Appeal No. UKEAT/0230/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 February 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

PRIME HEALTHCARE UK LTD — APPELLANT

MRS L BROWN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MICHAEL PATARA (Representative)
For the Respondent	MRS LAURA BROWN (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

There appears to have been a substantial irregularity in that the Employment Judge refused to allow a witness called by the Respondent to give evidence, although he could have given highly material evidence.

It is also fairly arguable that the Employment Judge made findings which were not supported by any evidence.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent, as I shall refer to it, Prime Healthcare Ltd, from a Judgment of the Employment Tribunal at Liverpool of 28 December 2012, sent to the parties on 3 January 2013. The Employment Tribunal was presided over by Employment Judge Shotter, who sat alone. She upheld the Claimant's claim for unfair dismissal and awarded the Claimant in all a total of £5,621.27. She also upheld her claim for wrongful dismissal in the sum of £1,314.

2. The matter came before HHJ Richardson on 11 April, who stayed the appeal in order for the Respondent to file an affidavit. That affidavit was in fact provided by Mr Patara, who is the Operations Director of the Claimant.

3. On 11 June 2013 the matter came before me, and I stayed the matter pending an application for a review to the Employment Tribunal. On 25 June the Employment Judge of her own motion directed a reconsideration. On 7 October 2013 HHJ Richardson again stayed the matter pending the completion of the review. The principal issue that has been canvassed, although not the only one, is whether a gentleman, Mr Keith Higgins, should have been allowed to give evidence before the Employment Tribunal in December 2012. He was prevented from giving evidence by the Employment Judge.

4. The Employment Judge did determine there should be a reconsideration to hear the evidence of Mr Higgins. On 24 January it appears that Mr Higgins was either not called to give evidence or was not available, so the hearing was adjourned to 28 April 2014. Mr Patara had

been in touch with Mr Higgins and received a text from him shortly before the hearing, saying that he would not be able to attend.

5. The Employment Tribunal therefore went ahead with its reconsideration without hearing from Mr Higgins and refused to reconsider the Judgment.

The Factual Background

6. I now want to say something about the factual background to this matter. The Claimant, on 27 February 2005, was first employed as a carer in the Respondent's care home, known as Ranelagh Grange in Prescott on Merseyside. She was subsequently promoted to Senior Care Assistant, but after her return from maternity leave, and because of a reduction in the capacity of the home and consequently a need for less staff, she was demoted to being a Care Worker.

7. The Claimant says, and I do not think this is disputed, that another carer was recruited to fill her role, Miss Wendy Green, while she was on maternity leave. As I understand it, Ranelagh Grange cares for elderly patients and, as one would expect, in order to protect the dignity of residents, there is a zero tolerance rule in relation to any form of abuse of or to residents, and staff are required to make an immediate report in the event of any breach of this policy.

8. On or about 9 March 2012 the Respondent's case is that the Claimant had attended hospital with an elderly resident and subsequently a patient (I will not mention the name of the patient or resident) in a confused state became upset. The Claimant maintains she attempted to control her and told her to be quiet. This event was witnessed by a son of the resident and Wendy Green, who was by now a Senior Care Worker, and Donna Rigby, a Care Worker. As I

shall subsequently come to, Miss Green and Miss Rigby maintained that the Claimant had used abusive language to this elderly and confused patient. The Claimant denied this and, as I have said, the Claimant's case was that she simply told her to be quiet. However, there is evidence in the sense of statements from Miss Green and Mr Higgins and from Miss Rigby in the form of letters or statements to the effect that the Claimant, which she of course has always denied, told the resident to shut up.

9. The incident is said to have taken place on 9 March. It was not reported, as it should have been, to management until some days thereafter. There is a letter, which I have at page 75, from Wendy Green. The letter appears to be dated 20 March, and it is in manuscript. It appears from this letter that it may have been known by 20 March that an incident had taken place involving the resident on 9 March but had not been reported. Miss Green reported that while she was on duty, as a Senior Carer, one of the resident's sons had approached her for medication for his mother and to enquire about his mother's upcoming hospital appointment.

10. During this discussion the Claimant came out from the dining room wanting to speak to Mr Higgins. There was at this stage a three-way conversation and another resident, whose name I will not mention, approached the medication room. She was very confused and unsettled. Staff were aware of this. And she was very vocal, shouting "Where will I go? Which way do I go?". She began shouting with increasing vigour, and it is said that the Claimant then walked over to where she was standing and spoke in an intimidating manner. She pointed at her and shouted "Shut up. I am speaking". She said this in a very denigrating tone and manner. This was witnessed by Mr Higgins and another staff member, Donna Rigby, who was able to shepherd the resident away and to calm her down. The resident appeared to have been upset and was in distress.

11. There is no explanation that I know of as to why this matter was not reported promptly, but on 21 March Miss Rigby provided a statement. It was a short statement, and it is in essence saying in four lines what Miss Green had said at rather greater length. She confirmed that the Claimant had said to the resident "Shut up. I'm speaking" in an abrupt tone of voice. It was then that Miss Rigby was able to take the resident, who was a little confused, away. That is not the only evidence that there is. I refer to the evidence now but its timing is a matter of some significance. There is a letter from Mr Higgins dated 30 July. He wrote the letter relating to the incident which occurred in March and which he said was also to:

> **"… support you [Andrew Feeney] in your role as manager of Ranelagh Grange Care Home.**
>
> **My mother had been to a hospital clinic with a [I cannot read this but assume it is a care worker]. On visiting the home Wendy [Green] was telling me the outcome of the visit when we were interrupted by [the Claimant], who had accompanied my mother on the visit.**
>
> **As [the Claimant] was reiterating the information [another] resident was demanding attention. …"**

He describes how the Claimant "in a raised voice, vehemently" told the resident to shut up as she was speaking. He said:

> **"I did not report anything to yourself as I thought the other member of staff who was present would do so. …"**

12. Mr Higgins has also prepared a witness statement. I do not know what the date is of the witness statement, which I have at page 67 of my bundle. It certainly post-dates June or July 2012 and again he confirmed that the Claimant told the resident in a stern, raised voice to shut up and he was shocked by this outburst for which he could see no motive for such strong language:

> **"… This outburst by Laura did shock me, and it had clearly shocked Wendy too from the expression on her face as I looked at her in surprise. I did not feel it necessary to say anything at this time as Donna had arrived from the direction of the dining room and she took [the resident] towards the lounges. [The resident] was visibly distressed by the outburst as she did not say anything in response but was looking around at everyone in what I would describe as a state of shock. …"**

13. That is the state of the evidence. It is right to say, as I have already mentioned, that at all times the Claimant has denied the Respondent's account of what had happened. She does not dispute that the resident interrupted and was displaying what might be described as challenging behaviour. I refer to a document which I have at page 31 entitled "Statement of claim". She confirmed that the resident in question came out of her room looking very confused and agitated, which was unusual for her:

> **"… [The resident] walked up to the Claimant and started hitting the floor, and the Claimant's foot, with her walking stick, repeatedly asking, louder and louder, "Where do I go? Which way do I go?". Keith Higgins mentioned to the Claimant that he could no longer hear her as a result of this disruption. The Claimant calmly but firmly addressed the resident asking her to be patient as she was currently talking to someone. The Claimant raised her voice to be heard by [the resident] but did not shout or talk abruptly to her. The Claimant knew [the resident] well enough even though she did not deal with her on a one-to-one basis and she knew [the resident] could become upset and difficult at times and as such needed careful handling. At no time did either of the Claimant's colleagues intervene or offer to assist by calming [the resident] down or by leading her away to allow the Claimant to continue her conversation with [Mr Higgins]. …"**

14. I mention that because you now have both sides of the evidence as to what happened on 9 March. The Claimant arranged with the son of the other resident to attend hospital, and Wendy Green told off the Claimant for speaking in an inappropriate way in front of a visitor. The Claimant apologised and continued working. There was an unrelated incident that led to the suspension of a Care Worker for abuse and a police investigation.

15. On 20 March Wendy Green reported to Mr Feeney the incident of 9 March. Mr Feeney, whom the Employment Judge said had no knowledge of employment law, probably something that Mr Patara would not dispute, did not explore the reason for the delay in making the report, which was contrary to the Respondent's safeguarding policies, nor is it said to the effect of the delay on the credibility of Miss Green. However, it has to be said that in due course a written warning was issued to Miss Green for failure to following reporting practices.

16. The Claimant was suspended on 20 March. It is therefore apparent that, as at 20 March, the statement and letter from Mr Higgins were not available to Mr Feeney. On 21 March the Claimant was called to an investigating meeting by Mr Feeney. There were two allegations, one of which has not been proceeded with, and I say nothing more about it. But the second related to the verbal abuse of 9 March. Mr Feeney had before him the witness statements or letters from Miss Green and Miss Rigby. The Employment Tribunal (I now refer to paragraph 12) considered that Mr Feeney's investigation was unreasonable and inadequate. The investigation could have been carried out by someone else, Jane Humphries. Jane Humphries, I am told, was either a Senior Care Assistant or perhaps a Deputy Manager at the time.

17. Mr Feeney did not think of this. At no stage during the disciplinary process did Mr Feeney establish the Claimant's length of service with the Respondent. He was unaware she had been continually employed for about seven years with an unblemished record. As a consequence he did not take this into account during his investigations or subsequently. Anyway, the Claimant was suspended on 21 March.

18. A second investigation meeting took place on 28 March. This again was conducted by Mr Feeney. The Claimant denied that she had verbally abused the patient and said she had experienced a personality clash with Wendy Green. She said that before, Mr Feeney had confirmed it was Wendy Green who had raised the complaint.

19. Two "anonymous statements" were produced. I have seen both of those statements. They may not have been signed, but they are certainly not anonymous. I do not know what led the Employment Judge to describe them as anonymous. It is said Mr Feeney did not explore the differences in the evidence given, nor did he investigate the possibility that the allegation

raised by Wendy Green 11 days after the incident was caused by a conflict of personalities and the possibility that Wendy Green wanted to ensure she retained her job within the Respondent, a role she had been recruited for during the Claimant's maternity leave. Again, it seems to me that this may be a counsel of perfection because there does not appear to have been any significant differences in the evidence in relation to the primary matter, and that is whether or not the Claimant had told the resident to shut up in a somewhat aggressive way.

20. The disciplinary hearing then takes place on 15 May. It is said that Mr Feeney continued to treat the witness statement as anonymous. Again, I have some trouble with that because if the witness statements were shown, they clearly identify the persons who made them. The Claimant asked that the witnesses should give evidence at the hearing so she could question them, but Mr Feeney would not agree to this. The Claimant was told that the son of the resident (I think is a mistake. It was not the son of the resident said to have been subjected to the abuse; it was the son of the other resident) had confirmed he had witnessed nothing and did not want to get involved. Mr Feeney gave the resident's son no weight (that is clearly a reference to Mr Higgins' son), which the Claimant believed was unfair at the time as his evidence was in her favour. He had witnessed nothing untoward at the relevant time. I am not altogether sure where that came from. It certainly is not apparent from either the letter that he wrote or the subsequent witness statement. At no stage during the disciplinary process did Mr Feeney establish the Claimant's length of service and was unaware of her seven years' unblemished employment. This was never taken into account during his deliberations as to whom he could believe and in relation to mitigation. Mr Feeney therefore made the decision to dismiss the Claimant for maltreatment of residents in the plural despite there being only one allegation relating to the resident in question.

21. The Claimant appealed. Somewhat surprisingly, the appeal hearing was conducted by Mr Feeney, who dismissed it.

> **"15. … Mr Feeney did not think that it would have been fairer to the claimant for the appeal hearing to have been heard by the next level of management, for example, Mr Patara the operations director [who has appeared today to represent the Respondent, as he had indeed appeared before the Employment Tribunal]. At no stage during the disciplinary process, including appeal stage, did Mr Feeney explore the differences and contradictions between the evidence given by Wendy Green and Donna despite his appreciation that it was an "important" matter. Mr Feeney's understanding of the alleged verbal abuse was general and not specific as he had failed to explore the allegation in detail. Had he accepted Donna's evidence and not that of Wendy Green and taken the mitigation into account, he may not have dismissed the claimant for misconduct. During the relevant period Mr Feeney's mind was closed to any other sanction other than dismissal."**

22. I have already referred to the statement prepared by Donna Rigby. It is very brief, but there is nothing in it that is inconsistent with that of other witnesses and confirms that the Claimant had said to the resident "Shut up. I'm speaking" in an abrupt tone of voice and that the resident in question was a little confused.

The Employment Tribunal Decision

23. I draw attention to paragraphs 3 and 4 of the Decision of the Employment Tribunal. The Tribunal heard evidence from the Claimant. It heard from Mr Feeney, the manager, who confirmed, as a result of low capacity, he had unilaterally reduced the hours of three Care Workers out of 20, including the Claimant. He said he carried out the investigation, disciplinary and the appeal hearing. It is said by the Employment Judge that Mr Feeney refused to answer some of the questions put to him under cross-examination, for example whether or not he consulted with a Senior Carer, Wendy Green. He gave conflicting dates of 22 and 21 March when he spoke with Miss Rigby. Mr Feeney confirmed during cross-examination that mitigation including length of service and clean record was not taken into account and no other sanction was considered.

24. The Claimant gave credible evidence, says the Employment Judge, but Mr Feeney's evidence in relation to what Wendy Green said to him at the supervision meeting was contradictory. In his witness statement he said that the explanation Wendy Green had given was that she thought he was aware of the incident as he had taken the Claimant in for a meeting. In oral evidence under cross-examination Mr Feeney stated that Wendy Green had said that she had not seen him and wanted a physical discussion with him, and it must therefore follow that:

> **"25. … either Wendy Green gave a different and contradictory version to Mr Feeney … or Mr Feeney's evidence today is unreliable on this point. …"**

25. I refer to the decision of the Employment Tribunal further. The Employment Tribunal started *in medias res* in relation to the evidence of Mr Feeney and then went on to the **Burchell** test. I quote from paragraph 5.1, "Has the respondent satisfied the **Burchell** test?" I mention this because it is said that the Employment Judge misdirected herself by suggesting that there was a burden of proof on the Respondent to prove that it had complied with the **Burchell** test, and paragraph 5.1 is consistent with this, although it is not wholly clear.

26. The Employment Judge referred to the facts. I have already referred to the facts. She then went on to refer to the law. She referred to paragraphs 94 and 98 of the **Employment Rights Act**. She referred correctly to **Polkey v A E Dayton Services** [1987] IRLR 503. She then says this:

> **"19. … It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct …"**

27. That is said by the Respondent to be a misdirection bearing in mind there is no longer any burden of proof on the employer to prove these matters. There is now a neutral burden of proof.

28. The Employment Judge concluded there had not been a reasonable investigation. She concluded that one of the reasons there had not been a reasonable investigation is because Mr Feeney had not paid sufficient attention to what was said to be the different and contradictory versions of events given by Wendy Green to him, which he had not explored, and his evidence was unreliable. When he was asked to explain the discrepancy, Mr Feeney stated he was unable to understand why Wendy Green had made the assumption she had and he had concluded that her behaviour was unacceptable and issued her with a written warning. That is in relation to her failure to report. Mr Feeney was unable to explain the impact of Miss Green's contradictory statement and her behaviour of waiting 11 days before the reporting of the alleged incident when the Respondent had a zero tolerance policy and was at the time embroiled in two police and safeguarding investigations into abuse.

29. The Employment Judge concluded that Mr Feeney did not address his mind to the possibility that Miss Green was not telling him the truth about what she had seen and had over exaggerated the incident with the elderly resident for her own ends.

30. At paragraph 26 further reasons are given for not accepting Mr Feeney's evidence on the basis that he explained why he accepted the truth of what Miss Green had said that he trusted Wendy Green "and I trust her judgment". This view was reached despite the fact that Miss Green had less than 12 months' continuity of employment compared to the Claimant's seven years, which Mr Feeney was unaware of and did not take account of, and Mr Feeney had been employed by the Respondent for less than four months himself when he carried out the "so called investigation", which was:

> **"26. … far from objective and did not fall within the band of reasonable responses. For example, at the investigation hearing the claimant raised an issue between Wendy Green and herself which Wendy Green was not questioned about and nor was Wendy Green's evidence tested in any way by Mr Feeney who had accepted it as the truth because he trusted her judgment. Further Mr Feeney sought no explanation from [Miss Rigby] … concerning why she never reported the allegation (thus putting herself in breach of the respondent's**

> **procedure) and only mentioned the alleged incident when it was brought up twelve days later. Mr Feeney's failures were never put right given the fact that he then proceeded to hear the disciplinary and appeal hearing.**

31. The Employment Judge then turned to the part played by Mr Higgins. Mr Higgins was described as an independent third party:

> **"27. … this was valuable evidence which was not explored by Mr Feeney during the investigation process because [Mr Higgins] had said he had not witnessed anything and did not want to get involved. …"**

I, again, am uncertain where this comes from because this is not consistent with either the letter that I have referred to or the statement, nor is there any evidence as to any conversation that Mr Higgins may have had with Mr Feeney or anybody else. If Mr Feeney was aware of Mr Higgins's evidence, Mr Higgins's evidence appears to support the position of Miss Green and Miss Rigby.

> **"Mr Feeney did not address his mind to the impact of Mr Higgins's evidence on that of Wendy Green and Donna and in cross examination this was evidenced by the fact that he failed to understand the point put to him, namely Mr Higgins would have reported any abuse and Mr Higgins would have ensured that the claimant was not to attend hospital with his mother … a second time had he witnessed any of the alleged abuse by the claimant … Finally Mr Feeney did not explore the discrepancies in the evidence between Wendy Green and Donna and also Mr Higgins who said that he had not witnessed anything, which was evidence in favour of the claimant."**

32. The Employment Judge then turned her attention to whether the procedure carried out by the Respondent was fair in that the same person investigated, heard the disciplinary and then the appeal against the decision to dismiss. (I would add, who also was responsible for suspending the Claimant.) This was in breach of the ACAS Code of Practice, and:

> **"28. … The dismissal was unfair procedurally because Mr Feeney investigated; he was the disciplinary officer and the appeals officer. The Tribunal notes that he did not take into account any mitigation, he did not consider any alternative other than dismissal on the basis that the respondent's zero tolerance policy concerning abuse which included a care worker using the words "shut up" to a client would inevitably lead to dismissal without notice on the grounds of gross misconduct. Had the respondent established that the claimant told a client to "shut up" the Tribunal is satisfied on the balance of probabilities that a reasonable employer would not [have] dismissed for gross misconduct, and given all of the facts set out above, the decision to dismiss did not fall within the band of reasonable responses open to a reasonable employer complying with the ACAS Code of Practice."**

33. Again, I pause here to note that it is said that this is an example where the Employment Judge fell into error by substituting her views for those of the Respondent. The Employment Judge found that a dismissal for misconduct was a potentially fair reason. The Claimant had suggested that there was some link between her dismissal and return from maternity leave, but this was not put to Mr Feeney and, although the Employment Tribunal considered Mr Feeney may have been misguided, he had not set out to dismiss the Claimant because her role had been taken over by Wendy Green during the Claimant's maternity leave period:

> **"29. … The Tribunal is satisfied that the claimant was demoted but as Mr Feeney was not the responsible manager at the time this cannot be laid at Mr Feeney's door and it has not been suggested today that Mr Feeney was merely carrying out instructions of those above him so as to engineer the claimant's dismissal in order to save Wendy Green's position."**

34. At paragraph 30 the Employment Judge referred to the:

> **"… "no difference rule" relevant to assessing compensation and set out in … *Polkey v AE Dayton* … the procedural and substantive unfairness in this case goes to the heart of the matter and it is impossible for the Tribunal to reconstruct a fair procedure which would have resulted in the fair dismissal of the claimant and to find otherwise would simply be too speculative and fly in the face of the evidence before it. It is not just and equitable to reduce the claimant's damages under S.123(1) [Employment Rights Act] as it cannot be said that the claimant would have been fairly dismissed at a later date or if a proper procedure had been followed."**

35. The Employment Judge went on to consider contribution under section 123(6) of the **Employment Rights Act** and concluded that:

> **"31. … The investigation and disciplinary procedures carried out on behalf of the respondent did not reveal sufficient evidence by which the Tribunal could conclude that the claimant's conduct, which must be culpable or blameworthy, contributed towards her dismissal and it would not be just and equitable to reduce the claimant's award for the reasons set out above. …"**

36. In conclusion the Employment Judge found the Claimant did not contribute to her own dismissal and was not convinced on the balance of probabilities that, had a fair procedure taken place, the Claimant would still have been dismissed for gross misconduct:

> **"32. … the claimant was unfairly dismissed and her claim for unfair dismissal is well-founded."**

37. The Employment Judge then went on to consider question of remedy, as I have already mentioned, and the total compensation I have already set out above. There was a 25% uplift for failure on the part of the Respondent to comply with ACAS guidelines.

38. At the Employment Tribunal, it is quite clear that Mr Higgins was not allowed to give evidence. Mr Higgins was present. The letter and statement from him were in the bundle. The circumstances as to why he was not allowed to give evidence are unclear, and the Employment Judge has not referred to any reason why he was not allowed to give evidence. It has been suggested that the Employment Judge seems to have taken the view that Mr Higgins should not be allowed to give evidence because the evidence he could give would not be relevant as it had not been relied upon by Mr Feeney in relation to the decision to dismiss. One might have thought that evidence would have been relevant in enabling the Employment Tribunal to assess the credibility of the accounts given by Miss Green and Miss Rigby as compared to that of the Claimant, as well as in considering the question of any **Polkey** reduction.

39. So far as the law is concerned, I have already mentioned the Employment Judge considered the relevant statutory provisions. She referred to the **Burchell** test and range of reasonable responses, although there appears to have been a misdirection as to the burden of proof.

40. The Employment Judge, as I have mentioned, concluded that the investigation was not reasonable for the reasons I have given. The Employment Judge was critical of Mr Feeney's participation in all stages of the dismissal. I have the decision of the Employment Judge in relation to reconsideration. It is not at all clear to me why it is that the Employment Judge decided to reconsider the case at all. She intended to consider the evidence of Mr Higgins, but

she does not say why she thought it was right to hear his evidence when she had excluded it and indeed apparently had excluded him from the hearing on the first occasion. She records that the case was listed on 24 January, and Mr Higgins was unable to attend or did not attend, and it was then set down on 24 April giving Mr Patara seven days to apply for a further adjournment and making Mr Higgins available to give evidence.

41. On the day of the hearing, at 9.11 in the morning, Mr Patara wrote to the Tribunal, saying he had been contacted by Mr Higgins the previous night saying he would not be attending (I am told by Mr Patara that he was contacted by text) and also that Mr Patara would not be attending, asking that the hearing be held in his absence. It does appear that Mr Patara did not attend. The Employment Judge then correctly referred herself to the jurisdiction of an Employment Tribunal to reconsider a Judgment when considered necessary in the interests of justice.

42. The Employment Tribunal then went on to say this:

> **"5. In the original promulgated Judgment the Tribunal found that the claimant had not to any extent contributed to her dismissal, and following this reconsideration there is no satisfactory evidence before the Tribunal that the claimant was culpable and as a result the Basic and/or Compensatory Award should not be reduced. In short, the Tribunal did not find that the claimant had verbally abused the elderly resident (who for the avoidance of doubt was <u>not</u> the mother of Mr Higgins) and on the evidence before it the Tribunal did not find that the claimant had told the elderly resident to "shut up" as alleged by the respondent. …" (Tribunal's emphasis)**

43. If in fact it be the case that the Employment Judge declined to allow Mr Higgins to give evidence on the first occasion because that evidence was not available to Mr Feeney, it seems to me to fly in the face of fairness that she should then go on to make a finding as to the precise matter that Mr Higgins would have dealt with in his evidence, namely what occurred as between the Claimant and the elderly resident. The Tribunal said it had made a finding:

> **"… that the Claimant had attempted to control the resident and told her to be quiet. This was not verbal abuse and did not amount to blameworthy conduct on the part of the claimant.**
>
> **6. The Tribunal considered the written evidence of Mr Higgins which it dealt with in the Judgment and Reasons. As Mr Higgins has not given oral evidence and as the written**

> **evidence is disputed by the claimant, and she was unable to cross examine Mr Higgins and test that evidence, the Tribunal has given the written statement of Mr Higgins no weight. …"**

44. This is of course at the second hearing, but it does not explain why the Employment Judge refused to allow him to give evidence the first time round. The Employment Judge does not refer to Mr Higgins' evidence in any detail in either the first or the second Judgment. Based on those findings the Employment Judge went on to say:

> **"… There was no conduct of the claimant before the dismissal such that it would be just and equitable to reduce the basic and/or compensatory. In arriving in its finding that the claimant's conduct was not blameworthy, the Tribunal focussed on what the claimant did, which is a different issue than the one considered when looking at the unfair dismissal complaint which focuses on employer's reasons for the decision to dismiss. In considering contributory fault, the Tribunal has not taken into account the respondent's assessment of the claimant's act but concentrated on what the claimant actually did on 9 March 2012."**

45. Finally, paragraph 7 of the Judgment sets out the Tribunal's reasoning in relation to the "no difference rule" set out in **Polkey**:

> **"… and there is no evidence before the Tribunal enabling it to reconstruct a fair procedure which would have resulted in the fair dismissal of the claimant."**

Again, I am not sure that is the correct approach.

The Claimant's Case

46. The Notice of Appeal says that the Judgment of the Employment Tribunal was perverse. It is said the Employment Judge began the hearing by saying the Respondent must learn lessons. This is said to have been acknowledged in an e-mail from the Claimant's representative, but I have not seen any such e-mail and no such e-mail is in my bundle. In any event the Employment Judge denied having said that. Complaint is made by Mr Patara of documents being shown to the Employment Judge by the Claimant which he never saw. The Employment Judge denies that this happened. He complains, does Mr Patara, of the excessive cross-examination of the Respondent's witnesses. Again, the only witness was of course Mr

Feeney. This is denied by the Employment Judge. It is said that she curtailed the Respondent's cross-examination of the Claimant because he was asking leading questions. This again is disputed by the Employment Judge. It is said that the Employment Judge nevertheless rigorously cross-examined Mr Feeney, something again she denies. She also denied that her tone and demeanour was hostile.

47. Mr Patara has stressed that the Employment Tribunal ignored the evidence of Mr Higgins and would not allow him to be heard. No reasons are given by the Employment Judge for not allowing Mr Higgins to be heard. He disputes the Employment Judge's account of Mr Feeney's evidence and whether Miss Green was hired as a replacement for the Claimant during maternity leave. He does not know where that came from. I have seen nothing in the documents that were before the Employment Judge that would make that out.

48. He then refers to the burden of proof point, which I have already touched on, and the fact that the Employment Judge, in his submission, was substituting her view of what was proper in relation to the range of reasonable responses. He submitted that, contrary to the view of the Employment Tribunal, there were no material differences between what Miss Rigby and Miss Green had said.

The Respondent's Case

49. In her original Response Mrs Brown acknowledged that Mr Higgins was turned away. She says this is because his evidence was not relied on by Mr Feeney. If that is the case, it is no answer because it was clearly material to questions of **Polkey**, contribution and credit. She also submits that, as Mr Higgins is no longer available (Mr Patara has rather lost touch with him), it is pointless having a further hearing. That, it seems to me, is not something I can determine

now. If this decision is wrong, I have to set it aside, and then it is a matter for Mr Patara as to what evidence he may be able to produce second time round. It is also said by Mrs Brown that the evidence of her abusing the patient is unlikely to be true. The officers of the Care Quality Commission were in the building and could easily have been called into the office and complaint made straightaway, but nothing happened for nine days. She also says that she had known Mr Higgins for seven years, and if Mr Higgins had seen something untoward, she knows him sufficiently well to be able to say with confidence he would have gone straightaway to Mr Feeney.

50. It is said that Mr Feeney had told the Employment Judge that he had no evidence from Mr Higgins. That may be, but it certainly was not the case at the time matters got to the Employment Tribunal when there are two documents from him. The Employment Judge apparently took the view that the letter, with the information in it, for which Mr Higgins had been spoken to, could not be relevant because it was dated 30 July and the Claimant had been dismissed on 15 May. She also told me that Mr Patara had written to the Employment Tribunal saying he did not want to give evidence himself, and it is said the Employment Judge accordingly would not allow him to ask any questions. If that is right, it suggests a further material irregularity, but Mr Patara does not recall that having happened and therefore I take no account of it.

Conclusions

51. My conclusions are as follows. What happened in this Employment Tribunal is far from satisfactory. Partly, it is completely unclear what happened, and the Employment Judge has given no explanation as to why she prevented Mr Higgins giving evidence. If it was for the reasons that have been explained to me by Mrs Brown (those reasons are inadequate because

his evidence in relation to testing the credibility of the other two witnesses who did give evidence, Miss Rigby and Miss Green, and the account of the Claimant), it would have been relevant. It would also have been relevant to determine whether there should have been any deductions under the principle of the **Polkey** case or by way of contribution.

52. I also have some difficulty in understanding the contradictions that the Employment Judge has seen between the evidence of Donna Rigby and the evidence of Miss Green.

53. So far as the other complaints are concerned, it should be borne in mind that the Employment Appeal Tribunal was essentially here to deal with issues of law and not issues of fact. So far as the assertion is made that the Employment Judge got the facts wrong or that her decision is perverse, the Respondent comes nowhere near the very high standard required of mounting an appeal on the grounds of perversity.

54. So far as the other complaints are made about the conduct of the Employment Judge, in the absence of some further evidence, it is quite impossible for the Claimant to prove these matters in the light of what the Employment Judge has said. I consider, however, the position in relation to preventing Mr Higgins giving evidence was both unfair and wrong. The evidence was relevant, and it is impossible to say that it was not relevant to the findings which the Employment Judge later went on to make in relation to the evidence of 9 March as well as to the issues of deductions. The fact that Mr Higgins was not called was no reason to exclude his evidence from consideration. I also consider that the Employment Judge has fallen into error in placing the burden of proof on the Respondent to prove that it had complied with the various **Burchell** steps and that the dismissal was fair. In fact there is now a neutral burden. The fact that the Respondent has lost touch with Mr Higgins, bearing in mind such a substantial delay, is

not unsurprising. It is not, in my opinion, a reason for refusing to allow the appeal. I am satisfied, for the reasons that I have given, that this is a case where procedural impropriety has caused substantial unfairness. I also have had regard to the misdirection as supporting that conclusion.

55. In those circumstances I propose to allow the appeal and I will remit the matter for hearing before a fresh Employment Tribunal. It should not be heard by Employment Judge Shotter.