Appeal No. UKEAT/0222/12/LA
UKEAT/0475/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 October 2012
Judgment handed down on 26 June 2013

Before

HIS HONOUR JUDGE HAND QC

MR D BLEIMAN

MR B WARMAN

UKEAT/0222/12/LA

MR W VIGNAKUMAR	APPELLANT
CHURCHILL GROUP LTD	RESPONDENT

UKEAT/0475/12/LA

CHURCHILL GROUP LTD	APPELLANT
MR W VIGNAKUMAR	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Mr W Vignakumar	MS KATHRYN DUFF (of Counsel) Instructed by: North Ford Solicitors 74 North Street Romford Essex RM1 1DA
For Churchill Group Ltd	MR CHARLES SPARLING (of Counsel) Instructed by: Wedlake Bell 52 Bedford Row London WC1R 4LR

SUMMARY

UNFAIR DISMISSAL – Compensation

When an employee has been unfairly dismissed and/or discriminated against unlawfully by being dismissed and it is alleged by the employer it has been discovered since the dismissal that s/he had been guilty of gross misconduct during the employment, the Employment Tribunal does not have to find as a fact that the employee had committed the misconduct and in the instant appeal there was no error on the part of the Employment Tribunal by not doing so. In such circumstances the Employment Tribunal must consider whether the employee would have been dismissed by reason of the alleged misconduct, and, if so, when. Then it must consider whether such a dismissal would have been fair, adopting the approach suggested by the Court of Appeal in **Panama v London Borough of Hackney** [2003] IRLR 278. This was what the Employment Tribunal had done and, there being no misdirection, no inadequacy of reasoning and no perversity, the Claimant's appeal would be dismissed. In reaching that conclusion the Employment Appeal Tribunal also considered **O'Dea v ISC Chemicals Ltd** [1996] ICR 222, **King and others v Eaton [No. 2]** [1998] IRLR 686, **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615, **Gover v Propertycare Ltd** [2006] ICR 1073, **Thornett v Scope** [2007] ICR 236 and **Software 2000 Ltd v Andrews and others** [2007] ICR 825.

It was not open to the Respondent to appeal the liability judgment through the medium of an appeal against the remedies judgment but if it was the appeal would have been dismissed. **Credit Agricole Corporate and Investment Bank v Wardle** [2011] IRLR 604 and **Software 2000 Ltd v Andrews and others** do not preclude an Employment Tribunal from making an award on a percentage basis where the Employment Tribunal think it is more than 50% likely that the dismissal would have been fair.

HIS HONOUR JUDGE HAND QC

Introduction

1. The appeal UKEAT/0222/12/LA is an appeal by the Claimant employee from the judgment of an Employment Tribunal comprising Employment Judge Clark and Messrs Walsh and Pugh sitting at London Central over three days in November 2011 and a further day in January 2012 at a hearing dealing with liability, the judgment and written reasons ("the liability judgment") having been sent to the parties on 7 February 2012. It has been consolidated with an appeal (UKEAT/0475/12/LA) by the Respondent employer against a judgment made by the same Employment Tribunal, resulting from a further two days of hearing in May and July 2012, with the written reasons having been sent to the parties on 2 August 2012, in relation to remedies ("the remedies judgment"). We will refer to the parties as the Claimant and the Respondent.

2. The Respondent owns and operates the Churchill Hotel, which is located in Portman Square in the West End of London. The Claimant worked there between May 1993 and 19 April 2011 when he was dismissed. As a result he complained to the Employment Tribunal of Unfair Dismissal, Disability Discrimination, Redundancy and a failure to pay appropriate Holiday Pay and to pay salary in lieu of Notice. The last two claims were not pursued and the claim for a redundancy payment was dismissed. The Claimant succeeded in his complaints of Disability Discrimination and Unfair Dismissal but the Employment Tribunal concluded that there was a 65% chance that he would have been dismissed fairly on account of gross misconduct had that matter been investigated. It is against that part of the Employment Tribunal's judgment that the Claimant appeals. The Respondent did not cross appeal; we will return later in this judgment to the significance of that.

3. In relation to the remedies hearing, the Respondent's appeal takes a number of points; firstly, that the Employment Tribunal erred by awarding any compensation after 10 August 2011, the date by which it decided a properly conducted investigation into the Appellant's conduct might have been concluded; secondly, that the Employment Tribunal's conclusion as to mitigation was perverse; thirdly, that the Employment Tribunal had erred in relation to its award of compensation for injury to feelings, having in effect double counted; fourthly, that errors in relation to pension loss made in respect of the award of future loss after August 2011, errors in respect of the failure to mitigate and adopting the wrong discount rate rendered the decision on those aspects of compensation unsound.

4. Ms Duff of counsel appeared for the Claimant, as she did at both hearings below. The Respondent was represented by Mr Sparling of counsel, who appeared below at the remedies hearing but not at the liability hearing. The consolidated appeals proved rather too much to get through in a day's sitting. The submissions on the liability appeal were completed by mid-afternoon and we decided then to hear the submissions on first ground of the appeal against the remedies judgment but adjourn the other three grounds to be heard after judgment on the matters that had been argued, if that proved necessary. By the time submissions were completed there was not enough time to deliver judgment and so judgment on the liability appeal and the first ground of the remedies appeal was reserved. The period of time, which has since elapsed, has been due to the other judicial commitments of HHJ Hand QC, who wishes to apologise to the parties, for what has proved to be a very long delay.

Background

5. The Claimant started working at the Churchill Hotel in 1993 pursuant to a written statement of terms and conditions of employment, which describe him as a "shift engineer". His work involved maintaining and repairing the hotel's refrigeration and air conditioning equipment, although as the years went by there was less and less refrigeration work because this was outsourced. At first he worked on a day shift but in 1998 he agreed to a new shift pattern working shifts, including some night shift working. In fact, despite the proposed changes he continued working during the day, although he provided cover for the absence of other engineers, who did work the new shift pattern. In August 2008 and again in March 2009 the Claimant complained in writing that he was spending longer periods covering for absent Shift Engineers and this was having an adverse effect on his health. The Respondent referred him for a medical opinion and as a result the Claimant returned to his day shift work. In 2010 a new Director of Engineering, Mr Ian Odendaal, attempted to enforce the 1998 terms in respect of the Claimant so that he was no longer required to cover for the absence of a Shift Engineer but was required to work the rotating shift pattern and was no longer essentially a daytime worker. The Claimant lodged a grievance and went off sick with work related stress on 16 November 2010; he never returned to work.

6. The Director of Engineering rejected the Claimant's grievance. The Head of Human Resources, Ms Karen Hoffman, sought a further medical opinion; this recommended that the Claimant should "work minimal nightshifts to help prevent a deterioration of his mental state" (see paragraph 28 of the liability judgment at page 11 of the appeal bundle). In summary, the Respondent's position was that the Claimant must either work nightshifts or accept an alternative position at a considerable reduction in salary.

7. There were further negotiations in February 2011 and a yet further medical opinion was obtained. This was even clearer in its conclusion than the previous opinions namely, it was "not advisable for [the Claimant] to return to work doing nightshifts at any frequency as I am sure this would be detrimental to his mental health". The Claimant proposed a modest reduction in pay to reflect the fact that he was not working the rotating night shift pattern but he rejected the alternative position at a considerably reduced salary. The Respondent would not accept that proposal and as a result on 18 April 2011 he was dismissed with 12 week's pay in lieu of notice "by reason of capability on the basis that his inability to work nightshifts was unsustainable in the long term" (see paragraph 32 of the liability judgment at page 12 of the appeal bundle).

8. The Claimant raised both a formal grievance and an internal appeal. These were heard by Mr Gray, the General Manager and UK Area Director, on 20 May 2011. They were rejected by a letter dated 15 June 2011. During the hearing, however, Mr Gray asked the Claimant two questions. As narrated by the Employment Tribunal at paragraph 33 of the liability judgment at page 13 of the appeal bundle these were firstly, whether he had done any "outside work whilst employed by the hotel" and secondly, "whether he had done any work as an independent contractor". According to paragraph 33 the Claimant replied that he had worked purely for the Hotel.

9. As part of a considerable amount of supplementary material lodged in relation to this appeal[1] we have the notes of the appeal hearing and they show that the first question and

[1] Pages 92 to 185 seem to us to relate to the liability appeal; we are not certain by what authority they were added to the bundle but if it is necessary to do so we will grant permission for them to be added; pages 91A to 91O and 186 to 208 relate to the remedies appeal and, therefore, were lodged pursuant to the directions given by Mr Recorder Luba QC on 27 September 2012.

answer is not reflected with complete accuracy at paragraph 33. The passage in the notes reads as follows (see page 122 of the appeal bundle):

> **"MG: … whilst you have been working for the Churchill Hotel have you worked for anybody else or just for us?**
>
> **VW: No, just work for me.**
>
> **MG: And have you ever carried out any work as an independent contractor?**
>
> **VW: No.**
>
> **MG: You have not?**
>
> **VW: No.**
>
> **MG: So you purely worked for the Churchill Hotel?**
>
> **VW: That is right."**

The Employment Tribunal do not refer at all to what Ms Duff submitted was an element of ambiguity in the first answer. Nor does the matter appear to have been explored further. Mr Gray gave evidence but we do not have the notes relating to it; his witness statement is at pages 144 to 151 of the appeal bundle but although he produced the appeal notes he made no reference to the questions and answers set out above. So whether Mr Gray's query was based on information or just "a shot in the dark" is unclear.

10. The Employment Tribunal record the ET1 form as having been presented on 15 July 2011. Paragraph 54 of the Respondent's Grounds of Resistance, which was dated 18 August 2011 and was annexed to the ET3 form, refers to evidence having come to the Respondent's attention since the dismissal that the Claimant had been working whilst absent through illness. This originated from a discussion between the Director of Engineering and members of staff in the canteen in July 2011 when it was alleged that the Claimant had been working whilst off sick in what was said to be "his own refrigeration and air conditioning business" (see paragraph 34 of the judgment on liability at page 13 of the appeal bundle). Like paragraph 33 this is said by

Ms Duff to be an incomplete summary. The e-mail sent by Mr Odendaal to Ms Hoffman after the conversation is at page 92 of the appeal bundle. It shows that the actual allegation was that the Claimant and a fellow employee were "conducting private work together". The fellow employee is named but the name has been redacted and it is alleged that "they were in contact with each other and are in the process to pursue a large "pay-off" by the hotel". The redacted name was that of Mr Pathmanathan Somasundaran. He had resigned from his employment and he gave evidence at the Employment Tribunal on behalf of the Claimant. We do not know whether any of this was put to him.

11. Subsequent investigations revealed six listings on Internet Business Directories for a business called VG Refrigeration and Air Conditioning, which gave contact details for the Claimant. At the time that the ET3 form was lodged in August 2011, the Respondent was asserting that the information now available would have led to the termination of the Claimant's employment on the grounds of gross misconduct. Ultimately, the Employment Tribunal understood the Respondent's case to be twofold as it said in the second sentence at paragraph 50 of the liability judgment:

> **"The Respondent makes two separate allegations only: that of working in an outside business without permission and working whilst on sick leave."**

Later, in October 2011, as a result of an anonymous e-mail containing links to websites, advertisements for the same business were found on the Internet; these also gave contact details for the Claimant and, in addition, contact details for his nephew, a Mr Dharsan Premkumar.

The Liability Judgment

12. Under the heading "Unfair Dismissal" the Employment Tribunal set out the following issue at paragraph 3.16 of the liability judgment:

> **"Did the Claimant commit an act of gross misconduct such that the Respondent would have terminated his employment shortly afterwards in any event."**

and under the heading "Gross Misconduct" at paragraph 17 of the liability judgment the Employment Tribunal say this:

> **"Although the Claimant was paid his notice pay, one of the issues which the Tribunal was asked to determine in this hearing (rather than any hearing on remedy if that proves necessary) is whether the Claimant would have been fairly dismissed for gross misconduct following a tip off that the Claimant had been working in his own business whilst off sick. Misconduct is a potentially fair reason for dismissal and the Tribunal would have regard to the guidance given in the case of British Home Stores v Burchell [1980] ICR 303 that a dismissal for misconduct will not normally be fair unless the employer genuinely believed the employee was guilty of the misconduct alleged and that belief was a reasonable one based on a proper investigation. The Tribunal must not ask itself whether the employee was guilty or innocent of the allegations relied upon, but whether the employer had reasonable grounds for believing he was at the time of dismissal. In this case, the Tribunal must assess the chances the Claimant would have been retained aside from his dismissal on capability grounds."**

In effect, this is reiterated in the first sentence of paragraph 50:

> **"The Tribunal does not have to be satisfied that the Claimant was guilty of gross misconduct, but must assess the possibility that the Claimant would have been dismissed (either for misconduct or gross misconduct) had he remained in the Respondent's employment."**

Ms Duff submitted that this was not a correct direction and we will need to return to it later in this judgment.

13. At paragraph 34 of the liability judgment, which is the last of a series of paragraphs under the sub-heading "Findings of Fact", the Employment Tribunal records this in relation to the advertisements drawn to the Respondent's attention by the anonymous e-mail in October:

> **"The Claimant's contact details had been left on these advertisements throughout 2011, although the Claimant and his nephew gave evidence to the Tribunal that the Claimant had passed the business on to his nephew 5 years earlier on the basis of the Claimant could not continue working for his own business whilst employed full time by Respondent. In spite of the fact that the Claimant suggested he had no involvement in the business and had not taken any income from it, the business bank account remained in the Claimant's name and he was, therefore, liable for any default. Mr Premkumar explained that the Claimant's mobile phone**

was left on the advertisements in case old customers contacted him and the Claimant would then pass on the details to Mr Premkumar. The Claimant explained that Mr Premkumar had lived with his family and was treated like a son. Ms Hoffman suggested that had this outside work come to light whilst the Claimant was employed by the Respondent, he would have been dismissed for gross misconduct. The Respondent's Staff Policy provides that employees require permission to work for outside organisations and failure to do so could lead to dismissal. The Claimant maintained that he had historic permission to run his own business."

This last sentence refers to the evidence given by the Claimant that he had been told by the then General Manager that he had permission but he could not do restaurants (see pages 89A to 90[2]).

14. The Employment Tribunal's conclusion on this aspect of the case is in the last sentence of paragraph 50 of the liability judgment, the second and first sentences of which we have already quoted above at paragraph 11 and 12 of this judgment. Paragraph 50 is long but rather than take the last sentence in isolation we will set the rest of it out in full rather than attempt a summary; we think it convenient to intrude numbering of the sentences for ease of reference:

"[3] Although the Claimant was asked in the course of the appeal hearing in May whether he had worked outside the hotel (and denied it), there was no firm evidence that he had done so until July 2010 when Mr Odendaal was told by the Claimant's colleagues that he had done so. [4] Had the Claimant remained in the Respondent's employment the matter would then have required a disciplinary investigation. [5] The Claimant misled Mr Gray concerning this issue in the course of his appeal against his dismissal, but whether he would have done so in the context of a formal investigation (when he would have known that there was an allegation against him based on some evidence) is unclear. [6] The Tribunal considers that it would have taken at least a month to investigate the allegations and conduct a disciplinary hearing. [7] It is unlikely that the Respondent would have had the benefit of evidence from the Claimant's nephew at that hearing (although a letter of some sort may well have been produced from him by the Claimant, affirming that the Claimant had not been involved in the business). [8] Whether any of the Claimant's colleagues would have given attributable evidence against him is also uncertain. [9] The Respondent could have relied on anonymous evidence provided the substance of that evidence had been conveyed to the Claimant. [10] The Tribunal considers that the Claimant could not have been fairly dismissed merely for running a business outside work, given there was no suggestion of any competition with the Respondent and it would have been difficult for the Respondent to obtain evidence which contradicted the Claimant's suggestion that he had permission from a predecessor of the Respondent to run this business. [11] The much more serious allegation was that of working whilst he was off sick during his employment with the Respondent. [12] This would undoubtedly amount to serious misconduct and, as such an offence which would justify dismissal. [13] The Claimant had been absence [sic] from work on sick leave from mid November 2010 through to his dismissal in April 2011. [14] In the context of any unfair dismissal claim, the Tribunal would have to consider whether the Respondent had reasonable belief in the Claimant's guilt following an adequate investigation. [15] There clearly was evidence from the Claimant's colleagues, supported by contemporaneous evidence from websites which included the Claimant's mobile telephone number as a contact for the business. [16] It is unlikely that the business' bank

[2] As a result of a direction made by the President on 2 August 2012 a transcribed extract of the notes made at the hearing by Employment Judge Clark (pages 88 to 91 of the appeal bundle) was forwarded to this Tribunal sometime in early September 2012.

account would have been made available to the Respondent in the course of an internal investigation, although a lack of evidence of the Claimant's nephew's involvement could also have been probative of the allegation. [17] Although the Tribunal has concluded that the Respondent substantively unfairly dismissed the Claimant within these proceedings, it takes account of the fact that this was not a case in which the Respondent failed to follow fair procedure or consult the Claimant in reaching its decision. [18] There is every reason to believe that the Respondent would have conducted an investigation and held a proper disciplinary process prior to dismissing the Claimant. [19] Since such investigations which have now been conducted have taken place in the artificial context of other proceedings, it is impossible to be certain that the Respondent would and could have fairly dismissed the Claimant for misconduct (working in his own business whilst certified sick), however, the Tribunal considers it is more likely than not that it would have done so. [20] The Tribunal finds that there is a 65% chance that the Claimant would have been fairly dismissed for misconduct with effect from 10th August 2011."

15. The conclusion in sentence [20] relates only to the second allegation identified in the second sentence (quoted above at paragraph 11 of this judgment), namely whether the Claimant had been working whilst absent, allegedly through illness (reiterated at sentence [11]). This is because there is an earlier conclusion in sentence [10] that he could not have been fairly dismissed for carrying on another business in his own time. Sentences [12], [13]) and [14] consist of a further self direction as to how this allegation should be approached and sentences [15] to [16] comprise an analysis of the evidence, which the Employment Tribunal envisaged would be available, and it is these, combined with sentences [17], [18] and [19], which deal with the procedure, that result in the conclusion arrived in sentence [20].

16. If the earlier sentences have relevance, as Mr Sparling submitted they did, then it is worth pointing out that firstly, the first part of sentence [5], which is linked to sentence [3], appears to be a finding of fact by the Employment Tribunal that the Claimant had misled Mr Gray, secondly, sentence [6] amounts a finding that the investigation and disciplinary procedure, which followed, would have been completed by August 2010 and, thirdly, sentences [7] and [8] (in the same manner as sentences [15] and [16]) comprise an analysis of the evidence, which the Employment Tribunal envisaged would be available to anyone conducting a disciplinary hearing.

The Remedies Judgment

17. The judgment on remedies is at pages 75 and 76 of the appeal bundle and the written reasons follow at pages 77 to 87. We have referred to the issues raised in respect of the remedies judgment above at paragraph 3 of this judgment. The second, third and fourth points clearly relate to the remedies judgment but the first issue, in effect, bridges the liability judgment and the remedies judgment and raises an issue as to the scope of these appeals. This issue can be more easily understood in the context of the competing submissions, to which we now turn.

The Submissions

18. Ms Duff made three overlapping and interrelated submissions with the recurrent theme that the findings made by the Employment Tribunal were wholly inadequate as a support for the conclusion reached. Her first submission was that the Employment Tribunal erred in its approach to the decision as to alleged gross misconduct. The Employment Tribunal had set itself the task at paragraph 3.16 of the liability judgment, derived from issues set out at a Case Management Discussion on 22 September 2011, of deciding whether the Claimant "did commit an act of gross misconduct such that the Respondent would have terminated his employment shortly afterwards in any event". Whilst, in part, this bore some resemblance to the approach to be adopted when an issue arises under the umbrella of the decision of the House of Lords in **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, only in determining when the dismissal would have occurred did the Employment Tribunal need to speculate; the prior question as to whether or not there was gross misconduct had to be decided as a matter of fact by the Employment Tribunal. In essence, what the Employment Tribunal had been invited to do in this case was decide at the liability hearing one aspect of the general issue of compensation raised by section 123(1) of the **Employment Rights Act 1996** ("**ERA**"). The Employment

Tribunal was being asked to decide to what extent it was "just and equitable in all the circumstances" for the Respondent to be required to make compensation to the Claimant.

19. There were three questions, submitted Ms Duff, which the Employment Tribunal had to ask itself:

i. How is the future to be approached?

ii. Can it be shown that the Claimant was in fact guilty of gross misconduct?

iii. If so, can it be shown that the Claimant would have been dismissed following a properly conducted process?

20. What the Employment Tribunal had failed to recognise was the distinction between two types of case. The first is where facts are clearly established and the issue is whether, if a proper procedure had been followed, the employee would have been dismissed and, if so, when that dismissal would have occurred. A classic illustration of this genus is when there has been a procedural failure. The other species is where it can be proved in accordance with the necessary standard of proof that a particular event has happened and therefore it can be said with an equal degree of certainty that sometime in the future there would be a fair dismissal. In either case, compensation will accrue at the full rate up to the time when a fair dismissal would have occurred and thereafter there will be no future compensatory award. This was the approach of the Court of Appeal in both **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615 (see paragraphs 44 and 47 to 53 of the judgment) and **Ward v Ashkenazi** [2011] EWCA Civ 172 (see paragraphs 19 to 21 of the judgment). In **O'Donoghue**, where it was clear that a future dismissal would be inevitable, the Court of Appeal accepted that the Industrial Tribunal had been right to reject approaching compensation by assessing risk as a percentage and making a proportionate award in relation to future loss.

21. In the instant case the Employment Tribunal has mixed the two and at paragraphs 17 and 50 of the judgment it had misunderstood what had to be decided. The error made by the Employment Tribunal was that of taking a speculative approach, instead of asking itself whether the quality of evidence demonstrated that, on a balance of probabilities, the Claimant had been working on his own account, whilst absent through illness. When it said at paragraph 17 of the liability judgment that it must not ask itself whether the Claimant was "guilty or innocent of the allegations relied upon" and at paragraph 50 that it did not need to be "satisfied that the Claimant was guilty of gross misconduct" that was precisely the opposite of the correct direction; the Employment Tribunal had to find on a balance of probabilities that the Claimant was guilty and paragraph 50 showed that they had not done so.

22. Her second submission was that the judgment was inadequately reasoned. The Employment Tribunal had failed to clearly state what facts it had found. In particular the Employment Tribunal had failed to state which witnesses it believed and which it did not and why? There was no explanation as to how the 65%/35% figure had been arrived at. This did not comply with the minimum requirements of a reasoned judgment as explained by the Court of Appeal in **Meek v Birmingham District Council** [1987] IRLR 250 and/or set out in rule 30(6) in Schedule 1 of the **Employment Tribunals (Constitution & Rules of Procedure) Regulations** SI 2004/1861.

23. Finally Ms Duff submitted that the liability judgment was perverse. In fact, there was only one piece of evidence, namely the allegation made by employees, whose identity the Respondent wished to keep anonymous, to the effect that the Claimant had been working whilst absent through illness. This is a dubious allegation, given that it was explicitly said that this

working whilst off sick had been in conjunction with a fellow employee, Mr Pathmanathan Somasundaran, and subsequent investigation did not reveal any involvement by him in the Claimant's business nor is there any reference in the judgment to a finding made about this matter. The Claimant had denied that he had been working whilst absent through illness, as had his nephew, but the Employment Tribunal made no finding about the matter. The only finding made about the Claimant's credibility related to what he had said to Mr Gray at the appeal hearing. In the first part of sentence [5] of paragraph 50 of the liability judgment the Employment Tribunal appears to have accepted that the Claimant had "misled" Mr Gray and the first answer to the questions at the internal appeal hearing had been that the Claimant had done work for himself (see above at paragraph 9 of this judgment); that put a different complexion on it. Ms Duff went on in her third submission (see below) to submit that to find the Claimant had misled Mr Gray was a perverse finding on the evidential material but even if she was wrong about that, it was clear from paragraph 50 it related to the history of the Claimant's business, which the Employment Tribunal accepted could not have founded a fair dismissal. The rest of paragraph 50 related to a series of speculations as to what might have happened at a disciplinary hearing but failed to address the "prior question" as to whether there was any evidence at all to show that the Claimant had been working whilst absent through illness.

24. Mr Sparling submitted that there was nothing erroneous in the approach of the Employment Tribunal. There was no requirement for the Employment Tribunal to make a finding of fact as to whether the Claimant had been guilty of Gross Misconduct. It had done what was required by section 123(1) of the **ERA** in considering what was "just and equitable" in the light of section 98(4) of the **ERA** and the well known approach enunciated in **British Home Stores v Burchell** [1978] IRLR 379 (see paragraph 57 (the judgment of Hooper J) and

paragraph 73 (the judgment of Peter Gibson LJ) of the judgment of the Court of Appeal in **Panama v London Borough of Hackney** [2003] IRLR 278). As had been recognised by Peter Gibson LJ in **Panama** the exercise might be hypothetical but, submitted Mr Sparling, the exercise can only be unsound if as well as being hypothetical, it is excessively speculative.

25. Moreover, the reasoning in paragraph 50 of the liability judgment, when set in the context of the decision as a whole, was perfectly clear and accessible in terms of knowing why the conclusion had been reached and why a party had won or lost. This was what rule 30(6) and the authorities of **Meek** and **English v Emery Reimbold and Strick Ltd** [2003] IRLR 425 (the relationship between which had been explained in **Greenwood v NFW Retail** [2011] ICR 896) required and if the judgment fulfilled that broad objective then there could be no error of law.

26. Nor was the judgment one which no reasonable Employment Tribunal properly directing itself on the evidence could have reached. It was not a case of there being no evidence. The Claimant's submission really complained about the weight of evidence but as had been made clear in **Chiu v British Aerospace PLC** [1982] IRLR 56, **Piggot Brothers and Company Limited v Jackson and others** [1992] ICR 85, **Stewart v Cleveland Guest (Engineering) Limited** [1994] IRLR 443 and **Yeboah v Crofton** [2002] IRLR 634 arguments about how the evidence should have been interpreted inevitably involved this Tribunal in substituting its own view for that of the Employment Tribunal. Only if there was no evidence at all would an error of law arise. Here there was evidence and there was no error made by the Employment Tribunal when it relied on such evidence.

27. Mr Sparling then turned to the Respondent's appeal against the remedies judgment, the first ground of which was that the Employment Tribunal had erred by awarding any compensation in respect of future loss after 10 August 2011, the date by which the disciplinary hearing would probably have been concluded. He invited us to consider the analysis of the Court of Appeal in **Credit Agricole Corporate and Investment Bank v Wardle** [2011] IRLR 604 as applied to future loss. There the Employment Tribunal had been considering the future loss of an Appellant, who after his dismissal by the Respondent Bank, had gone to work for the Financial Services Authority. There he earned less than he might have done in banking but gained valuable experience that might enable him to find a job in banking, possibly in a different type of work, but with the equivalent salary to the banking job he had lost when dismissed. The Employment Tribunal concluded that within three years there was a 70% chance that he would have obtained a banking job at an equivalent salary. Another issue relating to future loss was whether he might have left the Respondent Bank in any event as part of the career pattern in banking. The Employment Tribunal concluded that there was an 80% chance that he would have left in any event within two years of dismissal. By a relatively complicated set of calculations the Employment Tribunal then applied those conclusions mathematically to the calculation of future loss.

28. In the Court of Appeal both of these conclusions were subjected to what was essentially the same criticism by Elias LJ, namely that if there is a 70% or 80% chance of something happening that must be a conclusion that on a balance of probability the event will occur (see paragraphs 54 and 66 of his judgment). He had made a similar point earlier at paragraph 53 of the judgment of this Tribunal in **Software 2000 Ltd v Andrews and others** [2007] ICR 825. Such an approach should be adopted in this case, submitted Mr Sparling, with the result that the conclusion at paragraph 50 of the liability judgment should have been interpreted in the

remedies judgment as making it "just and equitable" only to award compensation up to 10 August 2010 and no future loss thereafter.

29. Ms Duff's answer to this was threefold. Firstly, she did not accept that was the approach in **Wardle**; a closer reading of the judgment showed that in some circumstances Elias LJ would not have regarded the approach adopted in that case by the Employment Tribunal as wrong, although, on the facts as found by the Employment Tribunal in that case, it had been wrong. Secondly, a distinction should be made between the problem of whether or not in respect of future losses an assessment should be made on a whole career basis and the problem of assessing the chances that the Claimant would have been fairly dismissed for gross misconduct at a later stage. Thirdly, referring to paragraphs 26 to 41 of the judgment of the Court of Appeal in **Thornett v Scope** [2007] ICR 236 and the subsequent judgment of this Tribunal given by the then President, Elias J, in **Software 2000 Ltd**, she submitted that far from condemning the course followed in the instant case by the Employment Tribunal, it was sanctioned by these authorities.

Discussion and Conclusion

30. We have mentioned above that the course taken by the Respondent was to file an answer in respect of the appeal against the liability judgment by the Claimant and to launch an appeal against the remedies judgment. The implications of this need to be considered before we embark on any discussion of the issues raised by the respective appeals.

31. In the appeal against the liability judgment there is neither what would be termed in another context a "Respondent's Notice", seeking to support the conclusion reached by the Employment Tribunal but on grounds other than those relied on in the judgment nor a "Cross

Appeal" seeking to argue that all or part of the conclusion reached by the Employment Tribunal was wrong. Therefore the Respondent can oppose the appeal only on the basis that the Employment Tribunal was correct in its reasoning. Indeed, this is exactly what the second sentence of paragraph 9 of the Respondent's Answer asserts (see page 43 of the appeal bundle).

32. About four months after the Answer in respect of the liability appeal the Respondent filed its Grounds of Appeal in respect of the remedies judgment. Under the heading "Preliminary points" at paragraph 2 (see page 91C of the appeal bundle) the Respondent refers to the liability judgment in these terms:

> **"the Tribunal made a finding that there was a 65% chance that the Respondent would have been fairly dismissed in any event from 10th August 2011."**

and then at paragraph 6 (see page 91D the appeal bundle) sets out the first ground of appeal in the following terms:

> **"The Respondent should not have been awarded losses past 10th August 2011, being the date upon which the Tribunal concluded that it was more likely than not that the Respondent would have been fairly dismissed in any event. In awarding losses beyond a point, the Tribunal erred in law and failed to apply the principle espoused by Elias LJ in *Credit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604."**

33. The first sentence in the passage quoted above is an interpretation of the conclusion arrived at by the Employment Tribunal in the last two sentences of paragraph 50 of the liability judgment (sentences [19] and [20]). In effect, it treats the last sentence of paragraph 50 of the liability judgment (sentence [20]) as otiose. We can find no trace in the remedies judgment (see pages 75 to 87 of the appeal bundle) of any submission by the Respondent to the Employment Tribunal as to how it should interpret its own finding at paragraph 50 of the liability judgment in order to apply it in the context of remedy. In the last sentence of paragraph 1 of the remedies judgment there is a repetition of the operative part of the wording of the last sentence of

paragraph 50 of the liability judgment (see page 77 of the appeal bundle) and in the section headed "Submissions" (i.e. paragraphs 22 and 23 of the remedies judgment at page 83 of the appeal bundle) there is no record of this issue of the interpretation of the conclusion in the liability judgment having been raised. If it was, the Employment Tribunal plainly rejected it as can be seen from the second sentence of paragraph 24 of the remedies judgment under the heading "Conclusions" which reads:

> **"From this date onwards, the Claimant's losses should be reduced by 65% across-the-board to reflect the Tribunal's finding that there was a 65% chance of the Claimant been fairly dismissed the misconduct with effect from 10 August 2011."**

34. Neither in her Respondent's answer (see pages 91I to 91O of the appeal bundle) nor in her skeleton arguments in respect of either appeal does Ms Duff take the point that this matter was not advanced during the remedies hearing and we are happy to proceed on the basis that it was raised by Mr Sparling and that the Employment Tribunal did not deal with it expressly in the remedies judgment. This does not, however, resolve the difficulty that there is no Cross Appeal against the Employment Tribunal's judgment on liability and in particular against the conclusion at paragraph 50.

35. We have considered the extent to which this matter can be raised as one of pure construction of the Employment Tribunal's judgment or, putting it another way, that the language is so clear that it cannot be construed in any other way. Such an approach raises a further difficulty. If the matter was raised with the Employment Tribunal at the remedies hearing and, as must follow from its determination of the future loss issue, impliedly rejected by it as a proper construction of what it had concluded, it must be the case that the Employment Tribunal did not accept either that it had meant by the last two sentences of paragraph 50 that on a balance of probability the Claimant would have been fairly dismissed on 10 August 2011

or did not accept that was the only proper conclusion that follow logically from the rubric of those last two sentences. It seems to us that each limb of the above alternative must really amount to an appeal against the conclusion reached by the liability judgment. Even assuming that either is raised by paragraph 6 of the Grounds of Appeal (quoted above at paragraph 32 of this judgment) in relation to the remedies judgment we are far from convinced that we have any jurisdiction to consider the matter in the absence of any Cross Appeal raising the issue in the context of the liability judgment. Furthermore, although we have been prepared to assume that the matter was raised at the remedies hearing, if it was not, then there are different but equally serious objections to whether the matter can be entertained by us, namely that, generally speaking, a point cannot be taken on appeal if it was not taken below.

36. On the one hand, the issue raised is clearly both substantial and arguable and if it can be considered within the parameters of these appeals, in justice to the Respondent we should do so. Ms Duff has not said that the point is not open for consideration on this appeal and the Claimant has himself appealed against the liability judgment. On the other hand, we must consider the extent to which it is right to put the Claimant in jeopardy of being deprived of a conclusion in his favour if the matter has not been properly raised in accordance with the rules of procedure and the general practice relating to an appeal. We have concluded that the right approach is to consider the Claimant's appeal against the liability judgment and, having reached a conclusion about it, then consider the extent to which it is either necessary or just to consider the fundamental point, which the Respondent wishes to argue, namely whether the Employment Tribunal has, in effect, decided that on a balance of probability the Claimant's employment would only have lasted for another month before he was fairly dismissed and, therefore, was wrong to award any loss thereafter.

37. Future loss in the light of actual or hypothetical future events is an area, which has been traversed by the Court of Appeal many times since the House of Lords decided **W Devis and Sons Limited v Atkins** [1977] ICR 662 and then later decided **Polkey** and in attempting any re-capitulation we recognise that we must be at risk of re-stating the obvious. We will attempt the following summary of the principles, however, if for no better reason than that it might help us to pick our way through this difficult terrain:

a. By contrast with the position in a wrongful dismissal action at common law, evidence of discovery of misconduct on the part of the employee after the effective date of termination is not admissible in relation to the issue as to whether the dismissal was fair or unfair although it is admissible in relation to the issue as to what compensation is "just and equitable" (**Devis v Atkins**).

b. Nevertheless, particularly where there may need to be a further and later hearing on the issue of compensation, it may be sensible (and convenient) for the evidence to be heard at the same time as evidence relating to the issue as to whether the dismissal is fair or unfair and it may also be sensible (and convenient, not least because it avoids witnesses having to be called twice) for issues relative to the significance of that evidence in relation to compensation to be considered and resolved at that stage (see paragraph 39 of the judgment of Potter LJ in **O'Donoghue**, which only refers to the approach taken by the Industrial Tribunal in that case as being sensible but we think also implies the convenience factor referred to above).

c. The **Polkey** reduction relates to cases where the dismissal is held to be unfair because of a procedural failure and it is possible to distinguish such cases from cases like the instant appeal on the basis that the former is "procedural" and the latter is

"substantive"; this was the approach of the Inner House of the Court of Session in **King and others v Eaton [No. 2]** [1998] IRLR 686 (see paragraph 19 of the judgment of Lord Prosser). But two years earlier in **O'Dea v ISC Chemicals Ltd** [1996] ICR 222 Peter Gibson LJ had described this categorisation as "unhelpful" (see pages 234 to 235) and at paragraph 44 of his judgment in **O'Donoghue** Potter LJ did not regard the distinction as significant; that perspective has also been adopted by the Court of Appeal in **Gover v Propertycare Ltd** [2006] ICR 1073 and by the EAT in **Software 2000 Ltd**.

d. Nevertheless, we think Employment Tribunals should recognise (as did Lord Prosser at paragraphs 19 to 21 of the judgment in **King v Eaton**) that whereas considering how the case raised by the employer, which has been found not to have justified dismissal, might have developed in the future involves carrying a known and established set of facts into the future, of which type of case **O'Donoghue** might be regarded as an example, considering how something not known at the time of dismissal might have developed, to adopt Lord Prosser's memorable phraseology, is to "*reconstruct the world as it might have been*" and "*to embark on a sea of speculation*".

e. The later cases in the Court of Appeal and the EAT referred to above have sanctioned such journeys but when setting out we think that Employment Tribunals should bear in mind:

    i. that, although the matter has now come to light and in many cases that might have been bound to happen in any event, in some cases it may be necessary

to consider whether, and if so, when, it might have come to light, had the employee not been unfairly dismissed;

ii. although there is always an element of speculation as to the calculation of future loss, as HHJ McMullen QC put it in **Gover** in this Tribunal (subsequently approved by the Court of Appeal), there is a need for the "framework" of the "working hypothesis" to be supported by a careful consideration of the evidence;

iii. paragraphs 72 and 73 of the judgment of Peter Gibson LJ in **Panama v London Borough of Hackney**, (which, in effect adopt the approach set out by Hooper J at paragraphs 57 to 62 of the judgment) whilst recognising the hypothetical nature of the exercise, suggest that where allegations of misconduct are raised after dismissal (in that case fraud raised for the first time during the cross examination of the Claimant at the Employment Tribunal) the misconduct "has to be clearly proved" and the matter examined in accordance with "the well-known requirements set out in the *Burchill* case";

iv. The exercise of attempting to "reconstruct the world as it might have been" can involve two different considerations; firstly, whether and when there might have been a subsequent dismissal; secondly, if the conclusion is that there would have been a dismissal, whether such dismissal would have been fair;

v. In some cases it might not be necessary to analyse the matter expressly in two stages and it can be considered in one stage (as appears to have been the case in **O'Donoghue**); in others it will be better to do so;

vi. In either case the Employment Tribunal should avoid the pitfall of assuming that because there is the necessary degree of proof (whether expressed in terms of a balance of probabilities or expressed in terms of likelihood or, as in **O'Donoghue**, in terms of inevitability) as to whether and when there might have been a later dismissal that necessarily answers the second part of the consideration as to whether such a dismissal would have been unfair (and **Panama** is an example of there being adequate material for the tribunal or court to conclude that there would have been dismissal proceedings but not conclude that any dismissal would have been fair);

vii. The burden of proof is on the employer in respect of both matters; it is the employer who is asserting that there would have been a subsequent dismissal and that it is not "just and equitable" to award any or all future loss and the employer must prove that;

viii. The element of speculation involved in the calculation of future loss can sometimes be resolved in terms of a conclusion reached on the balance of probabilities; it must be recognised, however, that this means the matter has been proved to the requisite standard; it may well be appropriate, to decide whether or not there would have been a future dismissal "on an all or nothing" basis (to adopt the phrase used by Browne-Wilkinson J in **Sillifant v Powell Duffryn Timber Limited** [1983] IRLR 91) but that does not mean that the fairness of the hypothetical dismissal has to be approached on that basis; by way of examples the determination of the employer to dismiss may be obvious (as in **Panama**) as may be the continuing intemperate conduct of

the Claimant and consequent poor relations between colleagues (as in **O'Donoghue**) but the fairness or unfairness may be less easy to decide;

ix. So it may be unjust to reach an all or nothing conclusion particularly when attempting "to reconstruct the world as it might have been"; the Employment Tribunal has to hypothesise what might have happened had there been a properly conducted dismissal process; it has to decide what the evidence might have been and whether it can reach a conclusion as to what a reasonable employer might have concluded on that evidence; where the evidence is incomplete it may be impossible to reach any conclusion at all (as in **Panama** where the simple question as to whether it was the Claimant who had advised the tenant to make a fraudulent claim had never been asked and the answer was unknowable), in which case the dismissal would have been unfair; in other cases it may be possible to incline to one view or another but not possible to reach a firm conclusion one way or another; then, as suggested by Pill LJ at paragraph 41 of the judgment in **Thornett v Scope**, it is entirely legitimate to assess future compensation on a percentage or proportionate basis, which is a well tried method used to decide future loss in some types of discrimination cases and in some personal injury litigation and is used to assess risk or the loss of a chance in litigation in both professional negligence and breach of contract actions.

38. Turning then to the instant appeal it seems to us that paragraph 50 of the liability judgment is the focal point of all three criticisms made by Ms Duff of the decision of the

Employment Tribunal. Of these the most fundamental is whether there has been any misdirection as to law on the part of the Employment Tribunal.

39. We do not accept Ms Duff's submission that it had to be shown the Claimant was in fact guilty of gross misconduct. This confuses breach of contract at common law with unfair dismissal. The former requires proof of actual breach. In this context that means the employer would have to prove on a balance of probability that the Claimant had been working whilst absent through illness. But in relation to whether it is "just and equitable" to make an award of compensation, and for what period, under section 123(1) of the **ERA** the Employment Tribunal correctly directed itself in the liability judgment at paragraphs 17 and 50 (in the first sentence and in sentence [11] – see above at paragraphs 12 and 14 of this judgment) when stating that it did not have to be satisfied that the Claimant had been guilty of gross misconduct but had to consider "whether the Respondent had reasonable belief in the Claimant's guilt following an adequate investigation". In our view that was taking exactly the approach identified by Hooper J and Peter Gibson LJ in **Panama**.

40. Moreover, it seems to us that in sentence [19] of paragraph 50 the Employment Tribunal recognised fully how difficult it is to "reconstruct the world as it might have been". Putting it another way, the Employment Tribunal were confident that the matter would have been pursued by the Respondent and that process would have been concluded quickly but were not sure what the outcome would have been, a lack of sureness which they expressed by finding that it would be "just and equitable" for the Claimant to recover 35% of his future losses. It seems to us that far from being a misdirected approach that was entirely the function that the Employment Tribunal had to perform.

41. It might be said that the Employment Tribunal approached the issue of when dismissal occurred in a rather rigid way and seem to have assumed, without addressing it, that the meeting in the canteen between the engineers and the Director of Engineering would inevitably have occurred even if the Claimant had not been dismissed. Also it would perhaps have been better if the Employment Tribunal had made more explicit findings about the reasonableness of the investigation and about the credibility of the Claimant.

42. But we must remember that in **Gover** in the Court of Appeal at paragraph 22 of the judgment, Buxton LJ cited with approval the last sentence of paragraph 21 of the judgment of Lord Prosser in **King**:

> **"It seems to us that the matter will be one of impression and judgment, so that the tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure made no difference, or whether the failure was such that one simply cannot sensibly reconstruct the world as it might have been."**

and went on to say because these cases are decided at first instance as a matter of "impression and judgment" that: -

> **"… indicates very strongly that an appellate court should tread very warily when it is being asked to substitute its own impression and judgment for that of the tribunal".**

43. In the end this is what we think Ms Duff is attempting to persuade us to do. She makes cogent points about the fact that the Employment Tribunal has not addressed the adequacy of the investigation and we might well have arrived at a different conclusion were we the tribunal of first instance. This Employment Tribunal, however, saw the witnesses. It found that the Claimant had "misled" Mr Gray (sentence [5] of paragraph 50); if there is any ambiguity in the note of the appeal hearing it is not for us to decide what to make of it but solely a matter for the Employment Tribunal and there was an ample basis in the note for thinking that the Claimant

had been less than straightforward in answering Mr Gray. The Employment Tribunal balanced that against the prospect that if clear allegations had been put to the Claimant he was unlikely to have tried to maintain that position (see sentence [7]). It is true that no express finding is made as to his credibility but in sentence [16] of paragraph 50 of the liability judgment the Employment Tribunal appears to have regarded the absence of any reference (presumably in the banking documentation) to the Claimant's nephew as the person currently conducting the business as something that "could also have been probative of the allegation". That is a function it is well equipped to perform and one, in respect of which we are not only poorly equipped but have no function at all.

44. The Employment Tribunal balanced all these factors and reached a conclusion which in our view was open to it on the factual material and on the authorities we have attempted to summarise above. In our judgment the above analysis as to misdirection, and conclusion that there has been none, exposes the frailty of Ms Duff's other two submissions. We mentioned earlier that there is a degree of overlap between her three submissions. In our judgment, if there was no misdirection as we have concluded, then the reasoning in paragraph 50 provides an adequate explanation as to why the decision about compensation has been made. If it was not part of the Employment Tribunal's task to decide whether the Claimant had been guilty of misconduct, then the judgment does not need to contain express findings about facts or credibility relating to that beyond what might have fallen to be considered at a disciplinary hearing. We do not suggest that **Meek**, **Greenwood** and rule 30(6) can be ignored simply because the exercise is speculative and reconstructs the world as it might have been but the reticence expressed by the Employment Tribunal about artificiality illustrates that the findings do not need to be so definite and complete as they might need to be where an Employment Tribunal has to decide whether something happened or did not happen or whether someone is

truthful or not. It is quite clear why the Employment Tribunal reached the conclusions that it did from the terms of paragraph 50 of the liability judgment and, to borrow the phraseology of Sedley LJ, the judgment was **Meek** compliant.

45. As to perversity, it seems to us that there was evidential material to support the conclusions reached at paragraph 50. We have already indicated that left to ourselves we might have reached different conclusions but to try and give effect to them would be to fall into the trap of deciding the case ourselves. We reject the submission that the judgment was perverse.

46. What then of Mr Sparling's appeal? On balance we do not think that justice would be done to the Claimant were we to consider it. But were we to do so we would reject it and, out of deference to his industry and his careful argument, we will explain why.

47. His simple and logically powerful point is that, whether the concept is expressed numerically as 65% or in terms of what is "more likely than not", sentences [19] and [20] of paragraph 50 of the liability judgment can only mean that on a balance of probability the Employment Tribunal has actually decided the Claimant would have been fairly dismissed on 10 August 2011 and, if that is so, then it cannot be "just and equitable" for him to receive any compensation thereafter. We can agree that, at first sight, it is not altogether easy to fit the two sentences together and at one point during the hearing we wondered whether we should ask the Employment Tribunal to expand upon their reasons. We have concluded that we should not do so not only because any further delay in the resolution of this matter would be undesirable but also (and mainly) because we think that sentences [19] and [20] really decide that there would have been a dismissal by 10 August 2011 but that it is "impossible to be certain" about the fairness of the dismissal and the Employment Tribunal goes on to say what it thinks are the

chances of there being a fair dismissal. This was the Employment Tribunal's attempt to "reconstruct the world as it might have been" and decide what would be a "just and equitable" approach to the assessment of future loss.

48. But, submitted Mr Sparling, even so, if you say there is a 65% chance/risk of something happening you must be saying that the event is more probable than not. He relied on both **Wardle** and on paragraph 53 of the judgment of this Tribunal in **Software 2000**. Ms Duff's distinguishing of the former on the basis that it was concerned with whether future loss should be awarded on a whole career basis seems to us not to be compelling. We cannot see any distinction between the return to banking or leaving banking, as in **Wardle** or the fact of dismissal, as in the instant appeal. On the facts of **Wardle** the Court of Appeal regarded the conclusion that there was a 70% chance of a return to banking from the FSA as the equivalent of saying that on a balance of probability there would have been a return to banking (and likewise with 80% figure related to leaving the banking job at the Respondent).

49. But here the Employment Tribunal were dealing with whether on the evidence presented to it any dismissal would have been fair or unfair. They were uncertain. Mr Sparling submitted that certainty is not required and that if something is more likely than not or there is a 65% chance of it, then that is the equivalent of a finding on a balance of probability. We think the choice of words used by the Employment Tribunal is unfortunate but what it was expressing was that its position lay between that of the Court of Appeal in **Panama**, where the court felt able to be confident that any dismissal would have been unfair and **O'Donoghue**, where the conclusion of the Employment Tribunal that a fair dismissal was inevitable was upheld by the Court of Appeal. As the Court concluded in **O'Donoghue** where the Tribunal can be confident that a fair dismissal is inevitable it is not an error to reject approaching the assessment of future

compensation by reference to the valuation of a chance that something might or might not have occurred. But the Court did not condemn that approach in other circumstances and we do not think the Employment Tribunal was wrong to adopt it in the instant appeal. On the contrary this case fits into the category identified by us above at paragraph 37(e)(ix) of this judgment.

50. Finally on this topic Mr Sparling relied on paragraphs 52 and 53 of the judgment in **Software 2000**:

> **"52. The case** [Thornett v Scope] **emphasises that the task is for the tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. To fail to do this could lead to over compensating the employee, which would not be a just outcome. In this context we caution against taking the phrase "constructing the world as it might have been" too literally.**
>
> **53. The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture may have developed. For example there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on nay view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise."**

This supported his submission, said Mr Sparing; if you can reach a conclusion on the balance of probability then all questions of an assessment based on risk are eliminated. Once the balance tips a fraction over 50%, then an Employment Tribunal must conclude that there can be no award of future loss.

51. We think there are three answers to that. Firstly, as a matter of construction of the language used by this Employment Tribunal the point does not arise. We do not think that the Employment Tribunal intended to convey a finding that on a balance of probability there would have been a fair dismissal by its use of the expression "more likely than not". In our view the key words in sentence [19] of paragraph 50 of the liability judgment are "impossible to be

certain". This is not a misdirection as to the standard of proof but simply an expression of dubiety. Secondly, whilst we can understand that the task of picturing the future should not be shrugged off simply because it can be difficult to "reconstruct the world as it might have been" (as as is made clear by the last sentence of paragraph 52 of the judgment of the EAT in **Software 2000**), we do not think that when it comes to what this Employment Tribunal described as the "artificial context" of trying to hypothesise in the hearing before the Employment Tribunal what the evidence might have been at a future disciplinary hearing held by the employer, how it might have developed and how it might have been addressed by a reasonable employer, Employment Tribunals should be deterred from expressing doubts by reference to the chances of a fair dismissal.

52. Thirdly, it must be remembered that **Software 2000** is about the relationship between the now repealed section 98A of the **ERA** and a "Polkey reduction". This is highlighted in the summary at paragraph 54 of the judgment by sub-paragraphs (6) and (7) which read:

> **"(6) The section 98A(2) and *Polkey* exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely on from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.**
>
> **(7) Having considered the evidence, the tribunal may determine: (a) that if a fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A (2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615; (d) that employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."**

53. Taken out of the context of section 98A(2), which is what Mr Sparling's argument seeks to do, and taken literally, the words of sub-paragraph (7) might be thought to create an

asymmetrical position placing the employer in an advantageous position; if, by some fraction of a percentage the balance of probabilities was achieved there would no compensation for the employee but if it was just not possible to say on a balance of probabilities that there would have been a fair dismissal, then the employee's compensation could still be reduced. But the removal of section 98A(2) from the picture may well distort it and, once that is understood, we think the passage does not provide the support for Mr Sparling's argument, which he claims.

54. If we had to decide the matter we would conclude that in the "artificial context" of this type of case if an Employment Tribunal cannot say with confidence that a dismissal would have been fair, then we would not regard it as an error for the Employment Tribunal to adopt the approach of deciding the issue of future loss by reference to its assessment of the chances of the dismissal being fair or unfair. As it is we do not regard this matter to be open for decision by us on this appeal.

55. The parties will need to take stock and decide what course they wish to adopt. If the Respondent wishes to pursue the other points on the remedies appeal then it must indicate that within 21 days of this judgment being handed down and a further hearing will be listed.