Appeal No. UKEAT/0034/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 June 2013

Before

HIS HONOUR JUDGE SEROTA QC

MR I EZEKIEL

MS P TATLOW

WM MORRISONS SUPERMARKET PLC — APPELLANT

MR A KESSAB — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR E NUTMAN (Solicitor) Messrs Gordons LLP Solicitors Riverside West Whitehall Road Leeds West Yorkshire LS1 4AW
For the Respondent	MR N FRIMOND (Solicitor) Nicholas Frimond Solicitors Little Dockray 2 St Georges Yard Farnham Surrey GU9 7LW

SUMMARY

UNFAIR DISMISSAL

Reasonableness of dismissal

Polkey deduction

The Employment Tribunal was entitled to find on the facts that the Claimant had been unfairly dismissed.

The Employment Tribunal was in error in considering that where there had been substantive unfairness as well as procedural unfairness there was no room for the application of a **Polkey** deduction; see the authorities referred to at Division D1/2549 of *Harvey on Industrial Relations.*

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent from the decision of the Employment Tribunal at London (South) presided over by Employment Judge Tsamados who sat with lay members, dated 6 November 2012. The Employment Tribunal dismissed complaints by the Claimant of discrimination on the grounds of his race and harassment but it upheld claims of unfair dismissal and wrongful dismissal. A remedy hearing followed and by a judgment of 10 January 2013 the Claimant was awarded, without any deductions having been made, the sum of £6,829.20 by way of compensation.

2. The matter came before Underhill J on the "sift" and he referred it to a full hearing on 16 January of this year.

The factual background

3. We take this largely from the decision of the Employment Tribunal. The Claimant was born in Belgium, he was brought up in France and apparently speaks with a French accent. At the time of the hearing he was aged 62 years old; he was employed as from September 21 2009 as a warehouse assistant at one of the Respondent's stores in Woking. The Respondent of course is a well known national chain of supermarkets. It is fair to observe that the Claimant has a chequered disciplinary history and at the time of the events leading to his dismissal he was on a 12-month written warning for breach of the Respondent's smoking policy. It is also right to point out that his managers regarded him as having what might colloquially be referred to as an "attitude problem".

4. On 21 August 2011, an incident took place at the warehouse involving the Claimant and the Assistant Deputy Manager, a Mr Ken Prince. The incident took place in the loading bay

where the Claimant was engaged in unloading pallets from a lorry. Mr Prince incidentally is said to have been one of two employees who racially abused the Claimant but as the claim was dismissed there is no need to become involved in details. The incident was witnessed by an agency driver, a Mr John Fellows. It is perhaps not disputed that the Claimant was working alone unloading the lorry and it was taking him a long time. Mr Prince wanted him to do some other task and felt that the Claimant was being very slow, he approached him on several occasions and the Claimant felt he was being harassed; he had not taken his break. He was told by Mr Prince to take his break and then come back and according to Mr Prince the Claimant said he had finished unloading, he was doing the paperwork and he then lost his temper, threw the keys at Mr Prince and told him to "Fuck off". In fairness to the Claimant, he maintained that he told him to "Back off".

5. The incident as I have said was witnessed by a Mr Fellows who was an agency driver. There was also a Mr Scott Burgess, a trainee manager who overhead some of the argument. According to Mr Burgess, Mr Prince asked the Claimant about the break and the Claimant reacted in a threatening manner and started throwing things around and swearing; see paragraph 13 of the decision of the Employment Tribunal which sets out what Mr Prince had said and subsequently disclosed that to Mr Burgess, the trainee manager at the Woking store.

6. Mr Fellows, who I have mentioned, according to Mr Prince was at the back of his lorry and Mr Prince spoke to him and asked, "Did you see that?" and Mr Fellows said he had but did not want to get involved. Mr Burgess, as I have said, spoke to Mr Prince and to Mr Fellows and according to Mr Burgess, Mr Fellows said that the Claimant was considered by Mr Prince to be taking too long to unload his lorry, Mr Prince asked him whether he had taken his break and the Claimant reacted in a threatening manner, started throwing things about and swearing,

"The Claimant was well out of order and violent whereas Mr Prince kept calm and done a good job" It sounds like the language that one would expect to be used in a warehouse in Woking!

7. The Claimant accepted that he was tired and annoyed with Mr Prince for going on at him to hurry up and maintained that he told him, as I have said, to "Back off". Mr Prince chose not to report the matter but for reasons which have not been explained Mr Fellows, although an agency driver, referred the matter to his manager. Mr Fellows' manager then referred it to Mr Burgess who told Mr Bartlett, the general manager of the Woking warehouse. Mr Burgess spoke by telephone to Mr Fellows. At page 68 of our bundle we have a copy of that statement. The operative part of the statement is 6 ½ lines, it must have taken all of five minutes to take and what Mr Burgess recorded was that a member of staff had taken too long (again "too" (to) is spelt in the way one would expect it to be spelt in a warehouse in Woking) 2 hours, to tip a fully loaded lorry:

> **"I heard the manager speak to the member of staff about whether or not he had taken his break. The member of staff then reacted in a threatening manner and started throwing things about and swearing. The member of staff was well out of order and was being violent. The manager kept calm [as I have said] and done a good job."**

8. This statement, as it is described, because it is written on the form, "Employee Witness Statement Continuation Sheet" is extremely brief, it does not suggest that any questions were asked of Mr Fellows, he does not even identify the member the staff, does not explain what was being thrown about, what the swearing consisted of, or how he was being violent. That statement was taken on 22 August 2011.

9. Mr Prince had to give an explanation why he had not reported the incident and in evidence to the Employment Tribunal he said it was his word against that of the Claimant, Mr Fellows did not want to become involved, Mr Prince felt he would not be believed and if he did report the matter the Claimant would simply behave even worse on the next time they were

together. It is fair to say that Mr Bartlett was not happy with that explanation and did write to him although he did not do so until 23 September. The Employment Tribunal asked Mr Bartlett why he took so long to send the letter to Mr Prince; he said it might have been due to holiday overlaps but he did not know. The Employment Tribunal was not satisfied with Mr Bartlett's explanation as to why it had taken him so long when contrasted to the disciplinary action against the Claimant which resulted in his dismissal within three days of the incident in question. It must be noted, however, that Mr Prince's management style was described to the Tribunal as being non-confrontational and he was someone who was reluctant to create problems for himself.

10. There was evidence before the Employment Tribunal that the warehouse was a swear-free zone, this was agreed by both the Respondent and the Claimant. It is good to know that warehouses in Woking are swear-free zones as compared to what one knows of warehouses in other parts of the country.

11. The Claimant was suspended on 23 August and a letter went out to him on that day inviting him to a disciplinary hearing on 25 August. The charge against him was that of swearing and being aggressive to Mr Prince. He was sent the witness statement of Mr Burgess and that of Mr Prince. Mr Burgess' statement, of course, simply recorded his conversation with Mr Fellows. This was received by the Claimant at approximately 8.00 pm on 24 August. The Claimant normally works night shifts and although on this occasion he was suspended he was given all of 21 hours to prepare to fight for his job. He was a warehouseman, not legally trained; he was accompanied by a work colleague at the hearing and it is right to say, and this may have been overlooked by the Employment Tribunal, that in his witness statement, see page 100 of our bundle, he complained about having very little time before the hearing to consider the papers. He did not apparently complain at the disciplinary hearing or the subsequent appeal

that he was in any way embarrassed or prejudiced by the limited time made available to him but it is equally clear that viewed objectively he was given very little time to seek advice and prepare, even if though it is said it would have not made any difference. He was denied the opportunity to consider the matter at greater length and to consult.

12. On 25 August he attended with a representative, a fellow worker, a disciplinary hearing which was conducted by Mr Bartlett. Mr Bartlett considered the witness statements to which I have referred, a letter from the Claimant and what the Claimant said but he did not seek to speak to Mr Fellows himself. He then broke for 20 minutes and drafted during that 20 minute period the letter of outcome which resulted in summary dismissal. The Employment Tribunal was surprised by the speed in which the Respondent took the Claimant from suspension to dismissal and in particular that Mr Bartlett was able to consider the evidence, reach a decision and produce the dismissal letter all in 20 minutes. That particular paragraph has been criticised by Mr Nutman as suggesting that the Employment Tribunal was substituting its views for those of the employer. We do not accept that criticism at all; the Employment Tribunal was doing what it was supposed to do, it was considering whether the dismissal procedure was fair and it was entitled to comment critically on the fact that the dismissal officer does not seem to have allotted himself very much time to consider the evidence and reach a decision and produce a detailed letter of dismissal all within 20 minutes.

13. The Claimant appealed, the appeal was conducted by a Mr McCreanor. Mr McCreanor was the general manager of the Morrison's store in High Wycombe. He considered the documents and also it is said spoke to Mr Fellows. We are told, although there is no direct evidence of this because we have not seen his notes, that Mr Fellows simply repeated what he had previously said. Be that as it may those notes were not supplied to the Claimant. The Employment Tribunal say this would have made no difference: in our opinion it is impossible

to say without having seen the notes. In any event it is certainly not a practice to be approved of. On 17 November the appeal was dismissed.

14. The Claimant apparently did not receive the outcome letter at the time and he only saw it once the proceedings had begun during the process of disclosure; that explains why he did not exercise his right of a second appeal.

15. I now turn to the judgment of the Employment Tribunal. It set out the issues, it set out the facts as we have briefly recounted them. It directed itself as to the law, in particular in relation to the law of dismissal and section 98 of the **Employment Rights Act 1996**. We do not propose to refer to the directions given in relation to issues of discrimination. At paragraph 51 the Employment Tribunal shared the scepticism which we have as to the use of industrial language in a warehouse in Woking. Although it found it a little hard to believe, it recounted that it was in effect a swear free zone and that the evidence as to that had not been challenged by the Claimant. The Employment Tribunal did not find it appropriate to draw an adverse inference on this such as to displace the burden of proof in a case of racist name calling. There is no issue taken on the Employment Tribunal's self-direction as to the law.

16. The Employment Tribunal then went on to consider the fairness of the dismissal procedure. The Employment Tribunal first looked at how the Claimant was dismissed, that is to say the procedure that was followed. It was concerned as to the speed with which the process was undertaken by the Respondent and specifically the Claimant did not receive the evidence against him until 8.00 pm the night before the hearing. We believe this would be a breach of paragraph 11 of the ACAS Code of Practice to which we will refer shortly. With regard to the appeal we are concerned the Claimant was not provided with either the details of or a copy of the further evidence obtained from Mr Fellows. Given that the appeal was a re-

hearing to this extent we believe this must amount to a further breach of paragraph 11 of the ACAS Code of Practice.

17. The Employment Tribunal then directed itself in relation to the three stage test set out in **British Home Stores v Burchell** [1978] ICR 303 firstly whether the employer believed the employee was guilty of misconduct; it found that the Respondent did hold such a belief, secondly whether the employer had in mind reasonable grounds upon which to sustain that belief. The Employment Tribunal answered that question in the negative. Thirdly, at the stage at which the employer formed that belief on those grounds whether as much investigation into the matter had been carried out as was reasonable in the circumstances; again the Employment Tribunal answered the question in the negative. The Employment Tribunal directed itself that where an allegation turns on a conflict of evidence the employer ought at least to have tested that evidence in order to act reasonably; it should in the circumstances of the case tested the evidence of Mr Fellows as it went to corroborate Mr Prince's evidence in circumstances where Mr Prince, the alleged victim, did not voluntarily raise a complaint. At the dismissal stage Mr Bartlett had not spoken to Mr Fellows but relied on a short note of a telephone conversation Mr Burgess had with Mr Fellows to which we have referred. At the appeal stage Mr McCreanor two months later did actually speak directly to Mr Fellows but did not relay this evidence to the Claimant, however the crucial point is that no one took reasonable steps to investigate or test, the evidence that was obtained from Mr Fellows, particularly in the light of the Claimant's explanation of what he said had happened which remained consistent at both the dismissal and appeal stages. This particular sentence of the judgment is the subject of criticism by Mr Nutman and we shall come onto that.

18. The Employment Tribunal at paragraph 61 noted a number of discrepancies between the two telephone conversations the Respondent had with Mr Fellows and I quote. The Employment Tribunal said:

> **"No enquiry was made as to what motivated Mr Fellows to raise a complaint, which may well have simply have been that he was late back to his own depot because of the time taken by the Claimant to unload. No enquiry was made to establish where Mr Fellows was positioned in relation to the incident between the Claimant and Mr Prince. No enquiry is made as to what specific swear words were used by the Claimant or what Mr Fellows meant by threatening or violent behaviour. No enquiry is made as to what 'thing' or 'things' were thrown around (this goes from plural to singular between the two statements).** [As I have already said we have only seen one of those statements and not the other.] **On a separate note, no enquiry was made as to what activity it was that Mr Prince required the Claimant to carry out in the ten minutes or so that remained of his shift."**

19. The Employment Tribunal therefore found that the Respondent had no reasonable grounds on which to hold a genuine belief of misconduct, having not carried out as reasonable an investigation as the circumstances required.

20. The Employment Tribunal noted there was a conflict of evidence between two people; one person's evidence apparently corroborated to an extent by a third party. The Respondent should have taken reasonable steps to pin down the evidence of that third party particularly given the consistent explanation given by the Claimant and on appeal the discrepancies between the two telephone conversations with that third party.

21. Compared with the swiftness of the dismissal, say the Employment Tribunal at paragraph 64, the investigation on appeal did not take place until 19 October 2011, three weeks after the appeal hearing and two months after the incident in question and the Claimant's dismissal. By then the memories would naturally have faded.

22. At paragraph 66, the Employment Tribunal raise a number of matters arising from Mr Fellows evidence that a reasonable employer might have considered what was Mr Fellows

motivation for making the complaint to his own manager; the Employment Tribunal speculated it could be because he was back late. Secondly, the statement of Mr Burgess was not first-hand. Mr Fellows' evidence had come via Mr Burgess; how much of the lead up to the final altercation had Mr Fellows witnessed, where was he standing. The Claimant says he was in his cab, Mr Prince said he was standing close to him, what swear words were used, was it just once or more than once? If it was once this might be consistent with the Claimant's evidence the words "back off" may have been may have been mistaken for the words, "fuck off"; in what way was the Claimant violent? The Claimant says he was not. Mr Prince says he was shouting and standing close to him and had a slightly raised fist in his witness statement. What were the things Mr Fellows states the Claimant was throwing about? The Claimant says the keys dropped, Mr Prince says the Claimant threw the keys down. Both of these are singular and not plural.

23. The Employment Tribunal then asked about Mr Fellows' evidence to Mr McCreanor. We have not seen this, we are told by the Respondent it added nothing although different questions seem to have been in the mind of the Employment Tribunal. What was Mr Fellows motivation for raising the matter with his manager, in what way did the Claimant react very badly, what did he throw and why has it changed to one thing and not things? How was the Claimant behaving in a threatening manner and why is it not being violent as in the previous statement when swear words were used by the Claimant?

24. The Tribunal then directed itself that in considering whether the **Burchell** test had been met it had to ask itself whether what occurred fell within the band of reasonable responses from a reasonable employer and it directed itself by reference to **Sainsbury's Supermarket v Hitt** [2003] IRLR 885 that the range of reasonable responses applied in a conduct case, both the

decision to dismiss and to the procedure by which the decision was reached. There is then an important direction at paragraph 69:

> **"In addition we did remind ourselves that we must be careful not to substitute our own decision for that of the employer when applying the test of reasonableness."**

25. That self direction of course is absolutely correct and we remind ourselves of what was said in the Supreme Court by Lord Dyson in the case of **MA (Somalia) v The Secretary of State of the Home Department** [2010] UKSC49. Lord Dyson said at paragraph 46:

> **"It is often easy enough to find some ambiguity or obscurity in a judgment of determination, particularly in the field as difficult and complex as immigration whether facts may be difficult to unravel and the law difficult to apply. If, as occurred in this case, a Tribunal articulates a self direction and does so correctly the review in court should be slow to find it has failed to apply the direction in accordance with its terms, all the more so where the effect of the failure to apply the direction is that the Tribunal will be found to have done precisely the opposite of what it said it was going to do."**

26. We have that very much in mind because it makes clear the difficulty of the task facing Mr Nutman.

27. The Tribunal then went on to find, having expressed surprise at the swiftness of the dismissal process, that the dismissal was outside the range of reasonable responses and was consequently unfair.

28. It then turned its attention to the question of whether or not there should be a **Polkey** deduction: see **Polkey v A E Dayton Services** [1988] 1 AC 344. The Employment Tribunal says in terms when considering **Polkey** deduction that it was inappropriate to make such a deduction because the dismissal was not simply procedurally unfair but also substantively unfair. The Employment Tribunal then went on to consider the linked question of whether the Claimant had contributed to his dismissal. It directed itself correctly by reference to the leading authority on the point of contribution **Nelson v BBC (No.2)** [1979] IRLR 346, CA.

29. The Employment Tribunal then at paragraph 75 made its findings as to what had actually happened:

> **"On the evidence we have heard we find that the Claimant reacted to being badgered by Mr Prince to hurry up, not having had a break since 1.00 pm or 1.30 pm and having spent the best part of the last two hours unloading a lorry and moving the stock from the loading bay onto the shop floor on his own. At worst it appears to us he was a bit sharp with his manager, went to hand him the keys, they fell to the floor and he walked off to take his break as instructed. He came back after taking his 30 minute break and worked the last 15 minutes of his shift. As the Claimant said to us, it was an altercation between two grown men showing their feelings. If it was as severe an altercation as it was later portrayed then we are very surprised Mr Prince, even with his stated style of management, did not raise the matter himself but instead had to be approached by his own line manager. Whilst the Claimant in his response to Mr Prince may have reacted emotionally to the pressure he felt that he was under this cannot be said to have contributed to his dismissal."**

30. The Employment Tribunal then went on to consider whether there had been a wrongful dismissal. It directed itself, again correctly, that the breach of contract required to justify summary dismissal had to be repudiatory. On the facts as found by the Employment Tribunal which recognised that matter such as dishonesty, serious negligence and wilfully disobeying lawful instructions could justify summary dismissal, on the facts the Claimant had not committed a repudiatory breach of contract.

> **"On the evidence that we have heard we find that the Claimant reacted to being badgered by Mr Prince to hurry up, having not had a break since 1.00 pm or 1.30 pm having spent the best part of the last two hours unloading a lorry and moving the stock […]."**

31. The Employment Tribunal in the circumstances found that the Claimant was wrongfully dismissed in breach of his entitlement to notice of dismissal. The Employment Tribunal went on to fix a remedy hearing; we need not say any more about the remedy hearing although the question of **Polkey** does seem to have arisen again but the decision that there would not be a **Polkey** deduction had already been taken. We have already referred to the level of compensation.

32. We now turn to the submissions and the Notice of Appeal. The principal complaint was that the Employment Tribunal substituted impermissibly its views for those of the employer and did not consider whether or not the employer's conduct of the dismissal procedures and the decision to dismiss were within the reasonable band of responses. It is said that insufficient weight was given to the Claimant's rudeness to his manager, Mr Prince, it is suggested that the Employment Tribunal should not have accepted the Claimant's evidence because the Claimant's evidence had in fact changed. In this regard we were invited to look at the notes of what was said during the disciplinary hearing conduct by Mr Bartlett and it contains this:

> **"SB [Mr Bartlett] asked if TK [the Claimant] threw the keys on the floor. TK replied he said to KP, "You close the lorry" and then put the keys in KP hand. KP moved his hand and they fell to the floor and KP was pushing TK to go for a break."**

33. That is what is said in the notes. On the appeal before Mr McCreanor the Claimant is recorded as saying that he had given the keys to Mr Prince due to needing his 30 minute breaks. He gave him the keys and he threw them on the floor. He said that Mr Prince put words in the mouth of the driver to call, "I only gave back the keys I had in the first place". Well, there it is, the question of credibility and weight to be given to the evidence is a matter for the Employment Tribunal which they are far better equipped to have undertaken than we are sitting on appeal.

34. It is suggested that the investigation contrary to what was found by the Employment Tribunal was reasonable, after all the Respondent's case was supported by two witnesses whose word was being given against that of the Claimant. It is submitted that there was no breach of the ACAS code. It is probably helpful at this stage to remind ourselves of what the ACAS code says at paragraph 11:

> **"Hold a meeting with the employee to discuss the problem**
>
> **The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case."**

35. Mr Nutman bravely submitted to us that reasonable time had been given, all of 21 hours. The Claimant, he submitted, never complained he had insufficient time although, of course, there is the Claimant's witness statement before the Employment Tribunal to which we have referred, although it does not appear that he complained of lack of time either to Mr Bartlett or to Mr McCreanor on the appeal, and Mr Nutman submits it would have made no difference in any event if he had been given more time. He submitted that breaches of the code must be read as the code setting a basic standard. The code does not set a minimum time as to what is a reasonable time or not and that should be left to the good sense of the employer.

36. There was no need, he submitted, for Mr Fellows' second statement to have been disclosed because it said nothing new. He did concede however that the dismissal process may have been unimpressive and could have been done better but following the guidance in **Sainsbury's Supermarkets v Hitt** the Employment Tribunal had substituted its views rather than asking whether it had acted within the range of reasonable responses.

37. So far as **Polkey** is concerned there was material, Mr Nutman submitted, that may have entitled the Employment Tribunal to conclude that had the employer conducted a fair procedure it might have led to his dismissal and that this should have been assessed and an appropriate reduction made if appropriate. The Employment Tribunal was wrong, he submitted, to suggest that the fact that the dismissal was substantively as well as procedurally unfair to mean that there was no room for the application of a **Polkey** deduction.

38. The submissions made on behalf of the Claimant by Mr Frimond can really be summarised very shortly. He submitted that the decision of the Employment Tribunal which directed itself correctly as to the law and that its conclusions were in essence issues of fact.

These were determined in favour of the Claimant and it would not be appropriate for the Employment Appeal Tribunal to interfere as complaints as to factual findings did not raise any issue of law.

39. We now turn our conclusions. We cannot see any evidence of the Employment Tribunal having substituted its views of those of the employer. It is clear that the Employment Tribunal weighed the actions of the Respondent against the range of reasonable responses. There was substantial evidence to support the findings that it made and we have already referred to the guidance in the case of **MA (Somalia)**. So far as it is said that the Employment Tribunal gave insufficient weight to the claim of rudeness, had the Employment Tribunal found that the Claimant had been rude there might be some substance in this but the Employment Tribunal's findings as to what had occurred, to which we have already referred, do not suggest that this was necessarily the case. This is a case in which the Employment Tribunal was entitled to conclude that the conduct of the Respondent fell outside the reasonable range of responses as there were no reasonable grounds for its belief in the guilt of the Claimant because its investigation was inadequate. The weight of the evidence, including inconsistencies in the Claimant's evidence was, as we have said, essentially a matter for the Employment Tribunal.

40. While it is correct that there were two witnesses upon whom the Respondent relied giving evidence against the Claimant, the quality of that evidence was a matter for the Employment Tribunal and it is impossible in our view to say that the investigation of what evidence Mr John Fellows would give was adequate. It was clearly dealt with in the most perfunctory manner as evidenced by the telephone note to which we have referred. So far as the ACAS argument is concerned; is it is impossible to say in our view that the view of the Employment Tribunal is one that it could not reasonably come to, all the more so as the Claimant had complained in his witness statement about the inadequacy of the time given to him and viewed objectively there is

clearly material that would justify a finding that there had not been sufficient time allotted to him prior to the disciplinary hearing to consider the evidence.

41. So far as the disclosure of the second conversation with Mr Fellows is concerned, we have not seen this but it does appear to have in some way differed from his other statement and whether or not it may have assisted the Claimant, the fact is he never had the opportunity to consider it; that is unfair. The Employment Tribunal saw the witnesses, it considered the documents and came to conclusions based on the evidence it had heard and read. In the absence of perversity we cannot revisit its findings and the case comes nowhere near getting to the very high threshold referred to for perversity appeals in the decision of **Yeboah v Crofton** [2002] IRLR 634.

42. So far as **Polkey** is concerned, we are minded to accept the submissions of the Respondent. It is clear from *Harvey* and the authorities referred to at Division D1/2549 that the Employment Tribunal was in error in considering that where there had been substantive unfairness as well as procedural unfairness there was no room for **Polkey**.

43. In all those circumstances therefore, we dismiss the appeal in relation to the fairness of the dismissal, but we do consider that the case is made out in relation to the Employment Tribunal's consideration of a **Polkey** deduction.

44. We have carefully considered what we should then do. We have had regard obviously to the decision in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. We very much have in mind the importance of proportionality, the importance of saving the resources, of both of the parties and the Employment Tribunal both as to costs and time. We also have regard to the professionalism of the Employment Tribunal. This is not an Employment Tribunal that was

totally committed to the Claimant's case, indeed it dismissed what the Claimant may well have thought was the more substantial part of his case; that is the case of discrimination.

45. We would therefore direct that this matter be referred to the same Employment Tribunal, and, again, in the interests of costs the Employment Tribunal should consider whether it can deal with the matter on written submissions alone unless either party objects to such a course. We have in mind, of course, the relatively modest sum that is involved and the proportionality of having a further oral hearing.