Appeal No. UKEAT/0237/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 18TH December 2012
Judgment handed down on 29th January 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR T M HAYWOOD

MR P M SMITH

MS C S HILL APPELLANT

GOVERNING BODY OF GREAT TEY PRIMARY SCHOOL RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	MS CLAIRE DARWIN (of Counsel) Instructed by: Unison Legal Services Unison Centre 130 Euston Road London NW1 2AY
For the Respondent	MR OLIVER HYAMS (of Counsel) Instructed by: Essex County Legal Services 60-68 New London Rd Chelmsford Essex CM2 0PD

SUMMARY

UNFAIR DISMISSAL/POLKEY DEDUCTION/HUMAN RIGHTS

A school mid-day dinner assistant told a child's parents that the child had been tied to a railing in the playground and whipped across the legs by other pupils. She was suspended, She complained to the press about the suspension and in doing so confirmed what she had told the parents. Her claim that she was dismissed for making a disclosure in the public interest was rejected, but her dismissal was held unfair on procedural grounds. At the subsequent remedy hearing, the Tribunal concluded that she would have been dismissed fairly after 2 months if proper procedure had been followed, and compensation for that 2 months should be reduced by 80% on account of her contributory conduct, and awarded £49.99.

An appeal arguing that the ET took an erroneous approach to making a Polkey deduction was upheld; as was the ground that the ET approached central issues of confidentiality by applying its own paraphrase of the qualifications to Article 10 of the ECHR (freedom of speech) rather than the legislative words (it should have adopted a structured approach to applying those actual words). That might also have affected the assessment of contributory fault, and it was in event unclear precisely what was said to be confidential and to whom, the disclosure of which was the basis for dismissal. Since the claimant's argument that the "Polkey deduction" should be nil since any dismissal would inevitably be unfair because a primary school had no right to require confidentiality from its staff was rejected, and the Appeal Tribunal in no position to decide the matter for itself, it was remitted to a Tribunal for re-determination of remedy (submissions being invited as to the identity of that tribunal).

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. On 4th January 2011 an Employment Tribunal at Bury St Edmunds decided that the Claimant had been unfairly dismissed from her post as a mid-day dinner assistant at Great Tey Primary School in September 2009. It dismissed a complaint that the dismissal was automatically unfair because the Claimant had made protected disclosures in the public interest: she had not, nor had the disclosures been made in good faith since the Claimant had acted out of self-interest, and for personal gain, coupled with antagonism towards the head teacher. Nor had the disclosures had not been made by the appropriate route provided for by statute, and the Claimant did not reasonably believe that if she spoke to her employer she would be subjected to a detriment. It was not reasonable for her to have made the disclosures she relied on.

2. Neither party appealed against the decision.

3. Accordingly, the Employment Tribunal proceeded in a second hearing to consider what remedy it should grant to compensate the Claimant for her unfair dismissal. The reasons for holding the dismissal unfair had been essentially procedural: and the Tribunal had expressly held over to the remedy hearing the question whether if a fair procedure had been followed the Claimant would have been dismissed in any event or, if not, what the percentage chances were that she would have been.

4. At the outset of the remedy hearing, the Claimant withdrew what had been her primary claims – for reinstatement or re-engagement. Compensation was thus the only remedy in issue. The Tribunal determined that if a fair procedure had been adopted the Claimant would have been dismissed fairly two months after the date upon which she was. It found, also, that she had contributed to her dismissal to the extent of 80%.

5. In total it awarded her just over £350.

6. Represented by Ms Darwin, as she was before the Tribunal, the Claimant appeals against that decision on six grounds. Her appeal raises questions about the inter-relationship of Article 10 of the European Convention on Fundamental Rights and Freedoms, the expectations of the employer that she should hold certain matters confidential, the disciplinary proceedings before the employer, and the Tribunal's application of the relevant law of unfair dismissal; the proper approach to making a **Polkey** reduction; and the proper approach to contributory fault as principal matters.

7. The Respondent ("the school"), also represented as it was before the Tribunal by Mr Hyams, argues that the Claimant is precluded from essential parts of her argument by the Tribunal's unappealed final determination of issues in its earlier decision – effectively, maintaining that an issue estoppel prohibited it.

The Facts

8. On 24th June 2009 the Claimant was on duty in the school playground when she was alerted to the fact that a seven year old pupil, Chloe, had been tied by her wrists to a fence and whipped across the legs with a skipping rope by two male pupils (aged 9 and 10) whilst 2 other male pupils aged 6 or 7 acted as "guards". Chloe was crying. There were red marks on her legs, and rope burns and scratches on her wrists. The Claimant untied her, calmed her down, and took her and 3 of the boys to see the first aider and Mrs Crabb, the Head Teacher. She told Mrs Crabb what had happened before bringing the fourth boy to her and returning to her playground duties.

9. An entry was made in the school accident book which recorded that Chloe had been tied up and hit with a skipping rope, and had red marks on her right leg and right wrist, which were treated by a cold compress.

10. An Accident Notification Form was completed to give to Chloe's parents. It read:

> **"You may wish to know that Chloe had a minor accident today. She was hurt on the right leg and the right wrist with a skipping rope at lunchtime. We believe that we have dealt with it adequately. Cold compress applied.**

Mrs Crabb added a further handwritten note to the form, which read:

> **"Chloe was hurt by some other children (she will tell you I am sure) so to reassure you that they have all missed part of their lunchtime today and their parents have been informed."**

11. That notification was handed to Chloe's mother, Mrs David, on the same day, at the end of the school day, but before Chloe attended out of school swimming at the school. Mrs David was at the swimming: she spoke to the head teacher, who was also there, but did not mention the incident. She accepted, however, that she had already been told about it by Chloe.

12. Later the same day, the Claimant met Mrs David at the local Beaver Scouts. She spoke to Mrs David, and told her what she had seen in the playground. She said she did so because she thought that Mrs David was unaware of the full detail of the earlier incident (though the Tribunal thought this was inconsistent with Mrs David's own statement to the school disciplinary panel that in fact she already knew).

13. Mr David met Mrs Crabb the next morning, 25th June. He told her that the Claimant had spoken to Mrs David at the local Beaver Group.

14. The following Monday, 29th June the Davids contacted the Claimant to inform her that they had involved the police in the investigation of 24th June. The Tribunal found, in words which derive from the Claimant's own witness statement:

> **"Child C's parents informed the Claimant that the police may need a statement from her. The Claimant therefore prepared the Statement (page 73) setting out what she had seen. However, the statement goes further in the last paragraph:**
>
> > **'I was correct in my assumption the poor woman had not been told, she had been given an accident sheet via C which stated C had an accident in the playing field with a skipping rope hurting her arms and legs.'"**

15. The next day the Claimant hand delivered a copy of that statement to Mrs Crabb's secretary, and provided 6 copies for the governors of the school. Given the way in which the Tribunal expressed the matter, it should be noted it found that the Claimant was not asked to give a statement by the Davids, only that she was told that one might be required. If so, it would be required by the police. The Claimant did not, however, give the statement to the police. The last paragraph of her statement, which the Tribunal highlighted, was inaccurate. It did not set out any part of the handwritten note which Mrs Crabb had added, nor did it recognise that Mrs David had been told the facts, albeit that the details came from Chloe and not, save by invitation to speak to her daughter, from the school.

16. The next day again (1st July) the Claimant was suspended by Mrs Crabb pending investigation into what were thought might be breaches of confidentiality. An hour or so later, the Claimant contacted the local press to tell them that she had been suspended and that it involved a child – if they wanted further information, they would have to contact the Davids. The press did. They obtained the Davids' side of the story. They reverted to the Claimant for her to corroborate it. She did.

17. This led to national and international media coverage unfavourable to the school.

18. Arising out of this passage of events, the Claimant faced disciplinary charges that she had (i) broken confidentiality by speaking to parents about an incident that happened in school involving their daughter;

(ii) broken confidentiality by speaking to the local press about the incident;

(iii) acted in a manner likely to bring the school into disrepute by contacting the local press, and (iv) a further charge, which was dismissed for evidential insufficiency.

19. A disciplinary panel of governors from the school found the 3 charges proved and decided that the Claimant should be dismissed. She appealed. On 27th November 2009 an appeal panel dismissed the appeal. It thought that the school had a 'very clear' confidentiality policy, which it was reasonable to expect staff to follow – it provided for staff to speak with the head teacher if they had any concerns about anything they had seen or heard. That covered both the first two allegations. It found that the Claimant's actions had seriously damaged public and local community confidence in the school, and had resulted in an irreparable breakdown in trust and confidence between her and the school.

20. The Tribunal did not determine what actually was the reason for the dismissal, but thought that each of the three charges found proved were potentially fair reasons to dismiss. However, it held that the investigation and disciplinary process was unfair. The allegations had been investigated by Mrs Crabb, who was intrinsically involved in the events. She reported to the governors with a recommendation that the Claimant should be dismissed. That was likely to have an undue adverse influence against the Claimant. Relations between the Claimant and Mrs Crabb were strained. The investigation was not as thorough as it might have been. It was inappropriate for governors at the school to conduct the disciplinary hearing, particularly given the wide unwelcome, unhelpful public attention. A suggestion by the Claimant's trade union

that governors from another school should sit on the panel was rejected. The panel that sat was not impartial.

The Decision under Appeal: Legal Landscape

21. The task the Tribunal was engaged upon at the remedy hearing was to determine compensation. Such an award is, by section 118 of the **Employment Rights Act ("ERA") 1996** to consist of both a basic award and a compensatory award. The compensatory award is by virtue of section 123 to be

> **"…such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer…"**

22. In practical terms, this will split into two parts: an award in respect of past losses, and an award of future loss. Though past loss may be thought more certain, and likely to be capable of determination on a balance of probabilities (being a matter of past fact) it is based, as is future loss, upon one underlying assumption: that the employment will continue. Other assumptions too are built into the assessment: that the rate of pay will remain the same, unless evidence shows otherwise; that where the rate is an hourly one, the hours will remain the same. The assumption that the employment would have continued up until the date of the Tribunal and, in an appropriate case, will continue thereafter involves an assessment by a Tribunal of the chance that this will be so. Such an issue does not readily admit of certainty: many factors may affect it, from obvious ones, such as the health of a Claimant permitting the employment to go on; whether the Claimant might retire and, if so, when; whether the Claimant might for her own purposes wish to leave the job (for instance to follow a partner elsewhere in the country, or to accept promotion elsewhere). But they do not only involve factors relating to the employee concerned. The employer's position too must be considered. How likely is it that the employer

may, for instance, seek to reduce staff numbers and, if so, how likely would that be to affect the employee concerned? How likely to close down the unit altogether? How likely to wish to promote the Claimant if there had been no dismissal? And – of particular relevance here - how likely would it have been to have dismissed the employee? This latter is to be assessed on the assumption that an employer will act fairly (see, eg, **Johnson v Roller World** [2010] UKEAT/0237/10 [30th November 2010]).

23. Because of the frequency with which Tribunals have found employers wanting in the procedures they have adopted to effect dismissals which might otherwise have been fair this latter aspect of the broader question of compensation is known as the '**Polkey**' deduction, after **Polkey v A E Dayton Services Ltd** [1988] ICR 142.

24. A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer ***would*** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.

The Grounds of Appeal

25. Though grounds 1 and 2 of the Appeal relate to Article 10, we shall begin with the decision on **Polkey**. It is contended (by ground 3) that the tribunal took an erroneous approach.

26. Though the Tribunal directed itself appropriately at paragraph 2:

> **"The Tribunal does have to consider what compensation is just and equitable in all the circumstances, and in doing so… has to consider firstly whether had a fair procedure and reasonable investigation been carried out by the Respondents would dismissal have occurred in any event, or would there be a percentage chance she would have been dismissed and, then the Tribunal would have to, depending on the answer to that, go on to decide whether the Claimant had in some way contributed to her own dismissal or was in some way blameworthy."**

Ms Darwin argued that later in its decision the Tribunal took the wrong approach.

27. At paragraph 11 it concluded that "had an untainted set of governors following a reasonable investigation (been) put together, they ***could*** have formed a genuine belief in the misconduct that had occurred…" (emphasis added). It went on to say:

> "**12. The next thing that an untainted set of governors would have to do is to decide whether dismissal was within the band of a reasonable response that was available to the Respondent and was that dismissal fair in all the circumstances having regard to article 10 of the Human Rights Convention?**
>
> **13. The first point the Tribunal reminds itself of is when you are dealing with such matters, namely whether the dismissal is fair or unfair, we must not substitute our own view, i.e. what we would have done…**
>
> **……**
>
> **20. Given the Claimant's breach of confidentiality and bringing the School into disrepute and whether the Claimant could potentially be trusted in delicate matters of confidentiality in the future, the decision to dismiss by an untainted set of governors is clearly a sanction that would have been within the band of a reasonable response open to that set of governors.**
>
> **21. So taking all those matters into account, had there been a collaborate agreement with untainted governors to hear the disciplinary, the Tribunal are entirely satisfied that the Claimant would have been dismissed in any event."**

28. Though she herself did not specifically rely upon it, we noted that in paragraph 5 the Tribunal expressed its duty as being "to construct a working hypothesis as to what ***could or would*** have occurred…" (emphasis added).

29. In her impressive submissions, Ms Darwin complains that the reference to 'reasonable responses' had no place in the analysis here. It represents a test to be applied by the Tribunal when considering if an employer has acted fairly when dismissing an employee. Such a review test is applied in retrospect to an actual decision. It does not help to predict what the chances of an hypothetically fair decision would be, or would have been. It is asking, rather, if the school had reached a particular decision would a Tribunal have overturned it? That this was the approach the Tribunal apparently were adopting might be indicated by the first sentence of paragraph 13 (quoted above). What the Tribunal would have done is of no relevance in deciding what the particular employer before the Tribunal would have done if acting fairly – but the expression of the test might indicate that the Tribunal was envisaging a position in which it was hypothetically considering an appeal against a decision by the employer on some future occasion, such that it thought it relevant to ask, in advance, if that decision would be fair.

30. The fault in this logic would be clear: a decision to dismiss might be capable of being fair, but so also might be a decision not to do so. The potential fairness of any decision is not the issue: it is the chances of a particular decision being made at all.

31. Mr Hyams argued that the self-direction at paragraph 2 was appropriate. Thereafter the Tribunal had not inappropriately asked what the employer could fairly have done. If it had decided at that stage that an employer could not fairly have dismissed there would be no possibility of any **Polkey** deduction. Having decided that there could be a fair dismissal, the

Tribunal could move onto the next step: would there have been? That was answered by paragraph 21.

Discussion

32. Apart from the reference in paragraph 2 to percentage chance, there is no sign that the Tribunal understood it was dealing with an assessment of chance relating to what the employer who was actually before it, might have done. We accept Ms Darwin's charge that it may well have been looking at matters through review eyes, rather than clearly adopting a predictive approach. The use of the word "could" and the reference to "range of reasonable responses" suggests that the Tribunal may have been asking whether if following a fair procedure the employer had decided to dismiss, such a decision would have been upheld by a Tribunal. The conclusion at paragraph 21 is based upon factors expressed at paragraph 20 which might have resulted in a decision to dismiss, but even then such a decision is not said to be likely by any given percentage, but rather possible ("within the band"). Nothing is said as to the chance of a decision in the other direction. We would have expected consideration of the chances of dismissal to have involved setting out those matters that might be said in favour of the Claimant, as well as against – such as her service over 7 years, with no hint before the incident complained of that she had been anything other than an entirely satisfactory and loyal employee. The conclusion is expressed as a certainty: though this is not in itself an error, it tends to suggest that a percentage chance approach was not being adopted.

33. In the result, we are not satisfied that the Tribunal has applied the right approach: the indications are it has not and the appeal on this ground must be allowed.

Grounds 1 and 2: Article 10

34. Article 10 of the European Convention of Human Rights, scheduled to the Human Rights Act 1998, is as follows:-

> **"10 (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting television or cinema enterprises.**
>
> **10 (2) The exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."**

35. In **X v Y** [2004] EWCA Civ 662, ICR 1634 Mummery LJ set out at paragraph 64 the structured approach which he suggested employment Tribunals should adopt when dealing with points raised under the HRA in unfair dismissal cases between private litigants. That is informative. In the present case, however, the school was not a private litigant. It is a public authority. As such, it owes and owed a duty directly to secure the freedoms protected by the European Convention. An Employment Tribunal has no jurisdiction to consider a claim under the HRA for breach of Article 10: it is not one of the jurisdictions statutorily assigned to it. The Article is nonetheless relevant, for if dismissing the Claimant for speaking out to parents and press, and thereby lowering the reputation of the school, would be to penalise her for exercising the freedom to which she was entitled under Article 10, the fact that the school is a public authority and had a duty to ensure she had that freedom would be relevant in assessing the fairness of what occurred. With specific reference to the facts of the case before us, Miss Darwin suggests that a dismissal which constituted a sanction for exercising the right to freedom of expression would be bound to be unfair.

36. Ms Darwin argued that the Tribunal adopted an erroneous approach to Article 10 and, as a second ground, that the Tribunal itself failed to give effect to the Claimant's Article 10 rights. The Tribunal was indisputably bound as a public body to read and give effect to the Employment Rights Act 1996 in a way compatible with the European Convention (in accordance with Section 3 of the HRA).

37. These submissions beg the questions of what was the Tribunal's approach to Article 10 - whether it was in error, and what result a proper application of the Article might produce.

38. In its first (unappealed) decision the Tribunal, which had not been shown any specific authority from the European Court of Human Rights concerning Article 10 (though it had been referred to textbooks, and to **Pay v Lancashire Probation Service** [2004] ICR 187), expressed the view that the Claimant had a duty of confidentiality which it thought was clearly owed to the school and its pupils. It found that she knew that her job description included a duty of confidentiality, and had attended a meeting in 2007 in which it was discussed. The circumstances were such that she should have known that matters could be confidential to the school and its pupils, were only to be reported to the appropriate manager, and that

> **"there must be incumbent in the position of mid day dinner assistant that you simply do not discuss with third parties what goes on at school between children save to report it to the head teacher."**

39. Having said that, the Tribunal observed:

> **"6.4 The same very much goes for the right to freedom of expression. Clearly, individuals have such a right, but that right must be exercised judiciously, responsibly and not recklessly."**

40. That formulation was adopted almost word for word in paragraph 19 of the remedy decision (under appeal), adding "…bearing in mind the interests of any child must be of

paramount importance." The Tribunal went on to observe that the exercise of the right to freedom of expression relied on was one in which the Claimant had not acted for the child's benefit but for her own personal gain and to obtain support for her own position.

41. In her skeleton argument prior to the remedies hearing Ms Darwin had argued that the Article 10 rights were not limited by any general obligation to act "judiciously or responsibly" as the Tribunal had identified in its liability decision. It is a pity that the Tribunal did not look at the full text of any Strasbourg authority on the approach to Article 10, though potted summaries contained in a leading text were advanced: had it done, it might not have adopted that formulation.

42. As is well known the right to freedom of expression in Article 10 is not absolute. It is a qualified right. It may be limited if the conditions in Article 10 (2) are satisfied.

43. Though Mr. Hyams submitted that the words "judiciously, responsibly and not recklessly" which the Tribunal thought qualified the exercise of freedom of expression encapsulated the provisions of Article 10 (2), neither counsel could point us to any case which had expressed the force of Article 10 (2) in those words.

44. It is dangerous, in our view, for a Tribunal to attempt to explain in its own home spun language what are complex provisions which have been the result of careful balance in their legislative expression. The motive of expressing it intelligibly for the parties may be admirable, but a decision reached in consequence of the application of such an encapsulation as if it were the actual legislative test is prone to error.

45. The Tribunal here purports to have applied its own encapsulation. It did not purport to apply Article 10 (2) in its own terms. Its approach should have been:

(i) to ask whether what had occurred could fall within the ambit of the right to freedom of expression and;

(ii) if so, then to hold that the school as a public body would be bound to respect the exercise of that right, unless it could be qualified by Article 10 (2). That would have involved considering whether the restriction on the right to freedom of expression which was complained of could be justified in accordance with Article 10 (2). Accordingly, the Tribunal would have to;

(iii) identify the aim which the restriction on free speech sought to serve – which must be one or more of the aims expressly set out at 10 (2) ("Interests of National Security" etc.). Here, two aims were potentially legitimate – the protection of the reputation or rights of others, and preventing the disclosure of information received in confidence;

(iv) satisfy itself that the restriction or penalty imposed in the light of that aim was one prescribed by law. That does not mean, in the UK context, that it must be provided for by statute: a common law right will suffice. A contractual term requiring respect for confidential communications would, for instance, be sufficient. So, too, would a common law right to confidentiality;

(v) if so, consider if the restriction or penalty was "necessary in a democratic society". This involves looking to see whether the measure concerned was appropriate to the legitimate aim to which it was said to relate, and that the extent of the interference which it brought to the exercise of the right was no more than proportionate to the importance of the particular aim it sought to serve. This balancing exercise was, in the first place, for the school to perform, or, in the **Polkey** context, to be considered as if it had performed. However, the test in the present case for the Tribunal is not whether the school would be entitled to take a particular view of the exercise of Article 10 rights but whether that was where the law actually strikes the balance. The Tribunal has to make its own assessment: it does not apply a review test.

46. Ms Darwin submitted (rightly) that beyond principles of approach such as we have set out above, the actual decisions of the Strasbourg Court are exemplars rather than statements of principle to be adopted as precedent. In that light she took us to only two authorities in oral argument, though she had referred to others in her skeleton.

47. The first was **Heinisch v Germany** (application 28274/08) [2011] IRLR 922. She did so in order to highlight the Court's observation at paragraph 91 that dismissal is "the heaviest sanction possible under labour law", and thus emphasise her argument that it should not readily be taken to be justified as a response to the exercise of free speech. The case was one in which the employee had lodged a whistle-blowing criminal complaint against her employer and was consequently dismissed without notice. It does not appear that there is a German equivalent to the public interest disclosure provisions in the Employment Rights Act. Accordingly, recourse was to be had, if at all, to the European Convention.

48. The head note to the IRLR report, which it was accepted accurately recorded the substance of the judgments, reads materially as follows:

> **"The courts are… mindful that employees owe to their employer a duty of loyalty, reserve and discretion. In the light of this duty, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information can be disclosed, as a last resort, to the public. In assessing whether a restriction is proportionate therefore, the courts will take into account whether the applicant has any other effective means of remedying the wrong-doing which she intended to uncover. If an employer fails to remedy an unlawful practice that an employee has drawn his attention to, the latter is no longer bound by his duty of loyalty.**
>
> **The courts will also have regard to a number of other factors when assessing the proportionality of the interference in relation to the legitimate aim pursued. In the first place, particular attention is paid to the public interest involved in the disclosed information. There is little scope under Article 10 (2) for restrictions on debate on questions of public interest. The second factor relevant to this balancing exercise is the authenticity of the information disclosed. It is open to the competent state authorities to adopt measures intended to respond appropriately and without excess to defamatory**

accusations devoid of foundation or formulated in bad faith. Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify to the extent permitted by the circumstances, that it is accurate and reliable. On the other hand, the courts must weigh the damage, if any, suffered by the employer as a result of the disclosure in question and asses whether such damage outweighed the interest of the public in having the information revealed. The motive behind the actions of the reporting employee is another determinative factor in deciding whether a particular disclosure should be protected or not. For instance, an act motivated by a personal grievance or personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection. It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and no other more discreet means of remedying the wrong-doing was available to him or her. Finally, the review of proportionality requires a careful analysis of the penalty imposed on the applicant and its consequences."

49. From this we take that in assessing whether dismissal is a proportionate response to "telling tales out of school" it is relevant to consider the accuracy and reliability of the information, whether more discreet means of passing on the information are available, and the motive with which it is revealed.

50. Ms Darwin took us to **Kudeshkina v Russia** (2011) 52EHRR37. A judge of 18 years standing was permitted to suspend her role as a judge and campaign for a seat in the State Duma of the Russian Federation. During her campaign, she gave interviews on the radio and in print in which she described the Russian Courts as instruments of commercial, political or personal manipulation. She referred in particular to a case in which she presided and the Moscow City Court President withdrew from her. She was not elected, and was reinstated as a Judge. But the Judiciary Qualification Board decided to terminate her office as such claiming that she had deliberately disseminated deceptive, concocted and insulting perceptions of the Judges and judicial system of the Russian Federation during her campaign. The court held (by 4 votes to 3) that her removal from judicial office in view of her critical public statements violated her freedom of expression under Article 10. Ms Darwin suggested this demonstrated that freedom of expression was capable of protecting comments made to the press.

51. We note that what influenced the court to its finding was that the disciplinary proceedings entailed the loss of the judicial office and of any possibility of exercising the profession of judge – a severe and indeed the strictest available penalty, which did not correspond to the gravity of the offence and which could discourage other judges in future from making critical statements for the fear of loss of judicial office. The statements she made were not devoid of factual grounds, but were fair comment on a matter of great public importance. Her fears as regards the impartiality of the Moscow City Court were justified.

52. Accordingly, the case was a very different case in a very different context from that of the present Claimant. However, the judgment contains helpful pointers. Thus, at paragraph 84, it indicates that the proportionality of interference may depend on whether there exists sufficient factual basis for the statement complained of; that employees owe a duty to their employer of loyalty, reserve and discretion which is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion. Disclosure by them of information obtained in the course of their work, even on matters of public interest, had to be examined in the light of that duty of loyalty and discretion.

53. Ms Darwin relied upon the statement at paragraph 82 (1), to the effect that Article 10 is applicable not only to information or ideas which are favourably received or regarded as inoffensive but also to those that offend, shock or disturb. Indeed, we would observe that a guarantee of freedom of expression is likely to be meaningless if all it guarantees is the right to say that which other people are pleased to hear. The expression "judiciously, responsibly and not recklessly" was incapable, complained Ms Darwin, of capturing those cases in which the listener might not wish to hear what was said. Freedom of speech protects the right to speak injudiciously, and irresponsibly, subject only to the qualifications imposed by 10 (2). As to those, she argued that there could be no legitimate aim involved here. The disciplinary offence

with which the Claimant had been charged was that of bringing the school into disrepute. Although Article 10 (1) might be qualified by the aim of protecting the reputation or the rights of others a school was a public body and as such had no right to protection of its reputation. This, she argued, was determined by **Derbyshire County Council v Times Newspapers** [1993] AC534. The conclusion to which the House came was that under the common law of England a local authority did not have the right to maintain an action of damages for defamation. Lord Keith, with whom Lords Griffiths, Goff, Browne-Wilkinson, and Woolf agreed, thought that in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the Convention. Thus Ms. Darwin argued that this decision was applicable as if a decision under that Article.

54. The judgment distinguishes between a local authority and other corporations, whether trading or non-trading, because of particular features the House identified at p. 547. They are that a local authority is a governmental body, it is democratically elected, and it is thus of the highest public importance that it should be open to uninhibited public criticism. Lord Keith quoted from the **City of Chicago v Tribune Co**, (1923) 139 N.E. 86, a decision of the Supreme Court of Illinois (in which the remarks of Thompson C.J. were directed towards Government itself) and to **Hector v Attorney General of Antigua and Barbuda** [1990] 2 A.C. 312 in which Lord Bridge had said (at 318) that:

> **"In a free democratic society it is almost too obvious to need stating that those who hold office in government and are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."**

55. At page 549 B-C Lord Keith said that there was no public interest favouring the right of organs of government whether central or local to sue for libel, but rather that it was contrary to the public interest that they should have that right.

56. Ms Darwin submits that the legitimate aim in Article 10 to protect the reputation of others could not extend to the reputation of the school since the school 'in common with all institutions of central or local government' had, by virtue of **Derbyshire** no right to protect its reputation and was unable to sue for libel or defamation.

Discussion

57. We are satisfied that the Tribunal did not adopt a proper test in applying Article 10. The structured approach we have set out, applying the words of the Article and not a well-meaning homespun impression of them, should have been adopted, and was not. Where a balance has to be struck between a fundamental right on the one hand, and qualifications in the public interest to the exercise of that right on the other, even subtle changes of language may have an unintended effect.

58. This would give rise to no relief if Mr. Hyams' primary answer to the art. 10 point is accepted (see "Issue Estoppel" below), but if this is put to one side for the moment does give rise to two questions: first whether the Tribunal was plainly and unarguably right in any event, (if so the appeal would fail), and second Ms. Darwin's argument that **Derbyshire** has the effect that the school as a public body must legally be viewed as having no reputation which it was in the public interest to protect, so that the Tribunal sought erroneously to protect it (if so, the appeal might succeed). The answers to both depend in turn upon the reasoning adopted by and that which was open to the Tribunal.

59. Its conclusion was based upon a view of the duty of confidentiality which it thought the Claimant should have respected, and its view that she had broken that duty by what she did when she knew all too well that she should not have spoken out, nor done so to those to whom she spoke, had risked affecting other children and did so for motives which were self-centred or born of antagonism to the Head Teacher. Breach of the duty affected more than simply the reputation of the school as an institution. However, the charge upon which she was dismissed was brought by reference to a duty said to be owed to the school, and in respect of the protection of the reputation of the school.

60. The logic of Ms Darwin's argument was that any employee, civil servant, teacher, council worker, or National Health Service worker who worked for a public authority would be entitled to say whatever he or she wished – however inaccurate or extreme, and whatever its effects – and could not be restrained because it might bring the public authority, civil service, school, council or hospital into disrepute, since they were public authorities. She accepted this was so. It would be troubling if this were the law. It was not accepted in the Strasbourg cases – see the headnote to **Heinisch v Germany,** set out above, and paragraph 84 of **Kudeshkina,** which specifically recognises that a civil servant is bound by particular duties of loyalty and discretion. We do not think that **Derbyshire v Times** requires us to accept it.

61. First, **Derbyshire** relates not to any and every public authority but to a local authority exercising governmental functions. A state school is a public authority: but it is not a governmental body. It lacks the features to which Lord Keith drew particular attention. The comments of Thompson C.J. and Lord Bridge were directed at bodies with a political composition, and a politically driven administrative role. A school is not in such a position. Moreover, its reputation is a matter of importance – in the case of a small primary school in

attracting staff, and children. In these days of parental choice, state schools are in competition to secure funding by admitting pupils. We see no reason why in such a case the blanket ban on any restriction of the exercise of free speech which might affect the reputation of the school should represent the law rather than the balanced approach of Article 10 which recognises the legitimate right to make fair comment about a school (in respect of which any disciplinary reaction might properly be regarded as disproportionate) on the one hand, and is doubtful of any right to make inaccurate or misleading statements for personal reasons and out of personal hostility (which might not), on the other.

62. Further, we regard the expression 'school' in this context as representing not so much the institution but the body of pupils and staff attending and working at the school. If, indeed the common law and Article 10 entirely coincide, as the House of Lords decided unanimously, then there is no reason why the protection of the reputation and rights of others should be any less a legitimate aim for a school than it would be for any other body or person. The Tribunal thought that the speaking out of a member of staff in an uncontrolled way failed to ensure that the flow of information from the school was managed sensibly in such a way as to protect any pupil who might be seen by a parent or another pupil as a transgressor. This is, as the Tribunal said at paragraph 6.5 of its Liability judgment:

> **"..precisely as counsel for the Respondent says, because of the possibility of parental feelings running high in relation to perceived wrongs committed by other pupils. It is absolutely important for the school to be able to manage the provision of information to child C's parents to avoid one or both of them becoming if matters were not handled sensitively hostile towards the parents of other children involved in the incident of 24th June 2009."**

The Tribunal here was taking a view that regarded those "others" whose rights deserved protection as being other children attending the school and their parents.

63. Though we therefore reject Ms. Darwin's appeal to **Derbyshire**, and regard the Tribunal as having had in mind not the interests of an inanimate public institution but the real children staff and parents who populated and frequented it, we have nonetheless to deal with the matter we put briefly to one side: Mr. Hyams' primary response to the argument that the Tribunal erred in its approach to Art.10 – that its approach had been stated by the Tribunal at its earlier hearing, and since the decision had not been appealed was binding on the parties such that this ground of appeal should fail at the outset. Similarly, his primary response to Ms Darwin's absolutist argument in respect of Article 10 was that the Tribunal had already come to a conclusion on the issue during the liability hearing. Since that had not been appealed the decision stood as binding between the parties, and precluded her re-opening it here.

Issue Estoppel

64. Although he put this argument under the heading "Res Judicata", as Spencer Bower and Handley explain in the fourth edition of "Res Judicata" (2009) the Latin tag is appropriate where there has been a decision once and for all of the fundamental matters decided, so that except on appeal they may not be re-litigated between persons bound by the judgment. This relates in essence to decisions on causes of action, rather than decisions on discreet issues of fact or mixed fact and law. The phrase 'issue estoppel' is appropriate (as recognised at paragraph 8.01 of Spencer Bower and Handley) for the determination of an issue, which determination is then binding: as defined in case law (**Karl Zeiss Stiftung v Rayner and Keeler Ltd** [1967] 1A.C. 853, and **Thoday v Thoday** [1964] P.181) a decision will create an issue estoppel if it "determines an issue in a cause of action as an essential step in its reasoning."

65. There are limits to the doctrine. In particular it covers only those matters which a prior judgment necessarily established as the legal foundation or justification of its conclusion: the

fact which, if found, precludes further argument to the contrary must be fundamental to the decision, and not subsidiary or collateral to it. (See per Dixon J in **Blair v Curran** (1939) 62 CLR 464).

66. In order, therefore, to decide whether the Claimant is precluded from arguing that Article 10 would render unfair any hypothetical future dismissal responsive to her talking to parents and press it is necessary to see what was decided in the liability judgment and whether the view taken in respect of Article 10 and its repercussions was a necessary step or, as Dixon J put it "the groundwork for the decision".

67. In that earlier liability decision, the Tribunal drew two central conclusions. It first rejected the case that the Claimant had been dismissed for making a protected disclosure; and second held that the dismissal was unfair. Although Ms Darwin had addressed her Article 10 arguments to the latter, the Tribunal appeared to have considered them in respect of the former decision, since it said at paragraph 6.1 under the heading of "Public Interest Disclosure Claim" that, apart from ss.43B (1)(a) and (b), 43C, and 43G of the **Employment Rights Act 1996**, "the Claimant had also relied on Article 10"; specifically considered the Article at paragraph 6.4 "turned back to the relevance of the Convention" at paragraph 6.16 and observed at paragraph 6.17 that:

> **" It surely cannot be suggested that Article 10 permits free speech about confidential matters concerning children. That would be an anachronism (sic)."**

(There was some discussion about the word the Tribunal had intended to use: Counsel could not suggest what it might be. After retirement, we concluded that it had probably intended to

say, “antithesis”, since speaking freely is the direct opposite of keeping matters confidential.) Finally, it concluded in the immediately following paragraph that -

> **“6.18 So, *taking all matters into account*…”** We would interpolate - therefore - taking Article 10 into account **“… firstly, even if it could be said that the Claimant had made a qualifying disclosure (and for the reasons stated above we are not convinced she did) what is certain in the Tribunal’s mind is that it was not made in good faith and certainly was made for the purposes of her own personal gain. The suggestion, therefore, that the Claimant was dismissed automatically (sic) for making a public interest disclosure is not well-founded.” (emphasis added).**

68. The right to freedom of expression can logically relate to public interest disclosure. As Mr Hyams submitted, many of the Strasbourg authorities which considered appeals from jurisdictions other than the UK, dealt with Article 10 in precisely that context. The Tribunal’s discussion of Art. 10 in that context (rather than in the context of unfairness which Ms Darwin’s submissions were addressing) might have been of relevance to help it determine whether the application of the UK statutory provisions in respect of public interest disclosure produced a result in conformity with, or contrary to, that required by Convention jurisprudence. It might logically be that Article 10 would “trump” the public interest disclosure provisions, requiring the Tribunal to reach a conclusion opposite to that which it would have done in the absence of the Convention.

69. However, to conclude that this was the Tribunal’s process of reasoning would be entirely speculative of us. The Tribunal never made it clear what the relevance of Article 10 was to the issue of public interest disclosure. Tribunals are directed by the President of Employment Tribunals for England and Wales to set out at the start of a judgment the issues which the Tribunal is to be required to resolve. If this Tribunal had done so, then whether its conclusion as to Article 10 was relevant to its conclusion in respect of public interest disclosure might have been apparent. As it was, the list of issues, drafted by the Claimant, and we are told accepted at

a Case Management Discussion, did not refer to Article 10 in the context of sections 43 and following in the **Employment Rights Act 1996**.

70. Miss Darwin's approach was that it was relevant to "ordinary" unfair dismissal, since a dismissal for speaking out (in context, she submitted, to the press about her suspension) could not be fair because speaking out was exercising a fundamental right, and the Claimant was therefore entitled to do it. The Tribunal did not consider Article 10 under this head.

71. To resolve the question whether there had been a breach of Article 10, or whether the qualifications in Art. 10 (2) were operative, was thus not a necessary step (so far as the advocates were concerned) in deciding if there had been a public interest disclosure – which is the point which the Tribunal determined against the Claimant. Nor did the Tribunal make it clear that it was a necessary part of "the groundwork" to help it decide the public interest disclosure issue. From the language used, we are not able to say that it was a material finding in reaching the conclusion on this head of claim. Accordingly, it could not found an issue estoppel unless relied upon in reaching the Tribunal's conclusion on the fairness of dismissal. But that conclusion was reached on the basis that the decision was procedurally flawed (see paragraph 6.32), not on the basis that the Claimant could not properly be disciplined for doing something she had every right to do. So, on the principles set out at paragraphs 64 and 65 above, the conclusions as to Article 10 and confidentiality could not found an estoppel.

72. Mr. Hyams' argument has a further hurdle to surmount. That the matters in respect of confidentiality and Article 10 might remain open for further discussion and debate was indicated by the Tribunal expressly saying at paragraph 7 that it:

> **"..has not gone further in this Judgment to decide whether or not, if all things were equal (namely a panel of impartial third parties or governors undertook the disciplinary hearing appeal), the Tribunal would conclude that the decision to dismiss was in any event substantively fair or unfair."**

Adopting the Tribunal's own terminology, the question of whether the Claimant could lawfully be disciplined for telling tales out of school as she was alleged to have done was thus expressly not determined.

73. For those reasons, we have concluded that Mr Hyams' argument fails; he cannot satisfy us that a finding was reached which precluded further argument and decision on it.

<u>Ground 4: Confidentiality</u>

74. Ms Darwin argued that the conclusion as to contributory fault was based upon an erroneous finding as to confidentiality. The Tribunal found that the Claimant's job description set out duties which included that "to respect confidentiality at all times" (paragraph 3.2, Liability decision). There was a staff handbook which referred to confidentiality as a "very important issue" and to the school having a rigid code of practice, which included generally avoiding discussing children (or parents) in front of helpers, and that if a member of staff was concerned about something seen or heard they should find a convenient time to speak to the head teacher, and which reminded staff that they were ambassadors for the school and confidentiality should be seen in that light. The Tribunal had evidence (reported at 3.5, Liability decision) that training, and reminders given to staff after training, reiterated the importance of keeping information about children confidential, and that it should not be used for personal advantage. The staff handbook (which the Claimant testified she had not seen) had been placed in her tray for her to read if she wished. The Tribunal thought it clear that the Claimant "should not have needed to be told in writing that matters that go on in school which relate to children should not be relayed outside to third parties". Common sense was a moderating factor. It regarded it (paragraph 6.3, Liability decision) as "incumbent to the

position of midday dinner assistant, that you simply do not discuss with third parties what goes on at school between children, save to report it to the head teacher". We have already recorded the justification which the Tribunal accepted in the Liability Hearing for this approach. At paragraph 20 (remedy) it plainly concluded that there had been a breach of confidentiality, for this is expressed as a fact.

75. The Claimant's case before her employer had been that there was no breach of confidentiality in speaking to the parents; that her speaking to the press was to inform the press of her suspension, and not of any matter confidential to the playground and the children within it; and therefore it was wrong to hold them so. The perversity of it was demonstrated by the fact that any third party looking into the playground from outside the railings who had witnessed the incident would owe the school no duty to keep the information confidential; that information relating to a child (such as, that it was their birthday, or they had received a gold star) would not be confidential. The policies were vague.

76. Ms Darwin argued that for the Tribunal to conclude that there had been contributory fault it must first hold the Claimant's conduct blameworthy. It needed to identify clearly in what respects this was so. It could not have been blameworthy to reveal material if it was not confidential. Reliance was placed in her Skeleton Argument upon **Fowler v Faccenda Chicken Ltd** [1986] ICR 297 for the principle that in the absence of any express contractual restriction an employee is only prevented from disposing information properly categorised at common law as confidential, namely, "trade secrets or their equivalent". We found this authority unhelpful. It is concerned with whether a court should restrain a person from parting with information which is within their possession, having left the employment of the person who seeks to restrain it. That is very different from a situation in which what is in issue is whether the employer in the context of its own particular operations, on its own particular facts,

is entitled to regard the behaviour of an employee in speaking out as being misconduct, within its own policies and procedures, for which it could discipline or dismiss that employee. In submissions, she argued that **Napier v Pressdram Ltd** [2009] EWCA Civ 443, [2010] 1 WLR 834 was cited to the Tribunal, but that it did not deal with it. Had it done, it would have applied the test of whether a reasonable person in the position of the recipient would have recognised that information should be treated as confidential, given its nature and the circumstances in which it was obtained (see the Headnote at 935 E-F): it was arguable (she suggested) that applying that test, the Tribunal could not have concluded that the information was truly confidential, and should have held that disclosure of it was thus no breach of duty.

77. What the Tribunal said as to contributory fault, so far as material was this (at paragraph 24)

> **"The Court of Appeal has said that in dealing with contribution one has to look for culpable and blameworthy conduct, it must have actually contributed to or caused the dismissal and it must be just and equitable in all the circumstance to reduce the award. Having regard to the Tribunal's findings in this case, and what we have said about the Claimant's conduct leading up to and including dismissal, we take the view, as I said this morning, that there should be a substantial contribution, and we put that at 80%."**

78. Mr Hyams argues that that finding is sufficient. The specific matters complained of as blameworthy are not itemised in paragraph 24 - but they are incorporated by reference back to the earlier conclusions. He argued that the Tribunal was fully entitled to take the approach it did to the assessment of whether the information was truly confidential.

Discussion

79. The Tribunal directed itself accurately and appropriately as to the law. An evaluative conclusion, expressed in percentage terms, is not susceptible to precise explanation of why one percentage rather than one slightly higher or slightly lower has been adopted. It necessarily

represents a broad conclusion. Such broad conclusions are always likely to be expressed tersely, since they are not improved by attempts to explain a precise figure more closely. If a Tribunal has made it clear that it finds aspects of a Claimant's conduct blameworthy, and if it is clear that that conduct was causatively related to the dismissal (an almost inevitable conclusion here once one accepted that the Claimant's speaking out was blameworthy as being in breach of a duty of loyalty/confidence, contrary to the staff handbook, training and expectations of the post, and had in fact resulted in the press interest which lowered the reputation of the school and led to the disciplinary charges) there would be no need to spell matters out further.

80. But for two points, we would have tended to accept Mr Hyams' submissions to this effect. What satisfies us that this ground too should succeed are first that the Tribunal did not clearly identify what precisely was confidential about the information that was supplied, nor second to whom it was confidential. Though it might be inferred that the Tribunal thought that by speaking to the press about her suspension the Claimant was effectively inviting the press to speak to her about the underlying circumstances, and thereby impart with information about them, it does not quite go so far in its decisions.

81. Further and separately our conclusion that the Tribunal did not adopt the structured approach to Article 10 which we consider is necessary, and instead adopted a homespun and inaccurate reflection of 10 (2), means that it may have placed more weight upon factors suggesting that the Claimant had been blameworthy than it would have done if it had carefully balanced her right to free speech against her obligations to keep matters confidential to the appropriate authorities within the school so that the release of the information might be sensitively controlled.

Ground 5: The Police Statement

82. Miss Darwin argued that the Tribunal erred by taking into account that the Claimant had written a statement for the Police: the point was that it could hardly be blameworthy for her to provide such a statement.

83. She argued that the undisputed evidence before the Employment Tribunal at the Liability Hearing was that the Claimant had been asked to provide a statement for the police by Mr David. That premise is incorrect. At paragraph 3.14 the Tribunal repeated the Claimant's own witness statement to the effect that, "Child C's parents informed the Claimant that the police ***may*** need a statement from her".

84. Secondly, the Tribunal is criticised for finding that the involvement of the Police in the incident ceased before the Claimant provided her statement to the Davids. The relevant chronology is that on 29th June, the Claimant was told that the police might need a statement from her. At 5.00 pm on 29th June, the police came to see Mrs Crabb. On 30th June, Mrs Crabb was handed the written statement. This chronology is not inconsistent with what the Tribunal said at paragraph 14 of its Remedy Judgment.

85. It was suggested that the Claimant was not asked questions about the timing of her revelation of the statement, so that it would be unfair to take it into account, as the Tribunal might well have done, in determining contributory fault. This aspect of unfairness is not mentioned in the Notice of Appeal. Moreover, notes taken by Mr Hyams at the Remedy Hearing suggest that the issue might have been raised in terms which though general would have permitted argument. We are in no position to resolve the question what was, or was not, said below about this. However, the facts established without dispute were that the Claimant

volunteered a statement to the Davids, without having been asked by the police to do so; and provided a copy of the statement for the head and six governors without invitation to do that either. The extent to which this was culpable does not seem to have been addressed directly by submissions before the Tribunal. Yet the Tribunal may have taken account of it in concluding as it did about contributory fault. We would not be disposed to allow the appeal on this ground, but given our conclusion as to the first three grounds of appeal, and argument that in consequence the findings of contributory fault might need to be reviewed, we shall remit the case to the Employment Tribunal for redetermination of remedy, leaving open the arguments as to this particular aspect of it.

Ground 6: Wrongful Dismissal

86. A claim for wrongful dismissal was made in the ET1. It was included as one of the issues to be decided. But the Tribunal did not determine it. The Judge was asked if this was an oversight, or whether there was some specific reason for not doing so. He answered:

> **"Partly an oversight, but with reference to the notes, it appears neither Counsel for the Claimant or the Respondent dealt with this in their closing submissions and perhaps mistakenly I took it that the matter was not being pursued as the primary elements of the case were in relation to the unfair dismissal, protected interest disclosures and the claim/argument under the *Human Rights Act*."**

Ms Darwin accepted that no complaint had been made following the first hearing that the matter had not been resolved. It was not addressed in Skeleton Arguments at the Remedy hearing. Neither Counsel dealt with it orally. Though the matter had never formally been abandoned, the Judge was entitled to think that it was not in play before him. Ms Darwin did not contend, on reflection, that in such circumstances a Judge was bound to determine an argument which though available on paper had simply not been raised by represented parties,

which had not been appealed despite the opportunity of considering whether to do so, and in respect of which no application for a review had been made.

87. No fault can attach to the Tribunal in these circumstances. However, since we have decided that the appeal should succeed on the first three grounds and consequently on the fourth and fifth, this matter, never having been formally abandoned, is open to the parties to proceed with should they wish.

Conclusions

88. In conclusion, (i) we are not satisfied that the Tribunal adopted the correct approach to determination of future loss in its application of **Polkey**;

(ii) the Tribunal did not approach the application of Article 10 in the structured manner which was required. Accordingly, its conclusion that there would have been a dismissal after two months if there had been a procedure which rectified the defects it identified at the liability hearing cannot stand. It requires to be reconsidered. It took an erroneous approach by relying upon its own formulation rather than the words of the Convention;

(iii) the Tribunal considered that the issue of confidentiality arose in relation to sections 43B and 43G of the **Employment Rights Act 1996**. It is not obvious why that is so. It was not a step in leading to the decision that the disclosures did not qualify for protection under the ERA (though it is theoretically possible that the reasoning might have been relevant to the decision), so creates no issue estoppel; and we reject the contention that the Claimant was precluded from arguing Article 10, and confidentiality, by unappealed findings in the liability decision; but

(iv) we do not accept that **Derbyshire County Council v Times Newspaper** has the consequence that a school may not discipline any member of staff for bringing the school into disrepute by words spoken or information imparted. The common law it expresses is said to be co-extensive with Article 10, a qualified right where European authority recognises that civil

servants owe particular duties of loyalty and discretion. Nor do we accept that in the circumstances there could be only one conclusion on the question whether a dismissal would be fair in substance. Though we consider that the disciplinary proceedings constituted a restriction upon the Claimant's freedom of speech, it was open to the school to seek to justify the interference by reference to the legitimate aims of protecting the reputation and rights of others, and preventing the disclosure of information received in confidence. It was open to the Tribunal to conclude that the duty of loyalty owed by the Claimant to the school was such, or her contract of employment and understanding was such, that she had accepted a duty to keep confidential information relating to children. Thus it was open to the Tribunal to conclude that the restriction was prescribed by law; and the conclusion whether it was necessary in a democratic society in pursuance of the legitimate aim which was being considered would involve striking a proper balance between the Claimant's freedom of expression on the one hand, and the interests sought to be protected on the other, so as to evaluate whether dismissal was a step no greater than necessary in pursuance of the aim. We cannot conclude that that decision would necessarily be that any restriction on the freedom of the Claimant to speak out would render a dismissal unfair: there is much to be said to the opposite effect.

89. Though invited by Ms Darwin to substitute our own decision, we decline to do so. **Polkey**, properly approached, requires an assessment of chance, which depends upon all the facts. The weight of those facts is best assessed by the primary fact finder. Similarly, as Ms Darwin accepted, decisions applying Article 10 are fact specific. Since we consider it open to a Tribunal, applying a proper test, to consider that the interference with the Claimant's freedom of expression by dismissing her was justified by reference to Article 10 (2), this, too, is a matter for the Tribunal.

90. Because its assessment of the relative weights of the freedom, and the interest to be protected from unfettered exercise of the freedom, might differ upon reconsideration by the Tribunal, we cannot be confident that the 80% decision as to contribution would necessarily stand.

91. Finally, we think that the unresolved claim for wrongful dismissal may, in the circumstances, be remitted for consideration too should the Claimant wish it.

The Scope of Remission

92. We shall consider submissions by the parties as to whether the Tribunal to which the matter is remitted should be the same Tribunal, or a freshly constituted one. Those submissions should be received in writing within 7 days of the circulation of this Judgment in draft. Whatever our conclusion as to this, the findings of fact made as such by the Tribunal at the Liability Hearing stand, and should not be revisited. However, the Tribunal may, if it thinks it appropriate, hear further evidence which elaborates upon, or explains, matters of fact already found (though it will not be open to the Tribunal to come to any conclusion of fact which contradicts one reached at the Liability Hearing).

93. The parties should not be restricted in the scope of any argument which either wishes to raise as to compensation upon the basis of those facts. Since no findings were reached as to mitigation of loss, nor as to the chances of retirement at any particular age, or other feature which might cut short employment, it should be open to the parties to advance evidence in respect of that or any other aspect of quantum. It will not be open to the Claimant to seek re-engagement or reinstatement, these claims having already been abandoned.

94. If there is any respect in which these directions as to the scope of remission are unclear, the parties are to raise it when submitting their further written submissions.