Appeal No. UKEAT/0287/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 February 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR A R WILLIAMS APPELLANT

AMEY SERVICES LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

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APPEARANCES

For the Appellant	MR JAMES HOLMES-MILNER (of Counsel) Direct Public Access
For the Respondent	MR ANDREW SMITH (of Counsel) Instructed by: Bird & Bird LLP 15 Fetter Lane London EC4A 1JP

<u>SUMMARY</u>

UNFAIR DISMISSAL

Contributory fault

Polkey deduction

Employment Rights Act 1996 *sections 122(2) (basic award) and 123(1) and (6) (compensatory award)*

Unfair Dismissal - Compensatory Award - ***<u>Polkey</u>*** *reduction*

The Employment Tribunal's Reasons failed to disclose whether the Employment Judge had considered what would have been the likely outcome had this employer done that which ought to have been done (**<u>Elkouil v Coney Island Ltd</u>** [2002] IRLR 174). Even if the Employment Judge had considered this question, it was unclear as to the point in time at which he was assessing the question of the likely outcome - the Employment Tribunal's findings allowed various different possible times at which the unfairness arose. It may be that the Employment Judge had failed to sufficiently explain his reasoning. It was equally possible that he had failed to correctly direct himself as to the question he needed to ask. The appeal would be allowed and this matter remitted to the Employment Tribunal.

Unfair Dismissal - Compensatory Award - Contributory fault reduction

Contrary to the Claimant's submission, the Employment Tribunal had been entitled to make a reduction for contributory fault in this case. Blameworthy and culpable behaviour can encompass conduct which is bloody-minded or unreasonable in all the circumstances (**<u>Nelson v BBC (No 2)</u>** [1979] IRLR 346). The Employment Tribunal was entitled to have regard to the manifestation of the Claimant's personality in this regard (**<u>Bell v Governing Body of Grampian Primary School</u>** UKEAT/0142/07/CEA, paragraph 40) and plainly did so. The

Reasons adequately set out the factors that were influential. It was not a perverse conclusion and the appeal on this basis was dismissed.

As for the amount, it was common ground that the reduction cannot be 100%: on the Employment Tribunal's own findings the Claimant's conduct was not the sole or only cause. The appeal was allowed on this question and it was common ground this was an issue that had to be remitted to the Employment Tribunal.

On the Respondent's cross-appeal, the Employment Tribunal erred in law in taking into account the Respondent's conduct, in particular the unfair procedure which it had adopted in dismissing the Claimant. That approach was contrary to the established principles laid down in the case-law and the statutory language made it clear that the employer's conduct was not a relevant consideration.

In any event, the parties agreed that the Employment Tribunal's reasoning for making no reduction to the basic award was undermined by the successful appeal on the conceded point that there could not be a 100% reduction to the compensatory award in respect of contributory fault. The question of the Employment Tribunal's approach to the basic award had to be remitted in any event. Cross-appeal allowed and these matters also remitted to the same Employment Tribunal for fresh consideration.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties in this matter as the Claimant and the Respondent as they were below. This is the hearing of the Claimant's appeal and the Respondent's cross-appeal against a Judgment of the Huntingdon Employment Tribunal ("the ET"), Employment Judge Adamson sitting alone on 10-12 March 2014, which was sent to the parties on 8 April 2014. The Claimant appeared before the ET in person but is now represented by Mr Holmes-Milner, of counsel. The Respondent was, and is, represented by Mr Smith, of counsel. By its Judgment, the ET held that the Respondent had unfairly dismissed the Claimant and that he was entitled to a basic award without reduction but that any compensatory award should be reduced in respect of the loss sustained by the Claimant by 90% pursuant to section 123(1) of the **Employment Rights Act 1996** ("ERA") - the **Polkey** reduction - and then a further 100% pursuant to section 123(6) of that Act - the contributory fault reduction.

2. The Claimant appeals against both the 90% **Polkey** reduction and the 100% contributory fault reduction. The Respondent resists the **Polkey** appeal but concedes that the 100% contributory fault reduction was impermissible (contending that the appropriate level of reduction under that head should have been in the region of 90%). It further cross-appeals the ET's failure to make any reduction to the basic award by reason of contributory fault.

The Background Facts

3. The Respondent is a large company providing a wide range of public and infrastructure services including civil engineering works. It has contracts with local authorities in

Bedfordshire and an office in Bedford within which the transportation team of its Highway Division was based. The Claimant was there employed as an experienced engineer technician.

4. There was a background of less than happy working relationships between the Claimant and his managers, with the Claimant engaging in what was perceived as persistently annoying behaviour. That led to complaints from colleagues and ultimately a grievance on the part of one of his managers, who complained about him under various heads including: bullying and harassment; rude, demeaning, disruptive and unprofessional behaviour; poor personal hygiene; and taking "increasing satisfaction [in] trying to irritate and upset" the manager in question.

5. The grievance was investigated. The manager concerned and a number of employees were interviewed, albeit difficulties arose in respect of the Claimant's participation in the process. Ultimately the grievance outcome report summarised the evidence as confirming that it appeared that the Claimant was loud and disruptive in the office, distracting other employees. He was alleged to have made comments that other members of staff found offensive and to have continually pestered his manager. A disciplinary hearing was recommended.

6. Meanwhile, an issue had arisen regarding the Claimant's annual performance development review ("PDR"), the Claimant declining to co-operate on the basis that it included a review of behaviours in respect of which targets had not previously set.

7. The Claimant was invited to attend a disciplinary hearing regarding both the matters raised by the grievance report and his apparent refusal to carry out a reasonable instruction in participating in the PDR process. Further issues arose as regards that hearing.

8. Whilst those issues remained on-going, the Claimant raised a grievance. The disciplinary process was then stayed pending the investigation into that. Ultimately his grievance was largely unsuccessful. He then appealed.

9. During the grievance appeal process, further complaints were made by and against the Claimant. At this stage, the new Human Resources advisor with responsibility for the Claimant's case (a Ms Cleaver), expressed the view that it was time him to leave the business "under SOSR" as she felt there was "a total breakdown of the employment relationship".

10. On 19 October 2012, around the time of Ms Cleaver's expression of that view, the Claimant was called to a meeting with an associate director of the Respondent, a Mr Dave Brown, and was presented with two options: either to take three months' paid leave, at the end of which he would leave the Respondent's employment or to go through the Respondent's disciplinary process, at the end of which he would be dismissed with a month's notice. There was some confusion after that with the Claimant initially thinking he had been dismissed but then returning to work and being suspended. The Claimant then attended a meeting with Ms Cleaver at the end of October, which she opened by explaining her perception that the working relationship had broken down and considering how or if the employment could continue.

11. There was a disciplinary hearing on 3 December 2012. The Claimant attended, albeit initially wearing earplugs. The ET found that the Respondent - as evidenced by Mr Brown's meeting with the Claimant on 19 October 2012 and Ms Cleaver's statement of opinion around that time - had already determined to dismiss the Claimant, principally because it considered the employment relationship had broken down. The sole purpose of the 3 December 2012 meeting was to terminate the Claimant's employment. Ms Cleaver's position was that

mediation was not viable and redeployment of the Claimant would simply transfer the problem. At the end of the meeting, the Claimant was told that he would be dismissed with pay in lieu of notice. He appealed but that was unsuccessful and did not engage with the issues raised by the Claimant or with the point that the decision had been predetermined.

The ET's Reasoning

12. The ET concluded that the principal reason for the dismissal was the breakdown in the working relationship between the parties. It was not a whimsical or capricious reason but was such as to justify the dismissal of the Claimant for section 98(1) **ERA** purposes.

13. Turning to the question of fairness of the dismissal for that reason, the ET accepted that there had been a number of complaints against the Claimant and a failure on his part to demonstrate improvement. On the other hand the Respondent's concerns had not been raised formally by management until complaints and grievances were raised in September 2011. Moreover, the meeting on 3 December 2012 was arranged to terminate his employment, and the decision had already been taken. That rendered the dismissal unfair.

14. Turning to the compensatory award the ET found that:

> **"… the Claimant was the principal cause of his own misfortune by the manifestations of his personality and thus the effect on the employment relationship …"**

On the other hand:

> **"… had the Respondent itself acted more effectively and sooner, it may have caused a significant change in the Claimant and the relationship may not have broken down. …" (paragraph 49)**

15. Asking whether dismissal was inevitable or whether there was a chance that the Claimant might have remained in his employment had there been a fair process (the **Polkey** question), the

ET concluded there was a 10% chance that, had the Respondent issued formal warnings at any stage, he might not have been dismissed "either at all or when he was" (paragraph 49). In reaching that conclusion the ET had regard to the Claimant's own evidence that "it is just how I am" as explaining his behaviour and to the years of his working experience, which should have meant that the Respondent would not need to manage him to that degree.

16. The ET then turned to the question of contributory fault. It took the view that there should be further reduction to reflect the primary cause of the breakdown in the working relationship which the ET assessed at 100%, thus giving the Claimant no compensatory award.

17. On the basic award the ET noted it could have regard to the Claimant's conduct before dismissal. Given the Respondent had curtailed the internal process and determined to dismiss the Claimant before going through the formality of a disciplinary hearing, and having already reduced the compensatory award to nil, the ET did not consider it just and equitable to reduce the basic award (paragraph 50). Remaining issues as to loss were left to the Remedy Hearing.

The Appeal and Cross-Appeal

18. The grounds of appeal can be summarised as falling under the following heads. First, in respect of the 90% **Polkey** reduction: (1) that the ET erred in its approach to this question, being concerned with how a reasonable employer might have acted in this case in the past rather than considering what might have happened in the future had a fair process been pursued by this employer; alternatively, (2) if its decision was that this employer could fairly have dismissed on the same date as the Claimant was in fact dismissed, the ET' conclusion was perverse; and/or, (3) it failed to give adequate reasons for the conclusion it reached.

19. Second, as to the 100% contributory fault reduction: (1) the ET erred in failing to clearly engage with the requirement that the Claimant's conduct must be culpable or blameworthy and not simply his personality or disposition; further/in the alternative, (2) the ET wrongly made a reduction of 100% when it had only found the Claimant to be the principal or primary - not the sole - cause of the relationship breakdown; alternatively, (3) the reasoning was inadequate.

20. For its part, the Respondent accepted the 100% contributory fault reduction in respect of the compensatory award could not stand, given the ET had not found the Claimant's conduct was the sole cause of the dismissal; the precise percentage reduction would need to be remitted for reconsideration. Otherwise the Respondent resisted the appeal, and pursued its own cross-appeal against the ET's refusal to make a reduction to the basic award: (1) because once it was clear that there should not have been a 100% reduction to the compensatory award, the ET's reasoning on the basic award was undermined; and more generally, (2) the ET had wrongly had regard to the Respondent's own conduct and that amounted to an error of law.

The Agreed Legal Principles

21. The **Employment Rights Act 1996** sections 122(2) (basic award) and 123(1) and (6) (compensatory award) relevantly provide:

> ***"122. Basic award: reductions***
>
> **…**
>
> **(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**
>
> **…**
>
> ***123. Compensatory award***
>
> **(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**
>
> **…**

> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

22. Section 123(1) provides ETs with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal. It is in making this assessment that the ET might consider it just and equitable to make a reduction following the guidance laid down by the House of Lords in **Polkey v AE Dayton Services** [1987] IRLR 503 HL. That is, to take account of the fact - if this is what the ET so finds - that the Claimant's loss should be limited given that the employer might have dismissed fairly in any event.

23. In making such an assessment the ET is plainly given a very broad discretion. In some cases it might be just and equitable to restrict compensatory loss to a period of time, which the ET concludes would have been the period a fair process would have taken. In other cases, the ET might consider it appropriate to reduce compensation on a percentage basis, to reflect the chance that the outcome would have been the same had a fair process been followed. In yet other cases, the ET might consider it just and equitable to apply both approaches, finding that an award should be made for at least a particular period during which the fair process would have been followed and thereafter allowing for a percentage change that the outcome would have been the same. There is no one correct method of carrying out the task; it will always be case-and-fact-specific. Equally, however, it is not a 'range of reasonable responses of the reasonable employer' test that is to be applied: the assessment is specific to the particular employer and the particular facts.

24. As for the compensatory award and any reduction for contributory fault, it is common ground that, first, regard must be had to the conduct of the employee not the employer, and,

second, that the conduct must be culpable or blameworthy. That said, culpable or blameworthy conduct can include conduct which is "bloody-minded" or "unreasonable in all the circumstances", **Nelson v BBC (No 2)** [1979] IRLR 346. A wide range of behaviour is capable of justifying a reduction pursuant to section 123(6); the ET again has a broad discretion.

25. Similar principles apply to the possibility of a reduction in the basic award, for contributory fault under section 122(2), albeit that it is open to an ET to make different levels of reduction in respect of compensatory and basic awards, allowing for the difference in wording of the statutory provisions and the different nature of the compensation to which each relates.

Submissions

The Claimant's Case

26. Addressing first the appeal against the **Polkey** reduction, the ET had in considering how a reasonable employer might have acted in this case in the past, or - perhaps more fairly - in failing to distinguish between the two questions it had to answer: (1) what was the likelihood of the Claimant having been dismissed in the future had a fair process been followed? And (2), assuming that there was such a likelihood, when would that have taken place? The ET had answered the first: a 90% chance of a fair dismissal at some point, but failed to engage with the second: would that dismissal have taken place on the date the Claimant was dismissed or later, and, if so, when? The error was in failing to properly carry out the full exercise required and in failing to ask how this particular employer might have behaved fairly.

27. In making good this submission the Claimant relied on the case of **Trico-Folberth Ltd v Devonshire** [1989] IRLR 396 CA, authority to the effect that, notwithstanding the fact that another employer might have dismissed for reasons known to this employer, if this particular

employer had in its possession all the relevant facts, then it was not permissible to go back and say that it would have dismissed at that point in time for a reason that it had expressly disavowed as a reason for dismissal at that point in time.

28. The cases relied on by the Respondent did not undermine that submission. **Elkouil v Coney Island Ltd** [2002] IRLR 174 did not impact on that approach, but simply acknowledged that the dismissal was flawed for a particular reason and that, if that unfairness had not taken place, then the ET should look to see what would have happened. It did not address the situation where the employer knew all the facts and yet had not chosen to follow that path and dismiss for that reason. Similarly, the guidance in **Software 2000 Ltd v Andrews** [2007] IRLR 568 EAT was not saying that, had the employer gone about things in a different way in the past, the ET was then entitled to substitute its view as to what would then have happened.

29. Alternatively, the Claimant argued that the conclusion that the dismissal could fairly have taken place at the effective date of termination was perverse or inadequately reasoned.

30. In respect of the contributory fault reduction, the Claimant noted that the Respondent, correctly, accepted that the ET had erred in making a reduction of 100%. There was, however, a more fundamental error in the ET's failing to consider the question of culpability or blameworthiness. The conduct in question has to be more than simply a matter of personality, disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which they have become involved (**Bell v Governing Body of Grampian Primary School** UKEAT/0142/07/CEA, paragraph 40). That said, the Claimant accepted that a manifestation of personality might give rise to culpable or blameworthy behaviour, but there needed to be a clear finding to that effect, and that was absent from the ET's reasoning.

31. As for the cross-appeal, given that the basic award was not reduced expressly because there was a nil compensatory award, the Claimant accepted it was inevitable that that conclusion would have to go back to the ET and the cross-appeal allowed to that extent. The Claimant did not accept that it had to be to the same Employment Judge.

32. On the substantive part of the cross-appeal the Claimant did not accept that the ET did have regard to the Respondent's conduct; it kept its focus on the Claimant's conduct. The one line relied on by the Respondent (paragraph 50) did not detract from that. If simply looking at the finding on basic award alone (if the appeal was otherwise not being allowed), the ET was entitled not to reduce the basic award in the same manner as the compensatory award. The difference in wording between sections 122(2) and 123(6) allowed for that, recognising that the two awards were compensating for different things.

33. Returning to disposal, given the passage of time and the fact that an earlier application for reconsideration had been refused, there was no reason to send this back to the same Employment Judge. He had formed a committed view; it would be preferable for a different Employment Judge, to be charged with this matter on remission. The remission would be on the basis of findings of fact already made, so that would not give rise to any disproportionality.

The Respondent's Case

34. Section 123(1) allowed a just and equitable discretion, giving the ET significant leeway in how it approached the question before it. Any EAT should be reticent before interfering.

35. On the **Polkey** appeal, the ET had properly considered the documentary and oral evidence adduced by the parties. It had correctly summarised the legal principles. It had a

broad discretion and was entitled to approach its task using "its common sense, experience and sense of justice". It was not to be "enforced into a straitjacket" (see **Fougère v Phoenix Motor Co Ltd** [1976] IRLR 259, paragraph 2; **Software 2000 Ltd v Andrews** [2007] IRLR 568, paragraph 54; **Elkouil v Coney Island Ltd** [2002] IRLR 174, paragraph 19).

36. The task for the ET was "to assess compensation by reference to what would have been the situation … and look at what would have been the likely outcome had that been done which ought to have been done" (see **Elkouil**). The ET had correctly approached its task. Specifically, it was not precluded from taking into account steps or actions which it considered the Respondent ought to have taken in order to remedy any material unfairness to the Claimant prior to the date on which he had been dismissed and thus to what the probable impact of such steps would have been. The ET had not erroneously stepped into the shoes of the reasonable employer but had properly considered what the Respondent - this particular employer - would have done (see paragraph 49). That was effectively finding there was a 90% chance that the Claimant would have been dismissed at the time when he was dismissed. That to some extent worked against the Respondent; it could not say that it would have been certain that the Claimant would have been dismissed by some particular future date.

37. There were a number of different approaches open to the ET (see **Software 2000**) and the one that it chose to accept, a percentage reduction, did not amount to an error of law. There was not requirement under section 123 that, where the unfairness arose from a lack of warning, the ET must project forward and assess a particular period of time for the award of loss.

38. As for the adequacy of the ET's explanation the Respondent says that it must be seen in context. The issue in this case had been all about the earlier failure to address the Claimant's

behaviour. Seeing the finding at paragraph 49 in that context, it was clear there was a 90% likelihood that the Claimant would have been fairly dismissed when he was.

39. On the contributory fault reduction two issues arose. First, whether the ET was entitled to make any reduction to the compensatory award on the basis of the Claimant's contributory fault. Second, if it was, what was the appropriate reduction? On the first point, to the extent that the Claimant's case was that his behaviour was not capable of justifying any reduction, that submission should be rejected. Culpable or blameworthy conduct could encompass that which was bloody-minded or unreasonable in the circumstances (**Nelson**). Here, the fundamental breakdown in the working relationship was not found to be attributable to the Claimant's disposition or personality *per se* but to the manifestation of his personality or disposition in form of improper behaviour, conduct and interactions with his colleagues at work, which had been allowed to be a relevant factor by the EAT in **Bell**. The ET's Reasons demonstrated a proper basis for the finding that this was conduct of a blameworthy or culpable nature.

40. As for the level of any reduction, having regard to the ET's finding (paragraph 49) that the Claimant's conduct was the principal cause of his dismissal but logically not the sole or exclusive cause, the Respondent accepted the reduction should not have been 100%. Although the Respondent considered it clear that the ET must have concluded that the Claimant's conduct was the overwhelming cause and therefore it was open to the ET to make a substantial reduction such as 90%, given the restriction on the EAT's ability to substitute (see **Jafri v Lincoln College** [2014] IRLR 544), the matter would need to be remitted for reconsideration.

41. Turning to the cross-appeal, the ET's decision not to make any reduction to the Claimant's basic award amounted to an error of law. First, because the ET failed to focus

attention on the conduct of the Claimant prior to his dismissal. It was materially influenced by its findings in respect of the Respondent's conduct, in particular the unfair procedure which it had adopted in dismissing the Claimant (see paragraph 50, where the ET expressly referred to the Respondent having "curtailed the internal proceedings and determined to dismiss the Claimant before it went through the formality of a disciplinary hearing"). That approach was contrary to the established principles that the ET ought not to be concerned with the Respondent's conduct when considering the application of section 122(2) of the **Employment Rights Act**; see **Allders International Ltd v Parkins** [1981] IRLR 68, paragraph 14; **Parker Foundry Limited v Slack** [1992] IRLR 11; and **Montracon Ltd v Hardcastle** [2013] UKEAT/0307/12/JOJ. Although the **Allders** case referred to the reduction in a compensatory award, both **Parker Foundry** and **Montracon** referred to the same principle applying to a basic award reduction. In the alternative the ET's failure to make such a reduction was perverse.

42. The second point, and the alternative basis on which the cross-appeal was put, was that, the ET having allowed its reduction of the compensatory award to nil to influence its reasoning on the basic award, any finding in respect of the compensatory award appeal meant that the reasoning in respect of the basic award would need to be revisited in any event.

43. On the question of disposal, applying the guidance in **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763, the right outcome was to remit to the same Employment Judge. In terms of proportionality this Employment Judge was familiar with the evidence, having overseen a three-day Full Merits Hearing and would be best placed to conduct the remitted hearing in the most efficient and cost-effective manner. As for the passage of time, there was no reason to think the Employment Judge would have forgotten the case. There was no suggestion of bias or partiality on this appeal, and this was not a case where the ET had

made a wholly flawed decision or where there was a complete mishandling of the issues. There was no reason to think that the Employment Judge would approach the remitted hearing with any other than judicial objectivity and integrity.

Discussion and Conclusions

44. I start with the general observation that matters of compensation, and reduction in awards made, allow a broad discretion for the ET. That is appropriate as the ET has heard the evidence and made the relevant findings of fact. In particular, where the ET is to award that which it considers just and equitable, there is plainly a significant leeway permitted in terms of how it is to approach that question. An appeal court should be duly reticent about interfering. That said, if there is an error of law, the appeal court is obliged to interfere.

45. On the **Polkey** appeal, I accept the Respondent's general submission that the task for the ET, in assessing what is just and equitable in this regard, is one that permits of a broad discretion, applying common sense, experience and justice. There is no one approach. I also agree that paragraph 20 of the **Elkouil** case helpfully summarises the ET's task as being to "look at what would have been the likely outcome had that been done which ought to have been done". That, however, is not to say what would have been the likely outcome if done by the reasonable employer, allowing for a range of possible outcomes. It has to be what would have been the outcome if that which ought to have been done by this employer, faced with these circumstances, had been done.

46. The Claimant's case, putting it at its highest, requires that the ET must always "start the clock" for **Polkey** purposes at the effective date of termination (save for those cases where the employer discovers something after the dismissal that, had it known of that matter before,

would have provided it with a fair reason for the dismissal). I disagree. That seeks to apply a one size fits all approach which fails to have regard to the justice and equity in a particular case.

47. In my judgment, if one asks what would have happened in this case had that been done which ought to have been done, there are a number of possible answers. One possibility is that the unfairness arose from the fact that the Respondent decided not to give any formal warnings at an earlier stage. Alternatively, when issues were raised formally, the unfairness arose from the fact that, as from mid-October 2012 at least, the Respondent short-circuited the process, reaching the decision that the Claimant should be dismissed without going through the proper process. In the further alternative, even at the disciplinary hearing stage, the Respondent still had a choice but unfairly determined not to give the Claimant the chance to remedy his conduct, continuing to its predetermined decision to dismiss.

48. The Claimant says this is a case where the Respondent made a conscious choice as to the path it chose to follow and thereby denied the Claimant the chance of remedying his behaviour. On this basis, the ET was not permitted to look at what the Respondent (had it been a reasonable employer) might have done prior to the decision to dismiss because this particular employer had already rejected that path.

49. The Claimant's case looks at the question of assessing what would have happened if a fair process had been followed only as at the effective date of termination. Here, however, on the ET's findings, the issue of fairness was not simply what happened on 3 December 2012. It related also to the Respondent's decision-taking at an earlier stage. More particularly, at the point when the Respondent determined to dismiss (which, on the ET's findings of fact was mid-October), the question arises as to what would have happened if the Respondent had not then

acted unfairly in that way but had allowed the Claimant the chance of remedying his behaviour, having been given a formal warning (under a fair process) that he had to do so.

50. The problem that I think arises is in being sure as to whether the Employment Judge turned his mind to what would have happened if that which ought to have been done had been done; whether he considered projecting forward from the remedying of the unfairness, whether that was found to arise as at October 2012 or on 3 December 2012; whether he asked what would then have happened if the Respondent had then carried out a fair process.

51. The ET apparently did not consider that the Respondent could reasonably have taken the view that it was simply futile to warn the Claimant or adopt a fair process (if it had, it would have found the dismissal could have been fair under the exceptional category of case allowed in **Polkey**). Similarly, the ET did not conclude that no different outcome was possible throughout the relevant period from whenever the unfairness first arose (at least mid-October) to the effective date of termination. Even at the effective date of termination the ET allowed for the possibility of a different outcome if the Claimant had been given a formal warning.

52. That being so, what I do not see is the ET's engagement with what would have had to have been done to give rise to a fair process and what would then have occurred. It may not be that the ET necessarily erred in its approach; the difficulty arises from understanding the basis on which the Employment Judge made his finding. On one view, it was 90% certain that a fair process would have led to the Claimant's dismissal on the same date as the effective date of termination. That, however, does not sit easily alongside the finding that, even at the termination date, there was at least a chance the Claimant might have remedied his behaviour under some process, which presumably would have taken some further period of time.

53. The Respondent says that I have to see this matter in context; the issue was all about the earlier failure to address the Claimant's behaviour. That may be one answer, and I allow that it is potentially a permissible conclusion to say that it was 90% likely that the Claimant would have been dismissed in any event on 3 December 2012. On another reading, however, as at the effective date of termination it remained unfair not to have warned the Claimant and permit him the chance to remedy his conduct.

54. Ultimately I am unable to be certain as to the basis on which the Employment Judge reached his conclusion. Specifically, whether he turned his mind to the question as to what would have happened if what ought to have been done had been done at the different points in time in the chronology in this case. The answer to this question might be simply to remit this matter under the **Burns-Barke** procedure. I am, however, not convinced such a course would be sufficient. It may be that the inadequacy of reasoning discloses a failure to ask the right question; a substantive issue rather than simply one of explanation. In any event, as - for reasons given below - I will be remitting this matter to the same Employment Judge, it seems sensible for this question to go back at the same time. It will then be open to the Employment Judge to reach the same conclusion (with fuller explanation) or - if not simply an inadequacy of reasons point but a failure to consider the question as to what would have happened at the particular point in time when the Employment Judge considered the unfairness arose and ought properly to have been remedied - he may reach a different conclusion.

55. On the contributory fault reduction, two issues arise. First, whether the ET was entitled to make any reduction to the compensatory award in respect of the Claimant's contributory conduct. Second, if it was, what was the appropriate level of that reduction.

56. On the first point, I do not accept the Claimant's case, if indeed it goes so high, that his behaviour was not capable of justifying any reduction. On this point, I agree with the Respondent: blameworthy and culpable behaviour can encompass conduct which is bloody-minded or unreasonable in all the circumstances (**Nelson**); the ET was entitled to have regard to the manifestation of the Claimant's personality in this regard (**Bell**) and it plainly did so. The Reasons adequately set out the factors that were influential. It was not a perverse conclusion; the ET was entitled to make some reduction for contributory conduct.

57. As for the amount, it is common ground that the reduction cannot be 100%: on the ET's own findings the Claimant's conduct was not the sole or only cause. It is equally common ground that the precise level of the reduction is for the ET and not for this court.

58. I turn then to the cross-appeal. Again I agree with the Respondent. The Reasons disclose an error on the part of the ET in taking into account the Respondent's conduct, in particular the unfair procedure which it had adopted in dismissing the Claimant. I cannot otherwise see why the ET makes reference to the Respondent's conduct at paragraph 50. That approach was contrary to the established principles laid down in the case-law. Allowing that the language of the two statutory provisions (that for compensatory award and that for basic award) are different (they are referring to different forms of award and loss) and that different reductions may be made under each, the language of the statute makes it clear that the employer's conduct is not a relevant consideration (and see per HHJ Peter Clark in **Montracon**). To the extent, therefore, that the ET took into account that irrelevant factor, that amounts to an error of law.

59. In any event, as the parties agree, the ET's reasoning for making no reduction to the basic award is undermined by the successful appeal on the conceded point that there could not be a

100% reduction to the compensatory award in respect of contributory fault. Once it is allowed that that was not a permissible conclusion, as the Respondent rightly did, the question of the ET's approach to the basic award has to be remitted in any event.

60. I return, then, to the question of disposal. I apply the principles laid down by this court in **Sinclair Roche and Temperley v Heard**. To the extent that I have allowed the appeal on the **Polkey** award - allowing that the error might simply be a matter of inadequacy of explanation or reasoning - it is appropriate that this matter go back to the same Employment Judge. I acknowledge, however, that the fault may be more substantive than that. I accordingly turn to the guidance laid down in **Sinclair Roche and Temperley v Heard**. So doing, I consider it to be proportionate for this matter to go back to the same Employment Judge. The delay has not been so great as to cause me to think that he will have forgotten this case and there has been no suggestion of bias or partiality or that this was a wholly flawed decision. Ultimately the criticisms I have made of the decision relate solely to the points going to remedy, which appear at the end of what I would otherwise assess to be a detailed, careful and balanced Judgment. I have every confidence that the same Employment Judge will be able to approach this matter in a professional fashion on the remitted hearing.

61. I thus allow both the appeal and the cross-appeal on those bases.