Appeal No. UKEAT/0616/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 June 2013
Judgment handed down on 31 July 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MR J MALLENDER

MR P M SMITH

CARMELLI BAKERIES LTD APPELLANT

MR T BENALI RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MS HARINI IYENGAR (of Counsel) Instructed by: Islington Law Centre 38 Devonia Road London N1 8JH

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Compensation

DISABILITY DISCRIMINATION – Disability related discrimination

The decision of the Employment Tribunal that the dismissal of the Claimant pastry chef for using non-kosher jam in a product sold in an establishment subject to requirements of Kedassia was an act of victimisation under the **Equality Act 2010** and therefore also unfair was not perverse. The ET made findings of fact which supported their conclusion that because the Respondent was not prepared to show the Claimant any "leniency" the dismissal was an act of victimisation. The judgment of the ET should be read as a whole. Doing so it is clear that "leniency" means mitigation of the penalty which may have been decided upon if the Respondent had investigated the Claimant's explanation for his conduct and interviewed other employees involved and conducted a fair appeal hearing. The criticisms of the cursory nature of the investigation of events against the background of regarding the Claimant as a "problem employee" because of his continuing requests for reasonable adjustments supported the inference of victimisation. Perversity ground of appeal dismissed.

The ET erred in failing to consider contributory fault in assessing the compensatory award for unfair dismissal. Although the issue of reduction under **Employment Rights Act 1996** section 123(6) had not been raised in the ET3 or at the hearing, the Employment Tribunal having found that the Claimant was guilty of gross misconduct by using non-kosher jam and that this action led to the disciplinary proceedings against him, erred in failing to consider of its own motion whether and if so to what extent it was just and equitable to reduce the compensatory award for unfair dismissal. **Swallow Security Services Ltd v Millicent** UKEAT/0297/08 (unreported) applied. The issue of reduction for contributory fault remitted to the Employment Tribunal. The outcome may not make any or any substantial difference because of the overlap with compensation for victimisation.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Carmelli Bakeries Ltd ('the Respondent') appeals from the judgment of an Employment Tribunal ('ET') sent to the parties on 28 September 2012 ('the Judgment') that the dismissal of Mr Benali ('the Claimant') was an act of victimisation within the meaning of the **Equality Act 2010** ('EqA') and was therefore unfair within the meaning of the **Employment Rights Act 1996** ('ERA'). The ET also upheld a claim that the Respondent had failed to make reasonable adjustments for the Claimant within the meaning of the EQA. By the time the claims came before the ET the Respondent admitted that the Claimant was a disabled person within the meaning of the EQA. The ET dismissed his claim for damages for breach of contract for notice pay. In a subsequent judgment on remedy sent to the parties on 10 December 2012 ('the Remedy Judgment') the Claimant was awarded a total of £35,567 which included a basic award, a compensatory award under the ERA and an award for injury to feelings under the EqA. There is no appeal from the Remedy Judgment.

2. By their Grounds of Appeal the Respondent challenges as perverse the finding of the ET that dismissing the Claimant was an act of victimisation within the meaning of the EqA. The ET therefore also held the dismissal to be unfair because the Respondent had failed to establish that the reason for it fell within ERA section 98(1)(b) or (2). It is stated in the Notice of Appeal that the consequence of the Employment Appeal Tribunal ('EAT') agreeing that the finding of the ET as to the reason for the dismissal was perverse would be their substituting a finding that the reason for the Claimant's dismissal was his conduct. It is also said that if the reason for dismissal were the conduct of the Claimant, on any proper assessment, the act of misconduct in this exceptional case was a sufficient reason for dismissal and fair in all the circumstances.

3. An alternative ground of appeal is that:

> **"…even if the dismissal was still unfair under 98(4), the respondent will argue that the Tribunal should have applied a 100% reduction to unfair dismissal compensation."**

Outline relevant facts

4. The Respondent is a family-owned business with a shop in Golders Green. It is licensed to sell kosher food which conforms with the requirements of Kedassia, a very strict authority requiring the highest standards of purity.

5. The ET held:

> **"9. The respondent has some 25 employees, all of whom are made aware of the need for strict adherence to the Kedassia standards and who know that Rabbis visit the premises on a daily basis, often unannounced. Those rabbis have the power to withdraw the respondent's licence which would have a catastrophic effect on the business. The claimant was aware of the Kedassia standards and of the consequences of failing to adhere to them."**

6. The Claimant began working for the Respondent as a pastry cook/cake decorator on 1 May 2004. At the time of the events leading to his dismissal on 13 June 2011 he had a clean disciplinary record.

7. The Claimant was off work for some 10 months with sciatica in 2007-8. On his return to work he asked for adjustments to his duties due to his ongoing medical condition. The ET found that neither the Claimant's line manager nor the store manager, Mr David Carmelli, believed that he was disabled. The ET made findings about the Carmellis and his line manager's attitude towards the Claimant's sciatica which included at paragraph 15 the following observation to him by Mr David Carmelli:

> **"As he put it to the tribunal, *'if you can't do what the job demands, you should get another job. It doesn't make sense.'"***

8. In May 2008 the Claimant issued a claim in the Employment Tribunal against the Respondent for deduction of holiday pay and for disability discrimination. The claim was settled. The ET held at paragraph 20:

> **"However, the respondent's attitude towards the claimant hardened thereafter."**

By letter dated 6 June 2008 the Claimant raised a grievance complaining of victimisation because of his disability discrimination claim, and asking for adjustments to his duties.

9. The request for adjustments was ongoing and in the Judgment under appeal the ET upheld the Claimant's now resolved claim for failure to make reasonable adjustments. The ET held:

> **"34. Things came to a head in June 2011. On 3 June Mrs Carmelli was cashing up the takings and reconciling the books for the previous day when she noticed a till receipt for two jars or jam purchased the previous day from a nearby Tesco [doc 87]. She knew that Tesco does not sell kosher jam, and asked her son, David Carmelli, to find out who had authorised the purchase and whether or not the jam had actually been used. It should be noted that the respondent's handbook provides that '*when an employee runs out of ingredients, the shift manager must be informed so that he/she can make the arrangements to purchase/acquire new stock.*' [doc 180F]. David Carmelli interviewed Elmer, one of the cleaners, and the individual who had actually purchased the jam, who made a very brief statement [doc 88(a)] to the effect that the claimant had told him to go to Tesco to buy strawberry jam and had assured him that David Carmelli has authorised the purchase. David Carmelli then interviewed another employee, Adam Lerwill, who reported that he had seen the claimant on 2 June '*with jars of jam*' [doc 88(b)]. David Carmelli also wrote a brief statement himself denying that he had authorised the purchase [doc 88(a)]. No other employee was interviewed and nor was the claimant asked to make a statement. The entire investigation was a matter of, at the most, one hour."**

10. The Claimant was invited by Mrs Carmelli to a disciplinary meeting with her which was held on 10 June 2011. The ET held:

> **"36. At the disciplinary hearing, the claimant asserted that on the day in question he was making a cake which required strawberry jam. He told David Carmelli that there was no jam and was told by David Carmelli to send Elmer to get some. He denied telling Elmer to get the jam at Tesco but admitted that he had used it knowing it was not kosher.**
>
> **37. Mrs Carmelli, without investigating any aspect of the claimant's defence, summarily dismissed him by letter dated 13 June 2011 [docs 96-7].**
>
> **38. The claimant appealed that decision and a hearing was held on 23 June 2011 chaired by Mr M Carmelli. The notes of that meeting [doc 101] show that it was very brief indeed and Mr Carmelli's honest evidence to the tribunal was that he regarded it as a 'formality'. Mr Carmelli upheld the decision to dismiss [doc 102]."**

The Judgment of the ET

11. The protected acts for the purposes of the victimisation claim were the grievance in 2008, the subsequent ET claim and the ongoing complaints about the Respondent's failure to make or maintain reasonable adjustments. The ET concluded at paragraph 52:

> **"…that the claimant was victimised as a result of his on-going complaints about the respondent's failure to make/sustain reasonable adjustments which is the protected act."**

12. The ET did not uphold one of the allegations of victimisation made by the Claimant and another was withdrawn. The only other allegation of victimisation was that the Claimant's dismissal was such an act. The ET held at paragraph 54:

> **"We find that it was an act of victimisation. The claimant's on-going complaints about the lack of adjustments plus the complaints of his line managers to senior management about what they saw as malingering on the claimant's part meant that the respondent saw the claimant as a problem employee. When faced with the non-kosher jam incident, the respondent was not prepared to show the claimant any leniency. The resulting dismissal was tainted therefore by his complaints in relation to his disability and is therefore an act of victimisation."**

13. As for the claim of unfair dismissal, the ET held that once they had found that the dismissal was an act of victimisation they needed to go no further "as far as the reason". However they commented on the procedure leading to the dismissal. They found that a reasonable and fair investigation was not carried out. Mr David Carmelli conducted the investigation although he was the shift manager responsible for purchasing supplies when the non-kosher jam was bought and was, the ET found, "in the frame to be investigated himself". Further, the ET noted "the very cursory nature of the investigation" of the charge of gross misconduct against a long-standing employee with a clean disciplinary record. Further the ET considered that the investigation was also incomplete in that employees other than Elmer, one of the cleaners who had bought the jam, were not interviewed or statements taken from them. Most importantly the Claimant was not questioned nor a statement from him obtained. His

explanation was not allowed to be given until his disciplinary meeting. The ET held that when at the disciplinary meeting:

> **"…the respondent heard that explanation it was incumbent upon them to go back to the other witnesses and put to them what the claimant was saying in his defence. This was not done."**

The ET further held:

> **"58. The appeal was also flawed. It is clear from Mr Motti Carmelli's evidence that he saw it as a mere '*formality*'. He had made up his mind that the claimant was guilty and he was only prepared to consider the possibility of mitigation, but he did not do so as he said the claimant showed no remorse or recognition of having done anything wrong."**

14. The ET dismissed the claim for damages for breach of contract for failure to give notice. The ET held at paragraph 59:

> **"We find that the claimant did commit an act of gross misconduct; that is knowingly using non-kosher jam in a product made at a kosher establishment. That is an act of misconduct which would entitle the respondent to dismiss summarily, although, as we found, that was not the operative cause of the dismissal."**

The Remedy Judgment

15. By the Remedy Judgment the ET ordered the Respondent to pay the Claimant the total amount of £35,567. The award included a basic award and a compensatory award based on one year's loss of earnings from the date of dismissal. The ET made an award for loss of statutory rights. For victimisation under the EQA they also made an award of £14,000 for injury to feelings and aggravated damages, taking into account in particular the failure to make reasonable adjustments and sarcastic remarks by members of management who did not accept that the Claimant was disabled.

The submissions of the parties

16. Mr Rees, representative for the Respondent, made it clear that the challenge to the Judgment of the ET was not on grounds that they had failed to give adequate reasons for their

finding that the dismissal of the Claimant was an act of victimisation within the meaning of the EqA. No **Meek** (**Meek v City of Birmingham District Council** [1987] IRLR 250) point was being pursued. The conclusion of the ET was said to be perverse: no reasonable ET properly directing itself on the law and the evidence could have concluded that the reason for the dismissal of the Claimant was victimisation for his ongoing complaints about the lack of adjustments for his disability and the complaints of his alleged malingering made to senior management which resulted in him being viewed as a problem employee.

17. It was contended on behalf of the Respondent that since the Claimant had admitted to using non-kosher jam knowing that it was of great importance to keep all products sold by the Respondent kosher, dismissal was inevitable. This was a gross infringement of religious rules which could seriously prejudice the Respondent's business. The concept of "leniency" relied upon by the ET in coming to their decision had no place in the treatment of such misconduct. Mr Rees contended that the use by the Claimant of non-kosher jam was equivalent to contamination of food. It was reasonable to treat it with the same degree of seriousness. It was submitted that it was perverse for the ET to attribute an underlying motive for the Respondent's action when there could have been no other reason for the dismissal of the Claimant than his gross misconduct.

18. Mr Rees submitted that there was no proper factual finding to support the conclusion that the Claimant should have been shown leniency for his act which was one of gross misconduct. There was no evidence referred to in the Judgment of leniency being afforded to any other employee in similar circumstances. The finding of the ET that the reason for the dismissal of the Claimant was victimisation was predicated on the finding that the Respondent was not prepared to show the Claimant leniency. It was submitted on behalf of the Respondent that on a proper appreciation of the gravity of the Claimant's offence, summary dismissal was

inevitable and justified, regardless of the length of the Claimant's service with the Respondent and the absence of any disciplinary record.

19. Further, Mr Rees contended that there was a direct contradiction in introducing an expectation of "leniency", failure of which led to a finding of victimisation contrasted with the conclusion of the ET that the Claimant had been guilty of an act of gross misconduct which would entitle the Respondent to dismiss him summarily.

20. Having found that the dismissal of the Claimant was an act of victimisation under the EqA, the ET erred in holding that the Respondent carried out an improper and cursory investigation into the allegation against the Claimant. Mr Rees contended that where misconduct is admitted, the test in **British Home Stores Ltd v Burchell** [1978] IRLR 379 did not apply. An investigation was not necessary because the Claimant had admitted the misconduct. On any proper assessment of the facts the misconduct was a sufficient reason for dismissal. An ET holding to the contrary would be substituting their own view rather than applying the test in **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439 and assessing whether that taken by the Respondent was within the band of reasonable responses of a reasonable employer. Accordingly Mr Rees contended that if the ET had properly directed themselves they would have found the reason for the dismissal of the Claimant to be misconduct and fair in all the circumstances. Mr Rees referred to the judgment of the EAT in **The Royal Society for the Protection of Birds v Croucher** [1984] IRLR 425 as an example of the application of these propositions.

21. Alternatively Mr Rees contended that the ET erred in failing to reduce the award to the Claimant for his contributory fault. He recognised that if we held that the ET erred in this

regard the matter would have to be remitted to the ET for an assessment of the percentage reduction there should be in this case.

22. Although the Respondent did not raise the issue of contributory fault either in the ET3 or at the hearing, Mr Rees contended that having regard to their findings of fact, the ET were bound of their own motion to do so. In response to our enquiry about authority in support of this proposition, after the conclusion of the hearing before the EAT Mr Rees sent the unreported case of the EAT in **Swallow Security Services Ltd v Millicent** UKEAT/0297/08 (19 March 2009).

23. Mr Rees submitted that in the case under appeal the ET had found that the Claimant had committed an act of gross misconduct and that this act would have entitled the Respondent to dismiss him summarily. The conduct was clearly blameworthy and should have led to a reduction in the compensation for unfair dismissal.

24. Ms Iyengar for the Claimant submitted that the Respondent has failed to overcome the high hurdle in the path of an appellant seeking to overturn a decision of an ET on grounds of perversity. The ET considered and rejected the Respondent's case that the Claimant was dismissed because of his conduct even though at the disciplinary and appeal hearings and before the ET the Claimant had consistently admitted that he had knowingly used non-kosher jam.

25. Ms Iyengar submitted that the ET properly directed themselves on the law. Counsel agreed that this was not a perfectly reasoned judgment. However, she contended that it was implicit in the reasoning of the ET that the use of the word 'leniency' is in context a reference to the fact that whilst Mr David Carmelli, who was responsible for purchasing supplies was

himself "in the frame for investigation", he was put in charge of and, unlike the Claimant, not the subject of an investigation. The notes of the disciplinary hearing before the ET show that the Claimant contended that he spoke to Mr David Carmelli when he knew they did not have any strawberry jam and he gave instructions for the purchase. There was no independent or proper investigation into the non-kosher jam incident.

26. Further, the statement of the Claimant for the ET hearing included the assertion that he was quite used to management telling him to use non-kosher ingredients when there was a shortage. He used the non-kosher jam bought by Elmer. In her skeleton argument Ms Iyengar wrote:

> **"For reasons of its own, the ET chose not to make explicit in its judgment a finding which is implicit: that it accepted the Claimant's evidence that the Respondent did not always regard the use of non-kosher ingredients as misconduct, and that the Claimant had been particularly harshly treated in regard to his own misconduct, to the extent that the ET concluded that the real reason for his dismissal had not been his misconduct but was victimisation."**

Ms Iyengar contended that **Croucher** is to be distinguished from this case. An investigation was required into the circumstances in which the Claimant came to be using non-kosher jam. Those circumstances could have had an effect on mitigation of the penalty.

Relevant statutory provisions

27. **Equality Act 2010**

Section 27:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act**
>
> **…**
>
> **(2) Each of the following is a protected act ---**
>
> **(a) bringing proceedings under this Act;**
>
> **…**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;"**

Section 39:

> **"(4) An employer (A) must not victimise an employee of A's (B) –**
>
> **…**
>
> **(c) by dismissing (B)**

Section 119:

> **"(2) The county court has power to grant any remedy which could be granted by the High Court-**
>
> **(a) in proceedings in tort;"**

Section 124:

> **"(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court … under section 119."**

Employment Rights Act 1996

Section 122:

> **"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**

Section 123:

> **"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

Section 126:

> **"(1) This section applies where compensation falls to be awarded in respect of any act both under–**
>
> **(a) the provisions of this Act relating to unfair dismissal, and**

(b) the Equality Act 2010…

(2) An employment tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the tribunal in awarding compensation on the same or another complaint in respect of that act."

Discussion and Conclusion

28. Mr Rees rightly recognised that the Respondent faces a high hurdle to overcome if their perversity appeal from the conclusion of the ET that the reason for the dismissal of the Claimant was victimisation within the meaning of the EqA is to succeed. The Respondent does not challenge any findings of fact made by the ET but contends that on the facts found by them the conclusion of the ET is one which no reasonable Employment Tribunal properly directing themselves on the law and the evidence could have reached.

29. The Judgment of the ET should be read as a whole. Paragraph 54 on which Mr Rees concentrated his attack must be read in context.

30. The hearing before the ET occupied three days. The ET heard evidence from the Claimant and a pastry chef formerly employed by the Respondent. Mr David Carmelli, Mr Motti Carmelli and Mrs Janice Carmelli gave evidence. Certain facts relevant to the incident which led to the dismissal of the Claimant were not in dispute. It is of the utmost importance to the Respondent that they have on their premises and sell only kosher food. They are subject to daily inspections by a rabbi to check that is the case. The Claimant knew that only kosher products should be used. At all stages of the disciplinary process he admitted that he had used jam from Tesco which was not kosher. The strawberry jam was not kosher in that it failed to meet Kedassia standards of purity and lacked the relevant certification. The ET recognised the seriousness of the conduct of the Claimant. They held that this was an act of misconduct which

would entitle the Respondent to dismiss summarily. However they found that the Claimant's misconduct was "not the operative reason for dismissal".

31. On a fair reading of the Judgment, the treatment of the Claimant when the incident came to light led the ET to conclude that his misconduct was not the "operative reason for dismissal". It was the background of the Respondent's attitude to the Claimant's requests for adjustments for his disability which led the ET to conclude that the reason the sanction of dismissal was applied without any proper investigation or fair hearing was because the Claimant was regarded as a "problem employee" for making his disability related requests and complaints.

32. The ET recorded that after a settlement of his 2008 ET claim was reached, the Claimant began to feel that he was under "special scrutiny" and that the Respondent was "simply waiting for him to do something wrong" so that he could be dismissed. The ET found at paragraph 54 that the Respondent viewed the Claimant as a problem employee because of his on-going complaints about failure to make reasonable adjustments for his sciatica. That finding is not challenged.

33. The ET commented on failures in the investigation into the jam incident and made criticism of the failure to investigate further once the Claimant had been permitted for the first time to give his account of events at the disciplinary hearing.

34. The ET held that a reasonable and fair investigation into the Tesco jam incident was not carried out. Mr David Carmelli who was the shift manager and responsible for purchases and was "in the frame to be investigated" should not have conducted the investigation. The Claimant and other relevant employees were not interviewed. The ET held the investigation to be cursory.

35. The ET held that when the Claimant was given the opportunity to give the Respondent his account of events at the disciplinary hearing:

> **"…it was incumbent upon them to go back to the other witnesses and put to them that the claimant was saying in his defence. This was not done."**

36. The note of the disciplinary hearing was before the ET. The Claimant is recorded in the note of the disciplinary hearing as saying:

> **"…Again Crock [Mr David Carmelli] told me to tell Elmer to get the jam. It is not up to me to know where to get jam from. I know that I cannot buy jam from Tesco. I did not go to the till and give him the money. The girl on the till is supposed to know where to buy things from…"**

The Claimant said that Elmer, the cleaner, was worried about his job. That was why he said that the Claimant sent him to Tesco. In his statement which was before the ET the Claimant gave reasons why when Elmer gave him the jam he was sure that management were happy for him to use it.

37. The statement of the Claimant before the ET included the assertion that:

> **"As I was quite used to management telling me to use non-kosher ingredients when there was a shortage, I used the non-kosher jam that he had bought."**

38. In our judgment it cannot be said, as was submitted by Mr Rees, that in this case no investigation was necessary because the Claimant admitted he was at fault. The investigation which the ET considered should have taken place was into the circumstances in which the Claimant came to use the Tesco jam.

39. The ET held that the appeal was flawed. It was clear from Mr Motti Carmelli's evidence that he had made up his mind that the Claimant was guilty. He was only prepared to

consider mitigation but did not do so because the Claimant showed no remorse. This finding in paragraph 58 and the evidence recorded shows that the Respondent did not regard dismissal as the inevitable consequence of the Claimant's misconduct. Mr Motti Carmelli had in mind the possibility of mitigation.

40. In our judgment the reference in paragraph 54 to the Respondent not being prepared to show the Claimant any leniency must be read in context. On the findings of fact which are not challenged Mr Motti Carmelli was prepared to consider the possibility of mitigation. The ET considered that the Respondent had failed to investigate the Claimant's account of how the Tesco jam incident came about. They considered the investigation which was carried out to be neither reasonable nor fair. In our judgment having regard to the evidence of Mr Motti Carmelli, the ET were entitled to conclude that mitigation of the penalty for the Claimant's admitted misconduct was a possibility. "Leniency" may not have been the most appropriate word to use but the sense of paragraph 54 is clear. The failures in the investigation and procedures thereafter closed off any possibility of facts coming to light and being considered in mitigation of the otherwise likely penalty of dismissal.

41. The criticisms made by the ET of the investigation, the disciplinary and appeal hearings were in accordance with the findings of fact and supported the inference that the Claimant was treated less favourably than Mr David Carmelli. In the context of their findings regarding the view which the Respondent took of the Claimant's requests for adjustments and their approach to his disability, it was open to the ET to infer that the dismissal of the Claimant was an act of victimisation within the meaning of the EqA. The conclusion was not perverse.

Appeal Ground 2

42. The Respondent did not raise the issue of reduction in the compensatory award for unfair dismissal in the ET3 or at the hearing. Mr Rees relied on the judgment of the EAT in **Swallow Security Services Ltd v Millicent** UKEAT/0297/08 to contend that on the facts found by them the ET were bound to do so of their own motion. In **Swallow Security Services** the EAT, HHJ Burke QC and members held:

> **"27. …there is, in s 123(6), an express obligation upon the tribunal, if it finds that the dismissal was to any extent caused or contributed to by any action of the Claimant (which conduct must be blameworthy: see below), to make a reduction in compensation to the extent that it considered it just and equitable to do so. In our judgment it follows that, if in the course of their deliberations, a tribunal concluded that there had been such causative and blameworthy conduct, the tribunal would be bound to apply s 123(6), whether the issue of contributory fault has been raised by the employer or not. The tribunal are statutorily required so to do. Further, in our judgment, in any case before the tribunal in which the facts are such that a finding of contributory fault may appropriately be made, the tribunal are bound to consider the issue, raise it with the parties, and decide whether there has or has not been contributory fault and whether a deduction from contribution should be made. We do not accept Mr Massarella's argument that the trigger for the tribunal's duty to consider the issue has to be a finding that there has been contributory fault; for if the tribunal do not raise the issue, such a finding, however appropriate it might have been, may never be made. The trigger must arise at an earlier point, such as that which we have described."**

In **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 the Court of Appeal referred to the issue of whether an ET should consider of its own motion a reduction in a compensatory award for unfair dismissal by applying **Polkey v AE Dayton Services Ltd** [1987] IRLR 503. Elias LJ held at paragraph 62 of **Roldan**:

> **"There is authority in the EAT that when assessing compensation, *Polkey* should be addressed by the Tribunal of its own motion even if the point is not expressly raised, at least where there is evidence putting the point in issue: see *Red Bank Manufacturing Ltd. v Meadows* [1992] ICR 204. It seems to have been assumed below that this applies likewise to the application of section 98(a)(2). No challenge has been mounted to that principle in this case. So we shall assume it to be correct even in a case such as this where the employer is legally represented and makes no submissions on the point. However, it is plain from the remedies' decision that the Tribunal concluded that there was no evidence adduced to put the point in issue. On that basis there was no obligation on the Tribunal to engage with the issue at all."**

43. In one of the earliest cases on reduction of a compensatory award for contributory fault Brandon LJ in **Nelson v BBC (No. 2)** [1980] ICR 110 held at page 120 in considering the predecessor of ERA section 123(6), that before deciding whether it is just and equitable to reduce such an award there must be a finding by the ET that the unfair dismissal itself was to

some extent caused or contributed to by some action of the complainant. That action or conduct of the complainant must be culpable or blameworthy.

44. Even if, as in this case, the culpable action of the Claimant is not the principal or "operative" reason for dismissal it will fall within section 123(6) if it to some extent caused or contributed to it. In **Gibson v British Transport Docks Board** [1982] IRLR 228 Browne Wilkinson J (as he then was) held:

> **"What has to be shown is that the conduct of the [claimant] contributed to the dismissal. If the applicant has been guilty of improper conduct which gave rise to the situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal."**

The EAT held in **Robert Whiting Designs Ltd v Lamb** [1978] ICR 89:

> **"…we cannot accept that 'the dismissal' should be circumscribed to refer to dismissal only in the context of the real reason as found by the tribunal and to exclude matters which in fact existed and which played a part in the act of dismissal. In our view the proper approach is to decide first what was the real reason for dismissal and then to see whether the employee's conduct played any part at all in the history of events leading to dismissal. …the real reason for dismissal was not exclusive of all other matters and a bogus reason does not necessarily shut out the employer completely if there was material to support the reason relied upon."**

45. On the basis of the mandatory language of ERA section 123(6), in relation to a compensatory award for unfair dismissal and having regard to **Roldan** and **Swallow Security Services,** if the ET found that the Claimant had carried out culpable conduct which to any extent caused or contributed to the dismissal they were bound to consider whether it would be just and equitable to reduce the awards having regard to their findings.

46. However in the language of section 122(1), reduction in the basic award differs from 123(6), reduction in the compensatory award. The point at which section 122(1) imposes a mandatory obligation on an ET is after they have found that the conduct of the complainant before dismissal was such that it would be just and equitable to reduce the basic award to any

extent. If the ET have so found they are required to reduce the award to that extent. The difference in the statutory provisions for reduction of the basic and compensatory award was considered, albeit for a different purpose, in **Parker Foundry v Slack** [1992] ICR 302. Having regard to the language of ERA section 122(2), in our judgment the mandatory obligation on an ET is to reduce the basic award if but only if it has made a prior finding that by reason of the conduct of the Claimant, it would be just and equitable to reduce the award. There was no such finding by the ET in this case. Accordingly, the reduction in compensation not having been raised by the Respondent, unlike the compensatory award, the ET was not obliged to consider of its own motion the reduction in the basic award.

47. The ET found in paragraph 59 that the Claimant did commit an act of gross misconduct by knowingly using non-kosher jam in a product made at a kosher restaurant. However they found that this was not the operative reason for the dismissal. The ET held at paragraph 54:

> **"When faced with the non-kosher jam incident, the respondent was not prepared to show the claimant any leniency. The resulting dismissal was tainted therefore by his complaints in relation to his disability and is therefore an act of victimisation."**

On a fair reading of the Judgment the ET held that the misconduct of the Claimant in relation to the non-kosher jam was not the principal reason for his dismissal. We have considered whether misconduct which was found not to be the "operative" or principal reason for dismissal can be said to have to any extent caused or contributed to the dismissal. As was explained in **Gibson** and **Robert Whiting Designs Ltd** it can. The statutory provisions apply not only where the conduct is the principal cause of the dismissal. They apply where the dismissal was to any extent caused or contributed to by that conduct. The ET held that the use of non-kosher jam was gross misconduct by the Claimant. Sir Hugh Griffiths in **Maris v Rotherham Council** [1974] IRLR 47 held that a broad commonsense view is to be taken by an ET in deciding whether a Claimant's conduct played a part in contributing to his dismissal. On the findings

made by the ET the Claimant's misconduct contributed to albeit was not the "operative reason" for the dismissal. In our judgment, having made these findings of fact, the ET erred in failing to consider whether and if so to what extent it was just and equitable to reduce the compensatory award.

48. The award for victimisation under the EqA is unaffected by the error of the ET in failing to consider reducing for contributory fault the compensatory award for unfair dismissal. Compensation for victimisation under the EqA section 124(6) read with section 119 is awarded by applying the principles applicable to the calculation of damages in tort. ERA section 126(1) and (2) provides that where compensation is to be awarded for a dismissal which is both found to be unfair under the ERA and an act of victimisation under the EqA as in this case a tribunal shall not make an award which is or has already been taken into account.

49. In paragraph 8 of the Remedy Judgment the ET observed in respect of compensation for victimisation that they had already awarded:

> **"…a substantial amount for the financial losses flowing from dismissal which is the detriment suffered by the claimant."**

In light of this observation, if the amount awarded as compensation for unfair dismissal were to be reduced for contributory fault, having regard to ERA section 126(1) and (2) the ET may consider it necessary to reconsider the heads of compensation made under the EqA for victimisation.

Disposal

50. The appeal from the findings of victimisation under the EqA by dismissal and unfair dismissal is dismissed. The appeal in respect of the failure of the ET to consider the reduction

in the compensatory award for unfair dismissal succeeds to the extent that the issue is remitted to the same ET for determination.