is that it is the employer's conduct which must be judged by the Tribunal. It is not asked to determine for itself as between employer and employee whether the conduct of the latter is such that it, the Tribunal, if in the position of the former, the employer, would have dismissed. It is whether the employers' actions were reasonable or unreasonable in the light of its reasoning.

35. Viewed in that light, and remembering that **Polkey** itself very clearly showed that a decision could be unfair on procedural grounds even if the employer might have been able to show that it would have made no difference to the actual outcome. The employer will be entitled, should he think of it or should he not consciously think of it but should it be obvious, to conclude in very particular circumstances that a procedural step is futile. We would not ourselves elevate this to giving it the forensic label, as Mr Draycott did, of terming it "the **Polkey** exception" in his skeleton argument. It is a matter simply to take into account in the assessment of fact by the Tribunal, applying the statutory test: was the procedure adopted by the employer taken overall and looking at what the employer did, not what he might have done, fair or unfair?

36. The argument that Mr Draycott advances breaks down here when it is seen that the employer did not take the view that it would be futile to look at other jobs. Nor was the employer in the position of the employer in **Duffy** of it being inferred that he would have considered it or did consider it of no use. This is a case in which the employer at the time, on the findings of fact, indicated through the General Secretary that it was relevant to whether there would be a dismissal to know whether there was a clerical post that might be filled by the employee. Whether the Claimant ever would have accepted it would be a matter ultimately for a hearing on remedy, but the Tribunal did not make any finding that he would not. To the contrary the Tribunal made the finding that he had asked for any job on 18 October. Although it noted that his focus was very much on Mr Aylward to the exclusion of virtually everything else on 22 October and 16 November, it did not say that he rejected the idea of any alternative work. Focusing on the employer's behaviour, this employer showed, on the findings of the Tribunal, that it thought it important, in fairness, to investigate possibilities of work. It gave assurance to that effect. It failed to honour them. That is a very different situation from those upon which Mr Draycott drew for his submissions. It is plainly one which the Tribunal viewed seriously given its comments in paragraph 78 in the penultimate sentence. We, therefore, reject first the conclusion that this was a case in which it was so futile that the Tribunal could not have concluded as it did without error of law. Secondly, and associated with that, we reject any argument that this was a perverse conclusion. There was material for the Tribunal to evaluate upon which it could decide. It is not inherently unreasonable for a Tribunal to conclude that where an employer makes a promise as to its behaviour in a way which it sees and suggests as important in dismissal and fails to keep it that that might be relevant to fairness. We do not say that this is the same decision that we would have reached had we been the Tribunal. We acknowledge that this employee was plainly going to be dismissed from his job in the section 95(1)(a) sense because he would not do it with Mr Aylward being a superior. But that

in itself is not capable on its own of answering the question of fairness, which is a matter for the Tribunal to assess. The Tribunal here was not substituting its own judgment. It was making its judgment, applying a test which was appropriate (see **Sainsbury's v Hitt**) to apply. Given our conclusion on the first ground of appeal as to inconsistency between 72 and 78 and our conclusion overall as to what the Tribunal was here saying, we cannot accept that this appeal should be allowed.

37. Finally, we have not dealt with the "reasons" appeal as yet. The reasoning is, in our view, sufficient to meet the requirements of rule 30(6). It is undoubtedly **Meek**-compliant in that it indicates why one party has won and the other has lost. The real appeal here was the question of whether there was an error of law in the overall approach. We have taken the view we have of the judgment, viewed broadly. Though no part of our decision, we note that it is exactly the same conclusion as originally the Judge came to on the sift in this case.

38. For those reasons, we reject this appeal. We would, however, add these comments. First, that it should not be thought that in our decision we were endorsing the view of the Tribunal, expressed in the opening words of paragraph 78, that an employer is obliged "to take all reasonable steps to find suitable alternative employment". We do not consider there is any such duty arising either at common law, through employment law or through a code of practice. It is stated too absolutely. No ground of appeal was founded upon it nor argued before us, so we do not need to consider it further. But, because we are conscious that this judgment may see some currency elsewhere, we want to make it clear that we do not accept that approach. The question always to be answered in an allegation of straightforward unfair dismissal to which section 98 applies, once the reason for dismissal has been accepted or determined, is the test posed by section 98(4). There may be two strands to it but it is and remains one test. Whether it is satisfied is a matter of evaluation, taking into account all the circumstances. It is wrong, as the

cases have demonstrated time and again, for any particular factor to be elevated as though it were a particular point of law necessarily to be observed.

39. Finally we would like to thank Mr Draycott for his industry and the interest of his ultimately unsuccessful argument.