Appeal No. UKEAT/0409/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 May 2013

Before

HIS HONOUR JUDGE SEROTA QC

MS G MILLS CBE

MRS D M PALMER

AUDERE MEDICAL SERVICES LTD APPELLANT

MR F T SANDERSON RESPONDENT

Transcript of Proceedings

JUDGMENT

AMENDED

APPEARANCES

For the Appellant	MS ALISON FRAZER (of Counsel) Direct Public Access Scheme
For the Respondent	MR MATTHEW JACKSON (Representative) Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU

SUMMARY

UNFAIR DISMISSAL

Contributory fault

Polkey deduction

The Employment Tribunal did not order reductions for **Polkey** on contribution because the dismissal was automatically unfair. Held that such reductions were permissible depending on facts. Case remitted to the same ET.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is the hearing of an appeal by the Claimant from a decision of the Employment Tribunal at Cardiff presided over by Employment Judge Harper who sat with lay members; the decision is dated 22 May of 2012. The Employment Tribunal held that the Claimant had been automatically unfairly dismissed and awarded him compensation in the sum of £20,779.12. It is perhaps worthy of note that prior to the hearing in the Employment Tribunal another Employment Judge, Employment Judge Thomas, on 24 January had ordered the Claimant to pay a deposit of £300 as he considered that his claim had little reasonable chance of success. On 24 July 2012 HHJ McMullen QC referred the matter to a preliminary hearing which came before Slade J and lay members on 7 December of last year. They directed that this matter should proceed to a full hearing and gave permission to amend the Notice of Appeal.

The factual background

2. I take this largely, but not entirely, from the decision of the Employment Tribunal and I go into it only insofar as is necessary to understand the issues raised on this appeal.

3. The Respondent is a company that specialises in decontamination equipment, maintenance and validation. Its largest clients are the National Health Service and, I assume, private hospitals. Services carried out by the Respondent are both on and off site and include both routine and response to emergency engineering expertise on decontamination equipment used in surgery and medical procedures. The Respondent was founded by its two directors in 1999 and has since grown. The Employment Tribunal note that the two directors rightly have much pride in the successful company they have now created which now has some 22 employees, of whom 16 are field based technicians and of whom the Claimant was one.

4. The Claimant's employment began in 2009 and something like 90% of his time was spent on site at the Orthopaedic Centre site at Nuffield Hospital Trust in Oxford testing and repairing equipment. I note that although an independent Trust, the Nuffield Orthopaedic Centre is part of the National Health Service. The Employment Tribunal found that the Claimant was a challenging employee and on occasion was confrontational. I also think it is helpful to mention this at the outset of the Judgment, the Respondent had a whistle-blowing policy which provided that the divulging of information to an outside body without having first raised it internally by an employee might result in disciplinary proceedings.

5. It would seem that the relationship between the Claimant and management at the Nuffield Orthopaedic Centre was not always totally harmonious. The evidence suggests that on or about 13 August 2011 the Claimant attended the site on a Saturday without authorisation to carry out some works and those works may not have been fully documented. One of the directors, Mr Law, had a meeting on 15 September 2011 with Ms McLean who was an officer of the Nuffield NHS Trust. There is a record of what took place at this meeting (albeit it is dated 20 September) from Mr Law and during this meeting Ms McLean raised a number of criticisms of the Claimant; his appearance was described as scruffy and smelly, he used bad language, he had been heard swearing at several of their staff members, including a supervisor known as Caroline. So far as his attitude was concerned he seemed to come and go as he pleased, he would often take personal calls and could be seen using fire escape doors to exit the building. This has caused issues with security with the site and he had been told a couple of times about it. "He blinds with science as to some of the faults and seems to patch things together using some parts he doesn't charge for. He leaves old coffee cups lying around in the plant room". She did not wish to get him into trouble so much, she merely wants weekly's done on a Monday, Wednesday and Friday with minimal disruption and does not mind which Audere it is. This is not the sort of thing that any employer would wish to hear about an employee.

6. One moves ahead to 27 September 2011. An issue arose on that date as a result of a conversation that the Claimant had with an officer of the Respondent Company which led him to believe that he had been instructed through her by one of the directors to overcharge the client. The Employment Tribunal found that he "genuinely" believed that this was the case even though the Employment Tribunal was at pains to point out that there had been no illegality. I quite understand how galling it is for employers to learn that an employee has made a criticism of them whether it be in good faith or not which turns out to be wholly unfounded when such a disclosure can obviously cause irreparable damage.

7. The Respondent Company has as we have said a whistleblowing policy which is set out in the decision of the Employment Tribunal and which I also have in my papers, it reads as follows:

> **"Any employee who divulges information to an outside body or person without having first raised their concerns internally may render themselves subject to disciplinary action."**

8. The Employment Tribunal, in my opinion, correctly observed "the difficulty for the Respondent in this case, …is that we find that the Respondent's whistle-blowing policy attempts to go too far. We find that it purports to override or restrict the statutory provisions and not only does it try to do that, but it tries to impose a sanction for people doing [sic] acting accordingly". The scheme of the whistleblowing provisions in the **Employment Rights Act** is that an employee is protected from suffering any detriment as a result of making a public interest disclosure. So far as concerns these proceedings it is sufficient to note, that in order to be protected for whistleblowing, a disclosure has to be both qualified and protected. A qualifying disclosure means a disclosure of information which in the reasonable belief of the worker making the disclosure tends to show one or more the following and these include that;

a) a criminal offence has been committed, is being committed or is likely to be committed or; b) a person has failed or is failing or is likely to fail to comply with any legal obligation to which it is subject. There is, I believe, no dispute that the disclosure that was in due course made by the Claimant was capable of amounting to a qualifying disclosure.

9. However, in order to be protected it is necessary that the disclosure be addressed through certain channels; you cannot simply broadcast a disclosure of what you perceive to be your employer's misconduct to all and sundry. So far as concerns this case the only ground upon which the Claimant might rely as making his disclosure a qualifying and protected disclosure was to be found in section 43(b) of the Act where disclosure is made, see section 43(d) in the course of obtaining legal advice I do not think I need go further into the Act other than to draw attention to section 43(j) which deals with contractual duties of confidentiality:

> **"Any provision in an agreement to which this section applies is void insofar as its purpose to preclude the worker from making a protected disclosure. The section applies to any agreement between a worker and his employer whether a worker is contract or not, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract."**

10. The provision is clearly at odds with the Respondent's whistleblowing policy and it may well have led to some confusion so far as the Claimant were concerned and as to the relevant legal position.

11. I have mentioned that this issue arose on 27 September. The Claimant, according to the findings of the Employment Tribunal, wished to take some action but did not know precisely who to report the matter to. He therefore contacted the NHS Control Fraud office, he did not disclose his concerns but asked who he should go to and was referred to an organisation known as Public Concern at Work. The Employment Tribunal noted that its website says that it is a legal advice centre for assistance designated by the Solicitors Regulation Authority. No issue

has been taken in this case as to whether Public Concern at Work is a legal advisor and it has been assumed that it was. The Claimant has maintained that all times thereafter he acted strictly in accordance with guidance offered to him by Public Concern at Work.

12. The disclosure relied upon by the Claimant which gave him protection was reporting the perceived fraud to Public Concern at Work. On 15 September 2011 the meeting to which I have already referred to between Mr Law and Ms McLean took place. On 25 September 2011 the Claimant was called by the Respondent to attend a breakdown of a steam generator and it is this incident that led his perception he was instructed to charge for 9 hours work on a job that was only expected to take two hours.

13. The telephone call relating to this took place on 27 September. On 29 September 2011 a letter was drafted but not sent. This letter is to be found in our bundle at volume 2, page 2. The letter is from Mr Law stating that his intention to ask the Claimant to attend an investigatory meeting with Mr Law which might move straight to a disciplinary hearing if the investigation showed he had a case to answer, and the purpose of the meeting was to investigate a number of disciplinary concerns. These included the number of faults on the machines at site, client feedback relating to, poor appearance, misuse of fire doors, arguments with parking staff, use of bad language and machinery not at standards expected. The letter was drafted but it was not sent because at approximately 16:16 the Claimant had sent an email to Mr Gareth Jones complaining about an accusation made suggesting that he had sabotaged a piece of equipment at Oxford by the asking the engineer on site if he had sabotaged the steam generator. He then went on to say:

> **"I do know why are you doing it, it is because I refused to charge a customer 9 hours labour as instructed on Tuesday by the office and I have instructed Nuffield, the contact manager of your accusation."**

14. The Claimant maintained that he had done absolutely nothing wrong but he said he had been in touch with Public Concern at Work and he told them all about it:

> **"And you are forcing employees to commit fraud or you will accuse them of sabotage and I will, if need be, take legal action against you so please be aware this is a formal grievance."**

15. As a result of the receipt of this grievance the letter to which I have referred, which had been drafted, was amended but not in fact sent. Later that day the Claimant sent a further email confirming he had contacted NHS Counter Fraud, again referring to the fact he had been directed to overcharge.

16. The grievance meeting took place on 4 October 2011; we do not have the notes of that grievance meeting. At the meeting, according to the Employment Tribunal, see paragraph 30, the Claimant is said to have told NHS of the allegations concerning the overcharging by mentioning it to the contracts office at the Nuffield. The Claimant's grievance was rejected and the Claimant unsuccessfully appealed. Thereafter the Respondent wrote to the Claimant inviting him to attend a disciplinary hearing; the letter is dated 12 November 2011:

> **"The matters to be discussed, including matters relating to his performance and conduct, poor appearance, the use of fire doors, unfavourable feedback from the client,** [but it continued] **some additional allegations have become known during the period that the disciplinary hearing was postponed. Your client feedback: you give the impression you come and go as you please"**

17. And then this at paragraph 8:

> **"8. Breach of the Public Interest Disclosure Policy, as you admitted in a grievance hearing, that you breached the policy by notifying external bodies of a concern prior to advising Audere.**
>
> **9. You attended Nuffield Hospital on Saturday 13th August and repaired number 1 autoclave, returning on Monday 15th August to complete the work. You did not complete a service report for either visit, nor was this work arranged or authorised by Audere Medical Services Ltd."**

18. The latter allegation, it was said, could constitute gross misconduct. Because of the seriousness of the allegations the Claimant was informed by Mr Milner, the director who wrote the letter, that he was suspended from work with immediate effect.

19. The disciplinary meeting took place on 16 November 2011. After the hearing a letter of dismissal was drafted and then amended. In this letter, which is dated 25 November, and sent by a director, Mr Milner, the Employment Tribunal refers to the breach of the Public Interest Disclosure Policy, the attendance at Nuffield on 13 August and various matters including misuse of fire doors said to have caused issues with site security.

20. The meeting took place on 16 November. The meeting was apparently adjourned and during the adjournment a further meeting took place on 21 November 2011 between Mr Law and Ms McLean. The interview, of which we have the notes, was largely concerned but not entirely, with issues relating to fire doors. Mr Law's notes of either his original or subsequent meeting with Ms McLean were not disclosed to the Claimant although one of the reasons for which he was dismissed was misuse of the fire doors. The Claimant had maintained, contrary to the way in which the complaint against him was first made, that on occasions the fire doors had been left slightly ajar and he was authorised to use the doors in those circumstances. This in fact appears to have been confirmed on 21 November by Ms McLean, the Claimant however was not made aware of this and the information that had been obtained from Ms McLean was relied upon by the Respondent in taking the decision to dismiss Mr Sanderson but he was never supplied with the relevant information.

21. The three principal issues at the disciplinary hearing appear to have been the improper use of fire doors, the irregular and unauthorised attendance on the Saturday and the disclosure by the Claimant to NHS and to Public Concern at Work. The Respondent considered that it

was appropriate to dismiss the Claimant and the letter is dated 25 November 2011 and we have it in our bundle at page 19. I do not propose to go through the whole of that letter but I draw to attention to the following; paragraph 21:

> **"You advised us you contacted Public Concern either 28th or 29th September and had previously advised us you spoke with the NHS Fraud Team."**

22. There is then a reference to the company's whistleblowing policy. The letter also refers to something that had been imparted to the Respondent at its meeting on 21 November 2011 by Ms McLean that the NHS Trust would prefer it if the Claimant did not attend their premises any longer. The Respondent considered that the principal complaints which warranted disciplinary action were the three I have mentioned with the disclosure and use of the fire doors as being, "the most issues". Mr Milner said that he had weighed up the options available; that is the potential sanctions, and bearing in mind Mr Sanderson's previous clean record he had put the clients' health and safety and security at risk and without substance tried to sully the Respondent's reputation and worked on a client site without permission or authorisation. On balance of all the factors, says Mr Milner,

> **"It is evident to me the trust and confidence which should exist between us is irrevocably breached and this would appear to be the case with the client who no longer wishes you to attend their site and this combined [with] the serious breaches of the procedure lead me to conclude I have no other option than to dismiss you summarily. I do not take this decision lightly but after carrying out a thorough and reasonable investigation and reviewing all the information that we believe genuinely and reasonably that you have committed gross misconduct."**

23. The tenor of the letter suggests, with no disrespect to Mr Milner, that he may have had some assistance in its drafting. The Employment Tribunal at paragraph 35 referred to the fact that having seen Ms McLean the Respondent's difficulty is they never gave the Claimant a copy of that interview, they did not reconvene the meeting to enable him to have his say as he surely would have done, therefore a decision was taken by the Respondent to dismiss on that ground; that is the use of the fire door, without giving the Claimant the opportunity fully to

have his say. He had had the opportunity during the hearing to comment generally on that point but if it was felt important enough to see Ms McLean, it was important enough to put the consequence of that interview to the Claimant and this was not done.

24. The Employment Tribunal went on to say that bearing in mind the approach required to be followed as set out in the well known case of **Burchell v British Homes Stores** [1978] IRLR 379, had the case been determined on the separate issue of the unauthorised Saturday attendance the Employment Tribunal would have held that the Respondent had a genuinely held belief and reasonably held after a reasonable investigation the Claimant was there on 13 August, but this is a case not of just one allegation but three allegations for which the Claimant was dismissed.

25. At paragraph 40 the Employment Tribunal find the dismissal was automatically unfair,

> **"because we find the main reason and the background against which he was dismissed was because he had made a qualifying disclosure, he blew the whistle. He blew it to a legal adviser and we do not find that it is appropriate for the company's policy to try to override statute. We would observe that, of course, it cannot do so."**

26. The Employment Tribunal then went on to say at paragraph 42 that the timing of the various allegations made against Claimant was beyond coincidence.

> **"They all arise after the protected qualifying disclosure had been made, as we have already said the disclosures appear to have dated from 27th September and the disciplinary proceedings were put in motion on the 29th. Some of them were issues which relate to an earlier and could have been dealt with earlier; they were all raised after the qualifying disclosure had been made. One of the allegations that he faced, allegation number 4 for which he was dismissed, specifically was because he had contacted Public Concern. This was a qualifying protected disclosure and it was the principal reason why the Claimant was dismissed."**

27. The Employment Tribunal went on to say in the alternative if it was wrong in relation to that it would have to consider whether or not the Claimant was fairly or unfairly dismissed. It

would be impossible to separate the two because that is not how the Respondent approached it. They considered and decided the three issues together. As set out earlier in this Judgment there was a fatal procedural flaw in relation to the way in which the Respondent dealt with the issue of the fire door and subsequent interview and the failure to tell the Claimant about the contents of that interview. Therefore, we would find in the alternative that if this was an ordinary unfair dismissal there was that procedural defect which went to the core of the dismissal. We would therefore find for that reason that if it was ordinary dismissal it was also unfair.

28. The Employment Tribunal then went on to assess compensation, loss of statutory rights, £250, loss of earnings £859.18, loss of future earnings, £10,469.94. The Employment Tribunal was then addressed by Ms Frazer on the issue of contributory fault and also a **Polkey** reduction. The Employment Tribunal said this:

> **"We find it is illogical for us to make any reduction for these two amounts because our finding is one of automatically unfair dismissal. The question of whether any conduct contributed to the dismissal is not appropriate. The main reason that he was dismissed was because he made a protected disclosure, therefore we cannot see that how any *Polkey* or contribution arguments can be mounted. Therefore, we do not make any reduction of the award."**

29. It is conceded by the Respondent that that is a significant misdirection and that the issue of deduction for contributory fault and also on the **Polkey** principle which have to be reconsidered. We were invited to undertake that reconsideration ourselves. It seems to us however that that is a task that really must be left to the Employment Tribunal. The Employment Tribunal, to which in due course we will remit this issue, heard the evidence, we did not, and it is in a far better position than we are to weigh up the various factors based upon the evidence that it heard.

The Decision of the Employment Tribunal

30. We now turn to the decision of the Employment Tribunal. It started by directing itself as to the law; I have already referred to sections 43(a) and 43(b) of the **Employment Rights Act** and I have referred to qualifying disclosures and disclosures to a legal adviser under section 43(d). The Employment Tribunal noted correctly that disclosure to a legal adviser did not have to be in good faith and there were less stringent requirements than under section 43(g) for other disclosures. The Employment Tribunal considered firstly if the disclosure was a qualifying and protected disclosure, it then had to go on to consider whether the principal reason for dismissal was the disclosure. Now, as the disclosure to the NHS Trust would not have been a protected disclosure, the only disclosure that the Claimant could have relied upon as justifying his claim that he had been automatically unfair dismissed was the disclosure to Public Concern at Work.

31. The Employment Tribunal then directed itself in relation to what might be described as ordinary unfair dismissal by reference of the well known cases of **Burchell**, **Sainsbury Supermarkets v Hitt**, **Foley v The Post Office**, **Iceland Frozen Foods v Jones**; it is unnecessary for me to refer further to these because there is no issue as to the accuracy of the self direction.

The Notice of Appeal

32. We now turn to the Notice of Appeal. Ground 1 described as causation asserts that the Employment Tribunal misapplied the test of causation. We were referred by Ms Frazer to the well known authority of **Abernethy v Mott, Hay & Anderson** [1974] ICR 323 CA requiring an Employment Tribunal in considering the reason that a dismissal has taken effect, to have regard for what was in the mind of the Respondent at the time of the dismissal. It is said that the Employment Tribunal failed to have regard to the fact that the dismissal was by reason of

the potential damage that might be caused by the disclosure, risking its connection with its largest, the National Health Service, and the risk to its reputation.

33. It was put by Ms Frazer that the Employment Tribunal had considered the disclosure itself rather than the manner and potential effect of disclosure and the Employment Tribunal therefore without considering the fact that the Respondent, so it was said, was not so much concerned about the disclosure but the manner and potential effect on its business that it was entitled to treat as misconduct and as a breach of trust and confidence. It was said that in the finding to which we had referred that there was no coincidence in the disciplinary proceedings following very quickly after the disclosure having come to light that the disciplinary proceedings were a sham. We are unable to agree that that is what the Employment Tribunal found, it is more that the making of the allegations prompted the Claimant to take action that already appears to have been in contemplation.

34. Ms Frazer then submitted it was perverse of the Employment Tribunal to find that the principal reason for the dismissal was making the protected disclosure, not to the National Health Service, NHS Control Fraud, but in fact Public Concern at Work. Ms Frazer pointed to the fact that the Claimant was dismissed explicitly for the three reasons to which we have referred and the Employment Tribunal gave no reason for finding that the principal reason for the dismissal was the disclosure to Public Concern at Work. It is said, therefore, that the decision of the Employment Tribunal was perverse. Certainly the Employment Tribunal could have set out its reasoning in somewhat greater detail but reading the Judgment as a whole, and having regard to the correspondence that was shown to the Employment Tribunal and which we have seen, it is quite clear that there was material that justified the Employment Tribunal in concluding that the disclosures to Public Concern at Work were indeed the principal reason. This is what the Employment Tribunal has explicitly stated on more than one occasion. We do

not consider that the allegation that the finding was somehow perverse, gets anywhere near reaching the very high threshold, the "overwhelming case" referred to by the Court of Appeal in **Yeboah v Crofton** that is necessary for mounting a successful appeal on the grounds of perversity.

35. The second ground of appeal related to the fairness issue; that is the failure of the Respondent to provide information as to meetings with Ms McLean to the Claimant before his dismissal. It was submitted it could not be said to be a core part of the dismissal allegations or substantially unfair and Ms Frazer again drew our attention to paragraph 35, which we have already referred to, and paragraph 43 to which we have also already gone to. The defect in paragraph 53 related to one of the allegations, that is the allegation in particular about the Saturday working and the fire door issue. The fact that these defects went to the core of the dismissal does support the case that dismissal was not principally on the basis of the protected disclosure. Mr Jackson, who appeared on behalf of the Claimant submitted that in order to show that the Employment Tribunal's assessment of the fairness of the procedure was flawed the Respondent would have to dislodge that finding which, as it was a finding of fact made on the weighing up of the evidence, would be extremely difficult; we respectfully agree with that submission.

36. The Claimant largely supported the Employment Tribunal, the Claimant conceded in correspondence ground 4 relating to the contributory fault and **Polkey** deductions, but it was submitted that it would not be appropriate for us to remit this matter to the Employment Tribunal because the Claimant's loss was not caused by his dismissal but by his own conduct. If we were wrong about that Mr Jackson submitted this matter should be remitted to the same Employment Tribunal.

The law

37. So far as the law is concerned I have already referred to some of it. I refer to paragraph 122(2) of the **Employment Rights Act**; basic award reductions, where the Tribunal considered that:

> **"Any conduct of the complainant before the dismissal, whether dismissal was with notice before the notice was given was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly. The calculation of the compensatory award is dealt with in section 123(1). Subject to the provisions of this section and section 124, 124(a) and 126, which are not material, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances, having regard to a loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

38. And then I skip to subparagraph 6:

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

39. I also bear in mind the principle that it is not appropriate to take too technical a view of the way an Employment Tribunal expresses itself and that a generous interpretation ought to be given to its reasoning that it ought not to be subjected to an unduly critical analysis; see Lord Hope in the recent decision of the Supreme Court in **Hewage v Grampian Health Board** [2012] IRLR 870.

40. The Employment Tribunal only has to deal with issues with which it is dealing and does not have to deal with every contested issue of fact or submission that it receives. It is sufficient, if reading the Judgment whole, the parties know the reasons for the decision. We are quite satisfied reading the Judgment as a whole that that is the case with this particular decision.

41. The matter was well put by Elias J in the case of **ASLEF v Brady** [2006] IRLR 576:

> **"The Employment Tribunal must respect the factual findings of the Employment Tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions. It should not use a fine toothcomb to subject the reasons of the Employment Tribunal to unrealistically detailed scrutiny so as to find artificial defects. It is not necessary for the Tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so it cannot be assumed the EAT sees all the evidence and infelicities or even legal inaccuracies, in particular sentences of the decision will not render the decision itself defective if the Tribunal has essentially properly directed itself on the relevant law."**

42. We act in accordance with that guidance.

Conclusion

43. We now come to our conclusions. On the issue of causation we are satisfied that the Employment Tribunal findings show that it had in mind, without having to expressly state all of the reasons, for its conclusion expressed on more than one occasion that the main reason for the dismissal was disclosure to Public Concern. As the disclosure to Public Concern was for the purpose of obtaining legal advice the disclosure was both qualifying and protected and the main reason for the dismissal was the disclosure and that rendered the dismissal automatically unfair. There was evidence to support that finding and we cannot disturb it. The fact that there was more than one cause for the dismissal does not mean that the disclosure was not the main cause or that the Employment Tribunal gave no consideration as to why the Claimant was dismissed.

44. The original correspondence makes it clear why he was dismissed. At one point in time the Claimant seemed to have suggested that his dismissal was for disclosure to the National Health Service; see for example the documents at volume 2, pages 3 and 5 to which we have referred. But in his witness statement, the accuracy of which was accepted by the Employment Tribunal, the Claimant says that it was the disclosure to Public Concern which led to his dismissal; see volume 2 page 47. He also maintained, and this was again accepted by the Employment Tribunal, that he had never discussed with the National Health Service Prevention Team any details of his complaint. He had merely sought advice as where he could turn.

45. It was said that the Employment Tribunal had conflated the issue of whether there had been a protected disclosure and of what was in the mind of the Respondent. We are unable to accept that submission. The Employment Tribunal clearly had regard to the fact that the dismissal was in fact not for disclosure to the National Health Service, but it would clearly have had in mind that it was the Respondent's largest client and the Respondent was naturally concerned at the risk to its reputation. The Employment Tribunal however found explicitly that disclosure to the NHS was not the reason for the dismissal, disclosure to Public Concern was.

46. We do consider it of some significance that the Employment Tribunal at paragraph 28 suggested that there was no coincidence that the timing of the allegations made against the Claimant followed closely on from the disclosure. The Respondent may well have been contemplating some form of disciplinary action against the Claimant but it was already some 13 days after the meeting with Ms McLean when complaints were first made about the Claimant that it got round to drafting the letter of 29 September that was not in fact sent. Thereafter the Respondent acted with alacrity and, as we have said, the disciplinary procedures started very quickly. The Claimant was in touch with its employment advisers on that very day.

47. So far as perversity is concerned, we have looked at the Judgment as a whole and, as we have said, the evidence was there to justify the findings of the Employment Tribunal and we do not consider that the criticism of its findings as we have already said approach the overwhelming case required to surmount the threshold for a perversity appeal.

48. We now turn the issue described as fairness. In our opinion it was clearly unfair for the Respondent to decide a significant issue on material that the Claimant did not even know about. We consider that the Employment Tribunal at paragraph 25 was entitled to conclude that the

failure to supply this information yet have regard to it may well have caused a significant injustice and thus rendered the procedure unfair and outside the range of reasonable responses.

49. Even though the evidence showed that the complaints may not have been as serious as was first thought, it would only be fair to enable the Claimant to know what the case was with which he had to deal with so he could comment on it. So far as contributory conduct is concerned, it has been conceded that the Employment Tribunal was in error in not taking account the possibility that contributory conduct and a **Polkey** deduction might have been appropriate on the facts found by the Employment Tribunal. We did ask Ms Frazer if there was any authority of which she was aware as to the making of such deductions in cases of automatically unfair dismissal. She told us that she had researched the point and had not been able to find any. It seems to us as a matter of principle there is no reason at all why, if it would be appropriate to make a **Polkey** reduction or a dismissal for contributory fault, the fact that the dismissal was automatically as opposed to ordinarily unfair is of any relevance.

50. We also note as far as concerned one incident (unauthorised attendance on site) the Employment Tribunal considered that the Respondent had reasonable grounds for considering this to be an act of misconduct. In those circumstances, we consider the matter must be remitted for a reconsideration of compensation reductions under section 122 and 123 and the principles of **Polkey**. We have considered very carefully whether we should send this matter back to the same Employment Tribunal or to a freshly constituted Tribunal. We have come to the conclusion as I have already mentioned that this is not a matter we should deal with ourselves because we do not feel we have the necessary materials. We also have to bear in mind firstly the principles set out in the case of **Sinclair Roche and Temperley v Heard** [2004] IRLR 763 and also to the issues of proportionality. I appreciate, and it may be for the Respondent that the sum of £20,000 is a most substantial amount. It is a small company as we

have already mentioned but nonetheless we must have faith in the professionalism of the Employment Tribunal. This is not a case where their factual findings are being criticised, they have made a mistake as to the law, and we see no reason why they should not bring an entirely impartial mind to bear on the reconsideration, and we consider the benefits of having the matter remitted to the same Tribunal will be benefits to both parties and there will be a significant saving in costs.

51. For those reasons we allow the appeal in part and dismiss it in part.