Appeal No. UKEATS/0033/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 10 December 2013

Before

THE HONOURABLE LADY STACEY

MR P PAGLIARI

MRS G SMITH

SWANSTON NEW GOLF CLUB LTD — APPELLANT

MR JOHN GALLAGHER (SENIOR) — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS ALICE STOBART (Advocate) Instructed by: Absolutely HR Ltd 16 Society Road South Queensferry EH30 9RX
For the Respondent	MR RUSSELL BRADLEY (Advocate) Instructed by: HBJ Gateley Exchange Tower 19 Canning Street Edinburgh EH3 8EH

SUMMARY

UNFAIR DISMISSAL – Polkey deduction

The Appellant employed the Respondent as course manager and head green keeper until May 2012. The Respondent was suspended by the Appellant on 8 May 2012. Disciplinary procedure followed including a disciplinary hearing and an appeal. On 3 July 2012 the Respondent was told that his appeal had not succeeded. The Respondent lodged a claim of unfair dismissal which was successful. The Employment Tribunal found that no reduction should be made for the chance that the Respondent might have been dismissed fairly (**Polkey**). It also found that the Respondent had contributed to his own dismissal and that it would be just and equitable to make a deduction of 33% from his compensatory award. The Appellant argued that a **Polkey** reduction should have been made and that the deduction in respect of contribution was too low. **Held**: the ET explained why it made no reduction under **Polkey** and did not err in law. The matter of the percentage of reduction in respect of contribution was a matter for the Tribunal at first instance and was adequately explained by the judgment. Appeal dismissed.

THE HONOURABLE LADY STACEY

Introduction

1. We shall refer to the parties as the Respondent and the Claimant, as they were in the Tribunal below. This is an appeal about unfair dismissal in which the Employment Tribunal found that the dismissal had been unfair. It declined to make any reduction under the principle found in the case of **Polkey**, and it deducted 33% from the compensatory award, having found that the Claimant contributed to his dismissal to the extent of one third. The appeal is by the Respondent, against the lack of a reduction under **Polkey**, and against the amount of the reduction in respect of contribution. The finding of unfair dismissal is accepted.

2. The Claimant was employed as course manager and head green keeper at the golf club run by the Respondent. The club has approximately 1000 members and playing and general management matters were handled at the relevant time by Mr McClung, with the authority of the club committee. Mr McClung is a part-time employee of the Respondent. John Gallagher Jr, the son of the Claimant, was at the time the golf professional at the club.

3. The Claimant's employment began on 1 April 2007. It ended on 14 May 2012 when he was dismissed for gross misconduct. An appeal followed, which was unsuccessful. It is necessary to narrate an outline of the circumstances of his dismissal; while the unfairness of the dismissal is no longer in contention, any reductions from compensation require to be based on the evidence relating to the facts of the dismissal.

4. The events which led to the disciplinary action against the Claimant were found by the ET to have come to light towards the end of March 2012 when Mr Ellis, a member of the club, made a verbal complaint to Mr McClung about the actions of the Claimant towards him. The complaint was that the Claimant had spoken to Mr Ellis in a very belittling fashion. The

Claimant told Mr Ellis not to use a particular swing on the chipping green for fear of damaging the turf. Mr Ellis felt that the Claimant made a slanderous comment which he found very offensive. He said that he felt bullied.

5. Mr McClung investigated the complaint by speaking to the Claimant who denied that he had been aggressive in his approach but admitted that he had spoken to Mr Ellis due to potential damage to the chipping green. The Claimant's version of events was supported by another of the green keeping staff. A further complaint was submitted by Mr Ellis which alleged that he had had an altercation with John Gallagher Jr, the Claimant's son and the professional golfer at the club.

6. Following the complaint by Mr Ellis, Mr McClung was concerned that a number of incidents had occurred in relation to the Claimant and to his son. Consequently he spoke to John Gallagher Jr and told him that when it came to the golf club he should not become involved in arguments with the members. As a result of that conversation Mr Gallagher Jr advised Mr McClung that there had been a complaint made to the Procurator Fiscal about an incident at Hilton Park Golf Club, Milngavie, Glasgow, in which he had reported that he had been assaulted in the car park. Mr Gallagher Jr was concerned that he had not heard back from the Procurator Fiscal despite the incident having happened about a year before. Mr McClung decided to investigate the matter.

7. There had been an Optical Express Tour (a competition in which professional golfers, including the Claimant's son, played) held at Hilton Park in May 2011. Mr McClung made enquiries of officials of the tour and was told that there had been two disciplinary hearings concerning something that had happened at the tour. Mr McClung obtained the minutes of the disciplinary hearings and found that one related to potential disciplinary action against

Mr Gallagher Jr as a playing member of the tour and the other to potential disciplinary action against Mr Zack Saltman, another playing member of the tour. Mr McClung obtained information from a Ms Parker, a representative of Optical Express. She told him that as a result of an incident at the tour, Zack Saltman and John Gallagher Jr were each suspended for one week. It had been difficult to determine who instigated the trouble. The players were punished for unsportsmanlike conduct, for using inappropriate language. Ms Parker said that she was not aware of any official action being taken against Mr Gallagher senior. She noted that he was not a player in the tournament and so Optical Express did not have any involvement with him. She did however indicate that his name had been mentioned and others were going to investigate the allegations against him.

8. Mr McClung had spoken on a number of occasions to the Claimant telling him that he should not approach members on the golf course at Swanston to criticise them for their conduct but instead should draw any concerns he had to Mr McClung's attention. He now had been given information which might indicate that the Claimant had been involved in some sort of altercation at another club. He read the minutes of both hearings and was concerned that the Claimant was named as having been involved in the events on 26 May 2011 at Hilton Park Golf Club. The Claimant's involvement was described thus: –

> **"ZS then claimed during the last few holes of his game, he noticed the father of J G and another 'intimidating guy' appeared at the side of the course. ZS claimed ES told him just to concentrate on the hole. ZS claimed he was approached as he finished the 16th hole by the father of JG while the 'intimidating guy' stayed seated on a bench and called to ES 'hey big man can I have a word.' When ES complied ZS claims the father of JG asked 'what happened in the car park, what did you start?' And that ES replied 'ask Lee Harper (LH an OEPGT member) who started it.' JS (Jack Saltman, father of Zack and Eliot Saltman) wished it to be noted that this alleged altercation was taking place during play, on the course. ZS continued that ES stated that he did not want to know and the father of JG replied 'no one even likes you (ES)'**
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> **JS then claimed the father of JG apologised to the playing partners of ZS.**
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> **JS mentioned that this incident was reported to NSS (Nigel Scott Smith, the co-director of the Optical Express Tour) 'and what was being done about that?'**
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> **AT reiterated that this incident was being investigated as a whole together with the car park incident."**

9. By reading the minutes Mr McClung became aware that it was alleged that the Claimant had gone to Hilton Park and had walked onto the golf course in the middle of a tournament. He found that very disturbing. He had previously been aware of something happening at Hilton Park Golf Club in May 2011. On 26 May 2011 the Claimant had received a phone call from his son in which he was told details of a confrontation which had taken place with Eliot Saltman in the car park of the golf club that morning. The Claimant telephoned Mr McClung and advised him that he needed to take time off that day to deal with a personal or family matter. Mr McClung assumed that the Claimant required time to go and attend to his wife who was very ill at the time (and who died within a few weeks of this incident). Mr McClung did not ask any details and agreed to the request. On the next day, 27 May 2011 the Claimant attended work as normal. He told Mr McClung that he had travelled to Hilton Park the previous day, taking Mr Doig, his friend, for support and that he had gone to support his son after hearing about an altercation with the Saltman family. Mr McClung was at that point sympathetic to the Claimant's wish to support his son, as Mr McClung believed that John Gallagher Jr had had to put up with a lot of "harassment" from the Saltman family over a period of years.

10. Thus Mr McClung had known for approximately one year that the Claimant had gone to Hilton Park Golf Club to support his son in connection with some altercation that his son had described to him involving the Saltman family. Not only did he have no problem with that, he expressed sympathy to the Claimant. He did not know that the Claimant had gone on to the golf course and had some contact with the Saltman family while play was in process. Being concerned about what he was told in May 2012, Mr McClung contacted the Respondent's Human Resources Consultant, Mr Andrew Bourke, and asked what he should do. Mr Bourke told him that he had to put the allegations to the Claimant to answer and prepared a letter which he gave to Mr McClung on 8 May 2012. Mr McClung gave the letter to the Claimant. The

terms of the letter are set out by the ET; it is not necessary to quote all of it. The letter told the Claimant that he was being suspended pending an investigation. It said that a matter had come to light in relation to May 2011 when the Claimant left his employment having asked for permission to deal with a family matter. The employer thought that the matter related to the health of a family member. The employer now believed that instead, the Claimant removed himself from work, drove to pick up "a person or persons described as 'like bouncers' " and drove to Hilton Park Golf Course in Glasgow. The employer was said to believe that that the Claimant had set out to intimidate the other golfer playing on that day, Zack Saltman. It was acknowledged that the Claimant had subsequently reported to the employer that he did leave to visit Hilton Park, but it was noted that he did not report the fact that his son was banned from one event for his part in "this incident". It was noted that the Claimant did not report that criminal charges were raised by John Gallagher Jr nor did he report that the Claimant himself had been banned from attending the tour if his son was playing in an event. It is necessary to quote the following part of the letter: –

> **"This is classed as gross misconduct on the following basis:**
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> **For your excuse in leaving on the day in question – offence of dishonesty. You knew the true reason for your request to leave. You did not report this to your direct manager, Colin McClung. It is believed that if you had made the request and the reason for this is known, then the request would have been refused. Instead it is alleged that you made the request in such a way that you knew the request would be granted for your absence. You were not docked any pay or hours for this, so in effect at the time and date of the incident at Hilton Park it is held that you were still in effect working and that this was during normal working hours. It is also believed that you were still wearing Swanston working clothes as well.**
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> **The incident at Hilton Park itself – violent dangerous or intimidatory conduct. The reports from the Optical Express Tour, from the evidence they gathered and from the Disciplinary Hearing instigated are quite detailed and clear in their evidence. From this, it is alleged that you deliberately sought to provoke further and intimidate one Elliot Saltman and his younger brother Zack Saltman.**
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> **The incident at Hilton Park – Gross neglect or negligence, where results are potentially serious and might reasonably have been foreseen. You should have been aware, of the issues that your presence could have especially given that the press are present on the Optical Express Tour and the knowledge that the parties have in relation to your family and the Saltman family. As such, it is alleged that you did not hold yourself to the standards necessary in relation to what is required of an employee, especially one in which it may well not be known to third parties or the press as to which status you are present at Hilton Park as. Are you present as John Gallagher helping your son, or are you there as a fellow Swanston employee (which your son was at the time). Especially in this is the context of your work attire.**
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> **The incident at Hilton Park – Conduct which may reasonably be expected to result in damage to the Company image. It is believed that you have now been banned from attending any of**

the events on the Optical Express Tour. This is believed to be detrimental to the company image. You have we believe been banned from supporting your son, who at the time of the incident was a Swanston employee. It is known by the Optical Express Tour that your son was playing on behalf of Swanston and that you were at Hilton Park in behalf of your son. It is believed that you set out with the purpose of intimidation of a fellow member of the Tour, (Zack Saltman) as you stopped first on your way to Glasgow to pick up several, (we believe) friends who we believe are intended to deliberately intimidate and put off a member of the tour. This is an incident, which took place. This much at least is the truth. This severely contravenes the rules of golf, the rules of fair play in golf and all and any fair play standards. If it is not possible to distinguish between you the person/individual and you the person who is wearing (we believe) work branded clothing and supposedly supporting your son. In that light it is not (we believe) possible to have others who were present distinguish between the two. Therefore, we believe that your actions do not reflect well on your employer and that is would be difficult for others to distinguish between the two.

Should any of these charges of Gross Misconduct be proven against you, then you may be disciplined and dismissed which can be without notice."

11. Some of the information in the letter had been obtained by a conversation between either Mr Bourke or Mr McClung and the Saltman brothers. The ET found that the source of some of the information was not clear, for example that the Claimant was wearing work clothes.

12. The Claimant opened the envelope and read it. He became angry. He suggested to Mr McClung that if he wanted to get rid of him, he should make an offer and do so. He went on to say that he "felt sorry" for Mr McClung and his family in that Mr McClung would clearly not defend his family if they felt intimidated, unlike the Claimant.

13. On 8 May the Claimant sent an email from his son's email address to Mr Bourke asking for information including a copy of the evidence to be used against him as proof and a copy of all personal statements or letters gathered during the misconduct investigation. He also sought a copy of the "recent report which the company has been made aware of" referred to in the letter of suspension and a copy of his HR file. Mr Bourke replied 2 days later giving no further information.

14. The disciplinary hearing took place on 14 May 2012. Mr Bourke was in the chair and Mr Thomson, a member of the committee was in attendance to keep notes. At the outset of the

hearing the Claimant read a written statement which he had prepared. The only information which he had had provided to him by the Respondents were the two sets of minutes from the disciplinary hearings by the tour. He said that he had phoned his friend Mr Doig to ask for directions to get to Hilton Park and Mr Doig had offered to drive him there. When they got to Hilton Park they went on to the golf course looking for John Gallagher Jr. He claimed that while walking on the course they came across Elliott Saltman who was caddying for his brother Zack Saltman. The Claimant said that he asked casually what had happened earlier in the day. He could not make out the reply. He stated that he had not been in Swanston uniform and that he was not involved in any incident at Hilton Park that day and had not been banned from attending the tour. He denied that he had been guilty of violent dangerous or intimidatory conduct. He described Mr Doig as 6'3" and 20+ stone, and said he could easily be described as "cuddly". The Claimant produced a letter from an official of Optical Express which stated that John Gallagher Jr and Zack Saltman were the only individuals to receive any ban.

15. Following the disciplinary hearing Mr Bourke wrote to the Claimant to set out the Respondent's initial decision, by letter dated 17 May 2012. Mr Bourke had asked Mr McClung to make further enquiries. In the letter, Mr Bourke said that he considered the Claimant's statements to be "incongruous" when he said that he always wanted to support his children but did not know the way to Hilton Park. Mr Bourke explained that the Respondents had spoken to "Lloyd Saltman"; Lloyd Saltman is the third of the Saltman Bros. As a matter of fact Mr McClung had spoken to Jack Saltman who is the father of the 3 brothers in order to seek clarification. Mr Bourke recorded that Mr Saltman had said that

> **"Zack and Elliot told him today that John Gallagher senior was seen to walk the length of the 16th hole at Hilton Park golf course. It appeared obvious to Zack and Elliot (Saltman) that John Gallagher senior was looking for them and for an appropriate time to approach them. He (John Gallagher Senior) was then seen sitting at the back of the 17th tee from where he made his move to speak with Elliot."**

In the letter Mr Bourke then noted that the Claimant was aware that he had to dress in a particular manner due to the prestigious nature of Hilton Park golf club and Mr Bourke concluded from that that it was difficult to believe that the Claimant knew what clothing to wear on a particular golf course, but did not know where that course was. He then went on to say that disciplinary charges had been brought and proven against John Gallagher Jr and Zack Saltman. Dealing with the question of intimidation, Mr Bourke stated as follows: –

> **"you said at your disciplinary hearing that your statement was a true version of events and that your recollection of events was correct and that the statement from the Saltmans was incorrect in relation to you being intimidating. We have to remind you that in respect of intimidation is not for you to state that you felt you were not being intimidating, but in the eye of the person being intimidated. As far as the statement of the Tour, Zack Saltman stated that he felt intimidated by your presence and that of a person who was described as 'an intimidating guy."**

Mr Bourke summarised his findings as follows

> **"Accordingly in relation to the charges of gross misconduct against you:**
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> **We do not find against you in respect of you wearing Swanston badges clothing. Your statement is accepted.**
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> **We do not find against you for Conduct Which May be Expected to Result in Damage to the Company image, again based on your statement.**
>
> **We do not find against you for gross neglect or negligence, again based on your statement.**
>
> **However, in respect of the other two charges, we do find enough evidence and dispute your statement for your conduct in relation to Dishonesty and Intimidatory Conduct. The reasons for this are set out as follows: –**
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> **It is inconceivable with your knowledge of golf both via your own job and via your stated interest in your son's career that you would not be able to work out your son's start time on the course at Hilton Park and what hole he typically would be on. When you were seen and approached the Saltman's (sic) it was in fact on the 17th tee (the par 3).**
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> **We cannot therefore agree with your statement in respect of not knowing where your son was in the courts, nor that your stated reason for taking your "friend". There has also been a comment made by a 3rd party that states that your "friend" can in no way be described as "cuddly".**
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> **The company therefore upholds the charge against you for dishonesty in respect of you not giving the correct reason for you requesting time off. We believe that at the time of this request, you were aware of the reasons for the request but you did not inform your employer for obvious reasons as to the real reason for your absence request.**
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> **We also believe that you did, either by your presence and questioning of Zack Saltman's caddie (Elliot) or by that of your "friend" being there, that you did set out with the intention of deliberately intimidating the Saltmans. It is not a statement as to the "interpretation" of our version of information, but the simple statement from one of the people present on the 16th tee. Jack Saltman was very clear in his statement which is not open to interpretation as you state…."**

16. The letter indicated that in looking into the incident at Hilton Park and the Claimant's part in it, the Respondent had been forced to look at previous incidents. They requested that he attended a further meeting to discuss the incidents listed below as they could now see a common thread running through behaviour in the last 12 to 18 months. Reference was then made to incidents involving Aaron Ellis and Ross Fergus, two young members of the Respondent's club, which had been the subject of complaints by the members about the behaviour of the Claimant. Mr Bourke then went on to refer to disappointment which the Respondents felt in relation to an independent report on the state and condition of the greens at the club. He stated that the company believes that this strikes at capability and that the company wanted to raise it with the Claimant.

17. The letter was sent to the Claimant by email dated 21 May, to his son's address. The new disciplinary hearing was fixed to take place on 23 May. On 23 May at 0007 hours the Claimant's son sent an email to Mr Bourke in which he stated that he had just logged into his personal email account and found the email dated 21 May. He said that he was currently away from home and had no way of getting the letter to the Claimant. Mr Bourke received that email on 23 May and arranged for a copy of the letter to be prepared and issued to the Claimant, at the golf club, stating that a new hearing would be held on 28 May. The Claimant received that letter, and on 26 May he wrote to the Respondent saying that he did not consider that he had sufficient time in which appear for the new hearing. Mr Bourke received that letter but concluded that as this was the fourth hearing which had been fixed it was unreasonable to postpone and he proceeded to go ahead with the meeting in the Claimant's absence on 28 May.

18. At some time after the disciplinary hearing and before the decision to dismiss was taken, the Respondents obtained a statement from the Saltman brothers in writing. That statement

contained a number of assertions not previously known to the Respondents, including an allegation that the Claimant sat on a bench watching Zack Saltman play his shot at the 17th tee. As he walked down the path with his brother Eliott, the Claimant got off the bench and walked about 20 yards towards him saying "hey big man can I have a word?" According to the statement the brothers stopped and the Claimant came "right up to Eliott's face and he then threatened Eliott". Zack Saltman claimed that he said to him "Is that you threatening my brother." He said that Mr Gallagher continued with more threats and abuse before walking back to the bench where the other man was sitting.

19. The Tribunal found that there was no evidence that the statement was ever disclosed to the Claimant during the disciplinary process.

20. Mr Bourke considered all of the material and prepared a letter outlining the decision which was sent in draft to Mr McClung. The letter stated:

> **"You have not supplied anything in writing to contest the latest facts issued in writing to you by the company. We did not have to take into consideration any of the new matters which have come to light, however we would and do stand behind the facts that we have had to gather as a result of your actions. These further matters came to light based on your initial actions and written statement."**

The letter concluded:

> **"Accordingly you are dismissed for gross misconduct for the reasons stated in your last letter. This is in respect of Dishonesty and Intimidatory Conduct, both based on your conduct during the incidents at Hilton Park in 2011. We believe that there is a clear link to your pattern of intimidation with our members as well, linking back to your actions in Hilton Park."**

Mr McClung received the letter, spoke with the committee, which decided to follow the recommendation of Mr Bourke, and instructed Mr McClung to send the letter.

21. The Claimant submitted an appeal. He said that with regard to the finding of dishonesty, the Respondents had not presented any evidence of dishonesty and there were no grounds on which to uphold the charge. He pointed out that there was reference to a statement by "a third party" about the Claimant's friend who accompanied him but no information about the identity of that third party; that the allegations of dishonesty related to an incident which took place more than a year before, and had been a matter of public record, and that Mr McClung had known shortly after 26 May 2011 why he had taken time off, but had taken no action about that. The Claimant argued that the Respondents had failed to provide any evidence of intimidatory conduct. He questioned the reference made to a report from the Optical Express Tour which he had not seen. He expressed concern that he had not been provided with a statement from Lloyd Saltman, which was referred to in the letter finding him guilty of gross misconduct. He described the new allegations as nothing more than a character assassination and a deliberate attempt by the club to sully his reputation. On the question of his capability he was critical of the Respondent's summary of the report. The Claimant argued that the Respondents failed to follow a fair procedure, failed to carry out a reasonable investigation, provided insufficient evidence to entertain a genuine belief in his guilt and failed to demonstrate reasonable grounds for the findings.

22. The appeal was heard on 25 June 2012, in a hearing chaired by the club vice-captain Mr David Keen. The Claimant was present along with a friend. Mr Bourke was present to take notes. Following the appeal Mr Bourke drafted an outcome letter which was sent to Mr Keen. The committee decided to adopt the terms of the letter and it was sent out with no changes. Reference was made in the letter to a statement taken by Mr McClung from Michael Paterson, one of the playing partners of Zack Saltman. He confirmed that as he and the third member of the playing group, Robert Arnott, walked away from the 17th tee, they looked back and saw

Eliot Saltman talking to a person identified by Mr Arnott as the Claimant, and hearing raised voices.

23. The ET correctly directed themselves on the law by referring to section 98 of the **Employment Right Act 1996** and to a number of well-known cases, including **British Home Stores v Burchell** [1978] IRLR 379, **Iceland Frozen Foods v Jones** [1982] IRLR 439, **ILEA v Gravett** [1988] IRLR 497 **Sainsbury plc v Hitt** [2003] ICR111 and **Quadrant Catering Ltd v Smith** UKEAT /0632/10/RN. They found that the Claimant had been unfairly dismissed. At paragraph 167 the ET found that the Respondents had taken into account the alleged incidents involving Mr Ellis and Mr Fergus when reaching the decision to dismiss. They found that the Respondents were not entitled to take into account any findings in relation to these matters as no formal process had taken place about them and no findings had in fact been made. The ET found therefore that the Respondents had not been able to demonstrate that they were in possession of evidence which would provide reasonable grounds to draw the conclusion that the Claimant had been guilty of gross misconduct in relation to either the alleged dishonesty or the alleged intimidation. The ET went on to consider the Respondents method of investigation. In paragraph 173 they describe it as "piecemeal". After the disciplinary hearing of 14 May the Respondent carried out further investigations including speaking to Jack Saltman and obtaining a statement in writing from the Saltman brothers but none of that was shared with the Claimant before the decision was made about his guilt. At paragraph 177 the ET found that the Respondents were seeking to bolster their finding of guilt in relation to the two charges of gross misconduct by adding in matters which were unrelated to the issues previously considered. The ET found that the Respondent refused the request to put back the hearing from 28 May because they did not think that the Claimant would attend but there was no basis for them to come to that view. The Tribunal found at paragraph 179 that the dismissal process was unfair.

24. The Tribunal then went on to consider remedy. At paragraph 190 they say the following:–

> **"We then considered whether or not a further [having deducted a sum in respect of wages earned elsewhere after dismissal] reduction should be made on the basis that, following *Polkey*, had a fair procedure been followed, the Claimant would nevertheless have been dismissed. In this case, we were of the view that it would not be appropriate to make such a deduction. Given that the failings which the tribunal has identified were not only procedural but substantive, we cannot make a finding to the effect that the Claimant would have been dismissed had a fair procedure been followed. There was considerable information which was not put to the Claimant during the disciplinary process, and a fair procedure would have allowed the Claimant's explanations to be fully taken into account. The tribunal considers it too speculative to suggest that dismissal would have taken place had a fair procedure been followed in this case, and accordingly no deduction is made under this heading."**

25. The ET then turned to contributory conduct. The Tribunal found that the Claimant had not been dishonest in regard to requesting time off and therefore that his conduct in relation to that request was not blameworthy. In contrast it found that with regard to the incident at Hilton Park, the Claimant had been guilty of culpable and blameworthy conduct. It set out, in paragraph 192 in bulleted points, its reasons for so deciding. In essence, it decided that the Claimant was angry when he got a phone call from his son and that he decided to go to the golf club taking with him his friend Mr Doig who was described as "strongly built." The ET did not believe that the Claimant approached Mr Doig simply to get directions. The ET did not believe the Claimant when he suggested that he went onto the golf course looking for his son but came across the Saltmans. Though they do not state it, it is clearly implied by them that the Claimant knew, from his knowledge of golf, that the Saltmans would have been out that day before his son, as their score the day before had been higher than that of his son. Thus he went to the 16th hole where he found the Saltmans. He then interrupted a professional golfer in the course of a round of golf. (The ET found, somewhat oddly, that although he had not previously been disciplined by the Respondents he had been told not to continue his habit of approaching golfers on the course, but on this occasion he did so. It is hard to see that the two situations are similar. On this occasion the Claimant was not attempting to chastise golfers for damaging the course or anything of that sort. He was taking up the cudgels on behalf of his son.) The ET

found that there was insufficient evidence that the Claimant himself had acted in an intimidatory manner but he did take a person of intimidating appearance with him in order to intimidate the Saltmans. The ET found that the Claimant's conduct towards Mr McClung on the next day was unacceptable when he suggested to Mr McClung that he felt sorry for his family as Mr McClung would obviously not protect them. They regarded that as an improper suggestion. They also found it to be indicative of the Claimant's real intention when going to Hilton Park golf club. The ET found that the Claimant therefore knowingly went to Hilton Park golf club with the intention of confronting the Saltmans when accompanied by a friend who had an intimidating appearance. He interrupted a professional round of tournament golf in a way which he knew was unacceptable. They therefore found that the Claimant had contributed to his own dismissal by his own culpable and blameworthy conduct to the extent of one third and ordered that his compensatory award should be reduced by one third. They specify that no reduction should be made in respect of the basic award. They made no award in respect of any breach of the ACAS code of practice.

26. Ms Stobart, counsel for the Respondent, submitted that the ET had erred in law by their failure to speculate as to whether the Claimant would have been dismissed had a fair procedure been followed. Her position was that the ET had a duty to look at the evidence led before them and to decide, with some speculation, had the Respondent carried out a fair procedure what was the chance that the Claimant would have been dismissed in any event. She argued that the ET had held that the reason for dismissal was for misconduct. The ET had felt able, on the evidence led before them, to make a decision that the Claimant's actions had contributed to his dismissal. In doing so, the ET had heard all that the Claimant wished to say about the events at Hilton Park golf club. Thus the ET was in the position of having before it the Claimant's full version of events, which it was accepted the Respondent did not have at the time of dismissal, because the Respondent had not put before the Claimant all of the statements that had been

gathered. Thus the ET had made a decision to the effect that the Claimant had contributed to his own dismissal. It should not therefore have been impossible for the ET to consider the events which might have happened had the Respondent acted fairly in the dismissal. Ms Stobart made reference to the case of **Software 2000 Ltd v Andrew and others** [2007] ICR 825. The Tribunal in that case had found that the exercise of selecting people for redundancy was fundamentally flawed. The ET had declined to speculate and had not made any deduction. The EAT had decided that the appeal by the employer should be allowed and that in most cases while evidence might be insufficient for the Tribunal to decide that on balance of probabilities that an employee would have been fairly dismissed in any event, it may well be sufficient for the ET to conclude that there must have been some realistic chance that he would have been, in which case some assessment had to be made of that risk when calculating the compensation. In that case the EAT remitted the case to the Tribunal to assess that risk, the EAT having found that there was sufficient evidence to engage in the exercise. Counsel referred briefly to the case of **Thorner v Scope** [2007] ICR 236 which she described as another case which showed that the ET should take into account evidence which shows that there was a risk that the Claimant's employment would not continue indefinitely and in such a case should reduce the compensatory award. Counsel submitted that the ET had erred in law by apparently finding that because there was procedural and substantive unfairness there could be no **Polkey** reduction. She made reference to the case of **O'Dea v ISC Chemicals Ltd** [1996] ICR 222 from which she argued that it had been found that it is "not helpful to characterise the defect as procedural or substantive nor should the industrial tribunal be expected to do so."

27. Ms Stobart appreciated that the case of **King v Eaton Ltd** [1988] IRLR 686 was authority for the proposition that the Tribunal is not expected to "embark on a sea of speculation". She argued however that if there is evidence that can be relied on then any distinction between procedural and substantive unfairness should not prevent the Tribunal

considering the evidence and coming to a view. She referred to the case of **Steel Stockholders (Birmingham) Ltd v Kirkwood** [1993] IRLR 515 in which Lord Coulsfield had made reference to the distinction between procedural defects and substantive defects but argued that that distinction had been found by other cases to be less than helpful.

28. Counsel argued that in this case the ET had found that the Claimant did go to Hilton Park golf club taking with him his friend because he knew that his friend had an intimidatory appearance. They also found that he interrupted a golf tournament. They found that he had deliberately sought out the Saltmans on the 16th fairway. The ET had made these judgments by hearing the evidence of the Claimant. It was not therefore speculation to ask the ET to consider what would have happened if the Claimant had had a proper opportunity at the disciplinary hearing or appeal to explain his position. The ET should properly have decided that it was more likely than not that the Respondent would, like the ET, not have accepted the Claimant's version of events in its entirety and would have found that he had deliberately interrupted the tour and had tried, by taking his friend with him, to create an intimidatory atmosphere. Counsel referred to the case of **Fisher v California Cake & Cookie Ltd** [1997] IRLR 212 as authority for the proposition that the statements having been withheld from the employee may not be fatal to a **Polkey** reduction in that the ET is entitled to come to a view as to what would have happened had the employee been furnished with the statements.

29. Counsel argued that the decision by the Tribunal not to speculate was wrong in law but she also argued that their decision was perverse. Counsel's argument was based on the findings made by the ET at paragraphs 158 and 192. The ET found that the actions taken by the Claimant caused the Saltmans to feel intimidated. She submitted that he had therefore intimidated the Saltmans either by being there himself or by causing them to be intimidated by the presence of his friend. Therefore she said that the ET had misdirected itself in not

concluding that the conduct of the Claimant amounted to intimidatory conduct. She submitted that having made the findings that they did, it was perverse of the ET to suggest that it was too speculative to decide that a dismissal would have followed a fair procedure.

30. Counsel went on to address the duty to give reasons for the decision on conduct which contributed to dismissal. She argued that the ET had a duty to give reasons as to why they concluded that the Claimant caused or contributed to his dismissal by a particular percentage, in this case one third. She made reference to the case of **Nairn v Highlands & Islands Fire Brigade** [1989] IRLR 366. In that case, the ET had found that by being convicted of driving with excess alcohol in his blood, the claimant contributed to his dismissal by 25%. The dismissal was found to be unfair and the ET deducted 25% from the compensatory award. The EAT allowed the appeal to the extent that the contributory element was increased to 75%. In the Court of Session, the court held that the EAT had not erred in substituting 75% for 25%. It held that no reasonable tribunal could properly have assessed the appellant's degree of contribution at as low a figure as 25%. The court noted that logically it might be thought that the claimant was 100% to blame for the dismissal, but it decided that because the employee might have been able to persuade his employers to give him another chance, the EAT's conclusion that the contributory element amounted to 75% was reasonable. The Court of Session noted that no explanation or reason of any kind was stated by the tribunal for its assessment of the appellant's contribution at 25%. In the present case, counsel argued that the ET had found that the Claimant was guilty of conduct which had caused or contributed to his dismissal and failed to explain why he was not wholly or largely to blame for his own dismissal. They give no reason why they considered that his contribution was limited to one third. She argued that no Tribunal properly directed themselves on the facts and finding the Claimant guilty of intimidatory conduct could then find that he was only one third to blame for his dismissal.

31. When asked, the submission made by counsel as to the figures that she sought to substitute for those that she attacked was that there should be a reduction of 75% for the **Polkey** reduction and that the amount for the reduction in respect of contribution should be between 50% and 100%. Counsel invited us to substitute own view, on the basis that there was sufficient evidence before us. If we were not with her on that, she sought a remit to the same Tribunal for them to carry out that exercise.

32. The submissions on behalf of the Claimant were to the effect that the ET had done all that was required of it in regard to a **Polkey** deduction. Counsel, Mr Bradley, submitted that there were seven propositions which were relevant, the first 5 coming from the case of **Software 2000**. His propositions where as follows: –

1. The ET has to assess compensation by assessing the loss flowing from the dismissal using common sense experience and its sense of justice.
2. The employer has to adduce evidence on which it wishes to rely but the Tribunal must have regard to all of the evidence in making the assessment, including evidence from the employee.
3. There will be circumstances where the nature of the evidence is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what may have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
4. Whether the position is that no sensible prediction can be made is a matter of impression and judgment for the Tribunal. In reaching that decision the Tribunal must direct itself properly; it must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation even if there are limits to the extent to which it can confidently predict what might have been; and must appreciate

that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

5. An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must intervene if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
6. The Employment Tribunal should not rule out the making of a **Polkey** deduction because it has determined that the dismissal was substantively unfair.
7. **Polkey** deductions and deductions for contributory fault are approached and made on different bases. They do not directly overlap.

33. Counsel drew attention to the case of **Steen v ASP Packaging Ltd**, EAT unreported 17 July 2013. He referred to the judgment of Langstaff P, at paragraph 25, to the following effect: –

> **"… *Polkey* deductions and deductions for contributory fault are approached on different bases. They do not directly overlap. That is because the focus on a *Polkey* deduction is predictive: it is not historical as is the focus on establishing past contributory fault as a matter of fact. Second, *Polkey* focuses upon what the employer would do if acting fairly. Contributory fault is not concerned with the action of the employer but with the past actions of the employee. A finding in respect of *Polkey* thus may be of little assistance in augmenting reasons given by a tribunal in respect of contributory deduction."**

34. Counsel argued that the argument of the Respondent was based on a false premise, namely that the ET had failed or refused to carry out a **Polkey** exercise. He made reference firstly to paragraph 116 of the ET judgment which is in the following terms: –

> **"In the event that the tribunal found that the Claimant was unfairly dismissed, which the Respondents deny, Ms Stobart argued that there should be reductions in compensation on the basis both of *Polkey* and of contributory conduct."**

35. He argued that the Respondent had not put forward any particular evidence nor apparently any percentage that the ET was invited to find. He turned to paragraph 190, which we quote above. He argued that it was obvious from that paragraph that the ET appreciated that it had been invited to consider the **Polkey** deduction and it did so. It considered that it was

> **"too speculative to suggest that dismissal would have taken place had a fair procedure been followed in this case, and accordingly no deduction is made under this heading."**

36. Mr Bradley argued that the ET had done all that was asked of it, that is it had considered the position and had come to the view that it would be too speculative. It was also clear from that paragraph that the ET found that there were both substantive and procedural defects but they did not decide that no deduction could be made because there were substantive defects. He argued that the Respondent's arguments proceeded on an interpretation which was too narrow of the phrase "the Claimant's explanations" in paragraph 192. We understood him to argue that the ET thought that it would be too speculative to decide that the Claimant might have been fairly dismissed because there were explanations which he was not enabled to put before the employer because he did not have all the information which was held against him. Counsel for the Respondent had argued that he had before the ET the explanations which he would have given and they had made their own views known about that when considering a reduction in respect of contribution. Mr Bradley argued that what the ET had before them were explanations about why the Claimant went to Hilton Park, what he did there, and whom he approached. In paragraph 192 the ET had given its views on the Claimant's explanations about these matters. There were other matters however, which ought to be included in the phrase "the Claimant's explanations" in paragraph 190. For example the Claimant might have argued at a fair hearing that the evidence given by the Saltmans was full of contradictions and should not be treated as credible or reliable. He referred to paragraphs 161 to 164 of the ET judgment. In those paragraphs it could be seen that there were differing accounts given in the minutes from

the tour and the statements obtained from the Saltmans. There were contradictions about how many people were said to have accompanied the Claimant and that there had been an allegation made from an unknown source that he was wearing club uniform. These matters had not come up to proof. Mr Bradley argued that these matters would have been aired at any fair hearing and that the outcome of such a fair hearing was extremely hard to predict. He argued that the case of **Fisher** relied on by the Respondent was of no assistance. In it the ET heard evidence from the witness and it found her to be reliable. The ET was therefore able to decide for itself that the Claimant in that case would not have been able to make any difference had he been fully aware of the allegations against him.

37. Mr Bradley argued that the Respondent's arguments did not come up to the high test required for perversity. He made reference to the case of **Yeboah v Crofton** [2002] IRLR 634. He argued that if the Respondent was saying that no ET which made a finding that a deduction should be made in respect of contributory conduct could fail to make a **Polkey** deduction, then he disagreed with that. He said that they do not overlap. He argued that in order to make a deduction the Tribunal had to find what conduct had happened; it had to decide if it was blameworthy; it had to decide if it caused or contributed to the dismissal; it then had to decide to what extent it was just and equitable to reduce the compensation. He explained that his requirement for the question "is the conduct blameworthy" came from the case of **Steen**. He argued that no error in law had been made by the ET, which had carried out the requisite steps. They found that the Claimant had done the things which are set out in the bullet points in paragraph 192. They summarised this in paragraph 193 by finding that the conduct was culpable and blameworthy and that it contributed to the dismissal by at the extent of one third. He made reference to the case of **Nairne** and argued from paragraph 11 of it that there was no error of law committed by the ET. He maintained that the matter was one for the ET, having heard the evidence. In his submission this was not a case in which it was plainly wrong for the

ET to have decided that the contribution was less than one half and to fix it at one third. He argued that there is nothing perverse about it and that there was no overwhelming case made that the ET had reached a decision which no reasonable Tribunal would have reached.

38. Mr Bradley submitted that the appeal should be refused. If not, then it should be remitted to the original Tribunal. He argued that the ET had not heard nearly enough to justify a **Polkey** reduction in any percentage. He made reference to the case of **Steen** and to paragraphs 21 and 22 from which he sought to argue that the EAT would need to spell out its reasons for making a deduction and that it did not have enough information so to do.

Discussion and decision

39. We came to the view that the appeal should be refused. We considered that the ET had been addressed on making a **Polkey** reduction and had considered whether or not it could properly do so. The judgment given by the ET was in some ways helpfully direct and to the point but it could be said that the discussion of whether or not to make such a deduction was sparse. We have come to the view however that it is sufficient. The case of **Software 2000** makes plain that while it is a task that should be undertaken if possible, there will be cases where it is too speculative for any ET to make even a percentage assessment of a chance of a fair dismissal. In the present case, the complaint was of unfair dismissal for misconduct. The ET found that the dismissal had been handled unfairly and that material which was used in the disciplinary process was not given to the Claimant. Further it found that other matters were used to bolster the case against the Claimant. In all of those circumstances it is difficult to assess what were the chances of dismissal if matters were handled fairly. One would have to speculate on what would happen at a hearing in which the bolstering material was absent; and the other material was all notified to the Claimant timeously. That is a more difficult exercise than in a case where the unfair dismissal is due for example to unfair selection for a redundancy

and the evidence shows that all workers were made redundant shortly after the event. While a **Polkey** reduction may be applicable in all types of unfair dismissal cases, it may be that those that are concerned with misconduct or capability dismissal will involve more speculation than some other cases. In the present case, we as an appeal tribunal are obliged to have regard to the decision made by the ET on the degree of speculation required. They had the benefit of hearing the evidence which we do not. We have come to the view that the decision that the degree of speculation was too great is a decision with which we should not interfere.

40. In respect of the deduction for contributory conduct, once again the reasoning of the ET may be described as sparse. It is however always a matter of impression and judgment for the Tribunal at first instance as to the percentage contribution caused by conduct. We accept from Ms Stobart that the classification of something being "wholly or largely" and therefore over 50% the cause of a dismissal, is a reasonable way to consider matters. We do not however for the reasons given above think it correct for us to substitute our judgment on this matter for that of the Tribunal who heard the evidence. If the Tribunal came to the view, as they did, that this was not a case in which the conduct was wholly or largely the reason for dismissal it was then reasonable for them to fix on a figure of less than 50%. They did so and we are not prepared to interfere with that decision. We do not regard it as a figure which is plainly too low, as was the case in the case of **Nairne**. We do not understand that a reason for a one-third deduction be ing based on some degree of calculation or science is a requirement. Rather we understand it to be that the Tribunal has to set out the behaviour which it considered did contribute to the dismissal and to give some indication of its reasoning for coming to its view as to the appropriate deduction. We accept in this case that the reasoning on the appropriate deduction is perhaps very sparse, but we regard it as sufficient. We take the view that it can be inferred from what is written that the ET did not regard it as conduct which contributed wholly or largely to the dismissal. The reason for that is given in the judgment when read as a whole; the

ET took the view that the allegations made which were not proved, the "extraordinary" way in which the investigation was conducted on a piecemeal basis, and the bolstering of the allegations about the events at Hilton Park by the addition of other events which were never put to proof at all, were considered to be part of the reasons for the dismissal.

41. In all the circumstances we do not find any error of law and the appeal is refused.