Appeal No. UKEAT/0311/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 May 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

JP MORGAN SECURITIES PLC — APPELLANT

MR P KTORZA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BRUCE CARR (One of Her Majesty's Counsel) Instructed by: DAC Beachcroft LLP 100 Fetter Lane London EC4A 1BN
For the Respondent	MS DAPHNE ROMNEY (One of Her Majesty's Counsel) Instructed by: Payne Hicks Beach Solicitors 10 New Square Lincoln's Inn London WC2A 3QG

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

The Employment Judge erred in law in holding that to qualify as conduct within the meaning of section 98(2)(b) of the **Employment Rights Act 1996** the conduct, in the view of the Tribunal, has to be culpable.

The Employment Judge to a significant extent started from his own findings of fact and opinions, whereas the task under section 98(4) was to start with the Respondent's reasons for dismissal and apply an objective test of reasonableness to those reasons.

Appeal allowed. Case remitted for re-hearing.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. Mr Patrice Ktorza ("the Claimant") was employed by JP Morgan Securities plc ("the Respondent") from 2008 until his dismissal with notice in 2015. He brought a claim of unfair dismissal against the Respondent. Employment Judge Prichard, sitting in the East London hearing centre of the Employment Tribunal, heard the claim over four days in June 2016. By his Reserved Judgment dated 9 August 2016 he upheld the claim.

2. This is the Respondent's appeal against that Judgment. It is argued by Mr Bruce Carr QC that the Employment Judge adopted a legally incorrect approach to section 98(1) and (2) of the **Employment Rights Act 1996** ("ERA"), disregarded or misunderstood important aspects of the Respondent's case, and misapplied section 98(4) by substituting his own view of the facts rather than asking whether the Respondent's view was reasonable. Ms Daphne Romney QC, for the Claimant, submits that the Employment Judge did not err in law in any of these respects. She says that by virtue of unimpeachable findings about the process of dismissal it is in any event entirely plain that the dismissal was unfair. She accepts that the Employment Judge made findings of fact of his own but says these were necessary because of the range of issues with which he had to deal.

The Background Facts

3. The Claimant worked on the Respondent's foreign exchange desk. His status was Executive Director. He worked on the sales side of the desk, specialising in business for Benelux clients. The desk also had a trader side. He and his fellow sales team, of whom there

were about 20, worked in close proximity to foreign exchange traders in the same room. His basic pay was £270,000 in addition to which bonus might take his salary into seven figures.

4. The Claimant had twice been subjected to final written warnings. The first, on 24 July 2012, had lapsed by the time of the events giving rise to the second, which was imposed on 24 February 2014 and was expressed to be live for 24 months. The final written warning was imposed for late booking of trades and running risk by tightening prices without reference to a trader.

5. This case is particularly concerned with a practice known as short-filling or partial-filling. Filling means carrying out a client's order. Partial-filling or short-filling means carrying it out, at least to begin with, only in part. There is no doubt that prior to mid-2014 this was a practice that the Claimant and others on the sales side would undertake. The Respondent was subsequently to describe the practice in the following terms in a disclosure notice to the US Department of Justice in 2015:

> **"We made decisions not to fill clients' limit orders at all, or to fill them only in part, in order to profit from a spread or markup in connection with our execution of such orders. For example, if we accepted a limit order to purchase €100 at a EURUSD rate of 1.1200, we would in certain instances only partially fill the order (e.g., €70) even when we had obtained (or might have been able to obtain) the full €100 at a EURUSD rate of 1.1200 or better in the marketplace. We did so because of other anticipated client demand, liquidity, a decision by the Firm to keep inventory at a more advantageous price to the Firm, or for other reasons. In doing so, we did not inform our clients as to our reasons for not filling the entirety of their orders." (ET Judgment, paragraph 10)**

6. By mid-2014 the Respondent had initiated "Project January". The title was indicative of a fresh start not the time of its implementation. It covered a number of topics that had by this time become the focus of scrutiny by the US Department of Justice and the Financial Conduct Authority. Partial-filling was only one of these topics. There was a document called a "deck" running to some six pages. Only four lines in one column were devoted to the question of filling client orders. The lines read as follows:

> **"Trading has the right to decide if and when to fill a client order. Sales and traders may consult on order fills, provided that trading has the final say. The rationale is that trading should have the full set of information regarding all client orders and the Firm's internal orders and risk positions." (ET Judgment, paragraph 21)**

7. The Claimant was one of about 20 salespeople who attended a Project January training session on 27 August 2014. His own line manager, Mr Leffen, was also a trainee. He was not shown the written document during the presentation, and no one was given a copy of it. It was regarded as too confidential to hand out.

8. The trade that was eventually to lead to the Claimant's dismissal took place on 31 October 2014. A client had placed an order for 10 million EURUSD. A trader, Mr Mir, told the Claimant that he had filled it. The Claimant asked Mr Mir to sell back 5 million. This informed Mr Mir that the Claimant was engaging in or wished to engage in short-filling. Mr Mir evidently was taken aback. There was a disagreement between the Claimant and Mr Mir. He evidently expected that he should have been told the whole story before he filled the order. It was, according to the Claimant's manager, the first occasion since the training session when any member of the sales staff had engaged in short-filling in this way.

9. On 10 November 2014 the Claimant was suspended from work on full pay. There was no investigatory interview with him. In December 2014 he asked for a copy of the Project January documentation. It was not forthcoming. It was not until 11 May 2015 that he was invited to a disciplinary hearing, which had been listed for 14 May 2015 but was postponed until 22 May at the Claimant's request to enable him to prepare. He was given the Project January documentation only on 21 May. The Claimant wrote a statement for the disciplinary hearing. He said:

> **"I do not know whether there were any discussions about partial fill, just about how mark up should be handled. I did not read nor was I given any further documentation about Project January and was not aware at the time of Project January's limitations on the sales personnel**

withholding fill from the client. I therefore continued to act in accordance with the previously agreed practice at the Bank which allowed sales personnel to withhold fill.

…

I wish to reiterate that until my conversation with the trader on 31 October 2014 I was genuinely unaware of the new guidelines in place. My actions did not cause any harm at all to the Bank nor to the client. Had I been aware of the new guidelines in place I would certainly not have acted in this way.

Further I concede it may have been a mistake brought about by my lack of awareness of new guidelines which had been introduced approximately two months beforehand. As soon as I became aware of the new guidelines I acted in accordance with them.

I take my job incredibly seriously. I would not put it in jeopardy by deliberately ignoring the policy or contravening a compliance objective. I am acutely aware that I have a written warning on my file and as a result I have always sought to act entirely appropriately. This was one lapse of awareness of new guidelines which radically altered market places which has unfortunately led to this disciplinary hearing which I very much regret … I would never act in a way which would put my employment at JP Morgan at risk nor my career." (ET Judgment, paragraphs 54 and 55)

10. The disciplinary hearing was undertaken by Mr O'Grady. Since there had been no investigatory interview, he had not known what the Claimant's position was. He adjourned the hearing for further enquiries. He spoke to Mr Leffen, the Claimant's line manager. Mr Leffen, while saying that the sales team in general were aware of the distinction between their role and that of the trading side, accepted that the Claimant had been genuinely unaware of the position. Mr O'Grady did not speak to any of the other people who attended the meeting on 27 August at which training had been given. He spoke to Mr Mir and another manager senior to Mr Mir on the trading side, who said the Claimant's actions damaged trust and confidence; he spoke to a Mr Hamilton to obtain information on the practice of short-filling; but he did not re-interview the Claimant or give him any opportunity to respond to what he had learned from these members of management. No note was kept of what was said by them or given to the Claimant.

11. Instead, Mr O'Grady convened a meeting on 29 June 2015 and announced his decision, which was to dismiss with notice. He said that as a result of his discussions he felt there was no ambiguity either from sales or trading that short-filling was the express domain of trading. The letter of dismissal dated 29 June did not challenge the Claimant's assertion that he had not been

aware of the change of practice regarding short-filling. Rather, it said that the Claimant should have been aware of it. Mr O'Grady's view was that he should have been aware of the remit of his sales role. The letter said:

> **"Project January was a training programme delivered to all front office employees at [sic] the point that was clearly communicated during the training is that its purpose was to provide a framework for employees to follow rather than being prescriptive on actions employees were expected to take. As an experienced Executive Director to whom the firm has invested considerable responsibility, I would expect you to be able to be [sic] properly interpret the firm's guidelines and modify your day to day behaviour. Had you been unclear on any aspect of Project January then I would have expected you to seek clarification. I do not find your assertion around a lack of awareness of the guidelines mitigates your responsibility in this regard." (ET Judgment, paragraph 59)**

12. The Claimant appealed against his dismissal. He said that the hearing had been procedurally unfair, Mr O'Grady had not taken into account that sales personnel had been allowed to withhold fill, and the change had been recent. His appeal was heard on 7 September. He made the point that if he had been clearly told at the Project January session that short-filling by sales was embargoed, he would have noticed it and queried it. Mr Hudson, who conducted the hearing, again went and interviewed witnesses. Again, he did not tell the Claimant what the witnesses said. The appeal was only a review, but it was not until 12 November that the outcome was made known. The appeal was rejected.

The Employment Judge's Reasons

13. Rule 62(5) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides that the Employment Tribunal's Reasons for a Judgment should identify the issues that the Employment Tribunal has determined, state the findings of fact relating to those issues, concisely identify the relevant law and state how that law has been applied to those findings in order to decide the issues. Rule 62(5) is not prescriptive as to the manner in which the Reasons will be structured, but it envisages that these requirements will be set out in a logical way appropriate to the case. The Employment Judge's Reasons are disappointing in this respect. It is necessary in order to find the elements required by Rule

62(5) to extract them from places where they happen to be found within overall reasoning that is largely based on a chronological account. There is no statement of the issues. It is, for example, only from one paragraph at the end of the Reasons that one can glean that **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 and contributory conduct were issues for the Employment Judge to decide. There is no concise statement of the law.

14. In a case concerned with dismissal the Employment Tribunal may have different tasks that call for different kinds of fact finding and reasoning. In **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 Mummery LJ said:

> **"44. I agree with the EAT that the ET was bound to make findings of fact about Mr Small's conduct for the purpose of deciding the extent to which Mr Small's conduct contributed to his dismissal. That was a different issue from whether the Trust unfairly dismissed Mr Small for misconduct. Contributory fault only arose for decision, if it was established that the dismissal was unfair. The contributory fault decision was one for the ET to make on the evidence that it had heard. It was never a decision for the Trust to make. That makes it different from the decision to dismiss, which was for the Trust to make. It was not the role of the ET to conduct a re-hearing of the facts which formed the basis of the Trust's decision to dismiss. The ET's proper role was objectively to review the fairness of Mr Small's dismissal by the Trust.**
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> **…**
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> **46. Mr Marsh spoke of his experience that ETs often structure their reasons by setting out all their findings of fact in one place and then drawing on the findings at the later stages of applying the law to the relevant facts. It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are only relevant to other issues, such as contributory fault, constructive dismissal and, increasingly, discrimination and victimisation claims. Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues, the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."**

15. The Employment Judge did not follow the "better practice" advised by Mummery LJ in **Small**. He did not set out in any separate or sequential way findings that might be relevant to unfair dismissal on the one hand or **Polkey** or contributory fault on the other. Both for this reason and because of the general lack of structure, the Employment Judge's reasoning is difficult to analyse, and it lays itself open to the criticism that the Employment Judge has substituted his own view for that of the Respondent when applying section 98(4). If the

A Employment Judge had separated out the findings that he was required to make for himself for the purposes of deciding contributory conduct from those that he was required to make about the Respondent's decision to dismiss in order to apply section 98(4), his reasoning would have been more transparent.

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16. There was no concise statement of the applicable law, but the Employment Judge made reference to the provisions of section 98 of **ERA** in various places within his Reasons.

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17. At paragraph 40, which is found in the midst of findings and discussions about the investigatory stage, he interposed the following:

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> **"40. For someone to be fairly dismissed by reason of their "*conduct*", as per s 98(2)(b) of the Employment Rights Act 1996, that conduct has to be in some way culpable. There is no suggestion that the claimant was dishonest or sought to get any personal gain. The respondent's original stance was that the claimant deliberately ran risk. That stance was then modified during and after the disciplinary hearings."**

E 18. Later, in the midst of findings and discussion about the disciplinary hearing stage, he interposed the following (paragraph 57):

> **"57. The agenda the claimant set was exclusively on his awareness of the change of guidelines. (To use the analogy which I introduced at this hearing - the distinction between *mens* rea and *actus reus*. This distinction seems to have been blurred by the respondent). To qualify as "*conduct*" within the meaning of section 98(2)(b) of the Employment Rights Act 1996 the conduct, in the view of the tribunal, has to be culpable. That can include negligence or recklessness. The person accused has to be aware that what they are doing, or have done, would or might be subject to the disapproval of their employer, their clients, or fellow employees. Put another way, there has to be a subjective element. One cannot establish culpability without any subjective element. (I did refer myself to some of the debate around the topic of subjectivity in the related context of dishonesty in *John Lewis v Coyne* [2001] IRLR, 139, EAT *R v Ghosh* [1982] QB, 1053, CA, and *Gondalia v Tesco* UKEAT/0320/14)."**

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19. At a more logical place towards the end of his Reasons, he said (paragraph 94):

> **"94. On that evidence I have to decide whether this is a fair or unfair dismissal according to section 98 of the Employment Rights Act 1996. I consider it unfair and not within the range of reasonable responses. I consider that the claimant had a compelling case for saying that he was unaware of the change in this particular procedure. It was counter intuitive and if it was truly "*unambiguous*" it should have been unambiguously stated. Even Mr Leffen could not recall ever mentioning this to the claimant, and he was not apparently asked how it had come across in the Project January session. It was prevalent prior to the "run up" to Project January, whatever that run up was. There was no evidence given of the run up to Project January, just vague talk of the "*evolving landscape*"."**

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20. Towards the end of his Reasons he said (paragraph 98) that he had been referred to "*a large amount of case law*" by counsel, but very little of it was anything more than the usual standard case law cited in conduct unfair dismissals. He went on (paragraph 99):

> **"99. Perhaps I should mention Mr Choudhury's [counsel for the Respondent below] repeated submission that section 98 mentions "*conduct*" rather than misconduct. Notwithstanding the literal correctness of that, the tribunal still adheres to its view that, whatever that conduct is, it should, in some degree, be culpable whether negligent, with guilty knowledge, dishonest, or just reckless. It must be culpable and not innocent unwitting conduct. That is how the tribunal considers the claimant's conduct should reasonably have been viewed by the respondent. The contrary view in [sic] unreasonable. The respondent should have focused upon the precise point that the claimant was making which was that he knew that sales could not run risk but he did not equate every short-fill as amounting to running risk. To that extent he had something to learn, maybe."**

21. Finally, he said that, given the high profile that the incident had, it would have been a brave decision not to dismiss the Claimant, but, he said (paragraph 101):

> **"101. … under the law, it would have been the fair and reasonable decision under section 98(4) of the Employment Rights Act 1996."**

22. The Employment Judge made most of his findings of fact where there were disputes, and stated most of his criticisms of the Respondent, as he went through the case in chronological order. The following are principal features.

23. At paragraph 9 he rejected evidence that the change in practice relating to partial-filling had evolved over the passage of time. He found there was a definite change in practice. At paragraph 15 he rejected at least to some extent the Respondent's view that partial-filling involved the running of risk. He said the Claimant "*must be right*" to some extent, although he returned to this question at paragraph 35 and reached a finding that it is not altogether easy to reconcile with paragraph 15. At paragraph 21 he stated his agreement with the Claimant that it would be quite easy not to notice the major change brought in by the four key lines in the Project January document. At paragraph 25, and again at paragraphs 89 and 90, he said it was remiss of the Respondent not to consult the person who gave the training. At paragraph 37 he

criticised the Respondent's six-month delay in pursuing disciplinary proceedings. At paragraphs 39 to 41 he criticised the failure of the Respondent to interview the Claimant at the investigation stage. At paragraph 56 he stated what appears to be his own conclusion that circumstantial evidence suggested the Claimant would have complied if he had known of the new practice because "*His career meant too much to him*". Indeed, in that paragraph he also found on the balance of probabilities that, "*It is more likely than not that the claimant was careful*", by reason of the warning. At paragraphs 68 to 72 he expressed detailed criticism of the failure to have an investigatory interview with the Claimant and the failure to give him an opportunity to comment on Mr O'Grady's further investigations after the disciplinary hearing. He returned to the latter point at paragraphs 76 and 78.

24. The Employment Judge had found at paragraph 61 of his Reasons that the Claimant was found wanting on the basis that he should have known not that he did not know. On this question he said:

> **"73. To say the claimant should have enquired, begs the question. One does not naturally enquire about something when one does not know or suspect that there may be a problem, or even an amiguity [sic].**
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> **74. There has been a lack of secondary evidence produced to this tribunal to help explain how Mr O'Grady's position on this was a reasonable one. There is no evidence from Scott Wacker, or from any other of the claimant's sales colleagues or managers who attended the same Project January training session which the claimant had attended. At that Project January session there were 20 other sales people, exclusively sales. Neither in the disciplinary process nor in theses [sic] tribunal proceedings has anyone spoken to any of them to test out the claimant's contention, that he had not got the message on short-fill. It had not come through. The claimant's clear recollection was the 2 main Project January headlines were a) that mark up was still legitimate and b) client confidentiality was now paramount, and care over communications."**

25. Also, in the context of discussing the appeal he said, speaking of Mr Hudson, who conducted the appeal (paragraph 92):

> **"92. Mr Hudson was ultimately a more compelling witness at the tribunal hearing than Mr O'Grady, in terms of detail. However, the substance of his evidence was no better in convincing the tribunal it was within the range of reasonable responses to consider notwithstanding his genuine lack of awareness *"that the claimant 'should have been aware'"*."**

26. I should also mention paragraph 97, in which the Employment Judge said:

> **"97. The claimant missed the point. The conclusion that the claimant did genuinely miss it leads to the logical conclusion that reasonably viewed the claimant's conduct should not have been seen as culpable. It is on that basis that I find there was an unfair dismissal, and further, that I cannot make a finding of contributory conduct, nor any *Polkey* finding arising from the procedural irregularity referring to the structural error in failing to reconvene a disciplinary hearing or appeal hearing prior to the decisions."**

27. I have taken some time to review the Employment Judge's Reasons. It is, I think, necessary to consider them in some detail to see whether, despite their lack of structure, they may be free from legal error.

Statutory Provisions

28. Part X **ERA** governs the right not to be unfairly dismissed. Section 98 is the key provision by reference to which in an ordinary case the Employment Tribunal determines whether a dismissal is fair:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
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> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
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> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
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> **(2) A reason falls within this subsection if it -**
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> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
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> **(b) relates to the conduct of the employee,**
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> **(c) is that the employee was redundant, or**
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> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
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> **(3) In subsection (2)(a) -**
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> **(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and**
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> **(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.**
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> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**

> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
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> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

29. In this case the remedy claimed by the Claimant was compensation. A compensatory award is assessed in accordance with section 123. Under section 123(1), an Employment Tribunal is entitled to consider whether there was a chance that the employee would have lost his job even if the dismissal had not been unfair; the **Polkey** question. The Employment Tribunal may reduce an award for contributory conduct (see section 123(6)).

Submissions

30. On behalf of the Respondent Mr Carr submits that it is well established, certainly as regards a conduct dismissal, that the reason is based on what is in the mind of the employer at the time that the decision is made; the set of facts known to him or believed by him (**Abernethy v Mott, Hay & Anderson** [1974] ICR 323). It is not necessary for the conduct in question to be reprehensible (see **Royal Bank of Scotland v Donaghay** UKEATS/0049/10 at paragraph 53). It is not necessary for the employer's reasons to be factually correct. Whether it was reasonable for the employer to have the reason is part of the section 98(4) assessment.

31. He then submits that the Employment Judge's approach did not accord with these principles. It was wrong to say that the conduct in the view of the Employment Tribunal had to be culpable (paragraphs 40, 57 and 97). This incorrect approach, he argues, infects the Employment Judge's reasoning. The Employment Judge at one point suggested that it was necessary for the Respondent: "*to establish, then or now, that the claimant in fact knew that it was completely wrong for sales to take it upon themselves to short fill a client order*." This was plainly wrong.

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32. It was implicit in the Employment Judge's reasoning that he thought that the Respondent had to establish not only what its reason was but also that the conduct in question was culpable. Section 98(1) and (2) only requires the Respondent to establish its reason. The Employment Judge put up an inappropriately positioned barrier, perhaps mistakenly applying the approach that would be appropriate if he was considering contributory conduct. Mr Carr submits that the Employment Judge effectively "closed the file" at the point where he found the Claimant not to have been culpable.

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33. Mr Carr then submits that the Employment Judge substituted his own view for that of the Respondent as to the "culpability". He took me through references that in his submission showed that the Employment Judge reached conclusions of his own rather than properly considering the Respondent's case. He submitted that the Employment Judge at no point brought into account sanction because of his mistaken approach to culpability. While it is true that the Employment Judge made findings critical of the Respondent in relation to procedural and substantive matters, Mr Carr says it is clear that the key finding was the Employment Judge's own finding that the Claimant was not culpable. Mr Carr also submits that the Employment Judge did not consider the Respondent's alternative case based on the existence of some other substantial reason: loss of trust and confidence given the risk the Claimant had run without reference to the trading side. Likewise, his conclusions on the question of reason determined his conclusions in relation to contributory conduct and **Polkey**.

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34. On behalf of the Claimant Ms Romney submits that on a careful reading of his Reasons the Employment Judge did not elide section 98(2) and (4). It is clear that he identified the Respondent's reason - namely that the Claimant ought to have known of the change of practice - and asked whether it was reasonable to treat that reason as sufficient for dismissal. While

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A section 98(2) refers to conduct not misconduct, it is difficult to see when an employer would rely on a reason for dismissal relating to conduct if the conduct was not perceived by the employer to have an element of culpability. Even if the Employment Judge may have fallen into error at paragraph 57, he was where he needed to be by the end, as shown, she submits, by paragraphs 92 and following, where he plainly applied the range of reasonable responses test and found the Respondent's decision and process unreasonable by reference to that test.

35. Ms Romney further submits that the Employment Judge did not substitute his own decision; he made findings that were required as part of the background to the dismissal or were relevant to contributory conduct or both. Even if, contrary to her primary submission, the Employment Judge elided the two provisions, he was in any event right to find that the dismissal was procedurally and substantively fair. She took me in some detail through the shortcomings in the process found by the Employment Judge. As to the final written warning, it applied only if there was "further misconduct". At most, the Respondent found that the Claimant had failed to keep abreast with a change of practice regarding short filling.

The EAT's Role

36. The EAT is empowered to intervene only if there is an error of law in the Reasons of an Employment Tribunal. I bear in mind the guidance in **Fuller v London Borough of Brent** [2011] IRLR 414 at paragraphs 12 and 29 to 31:

> **"12. A summary of the allocation of powers and responsibilities in unfair dismissal disputes bears repetition: it is for the employer to take the decision whether or not to dismiss an employee; for the ET to find the facts and decide whether, on an objective basis, the dismissal was fair or unfair; and for the EAT (and the ordinary courts hearing employment appeals) to decide whether a question of law arises from the proceedings in the ET. As appellate tribunals and courts are confined to questions of law they must not, in the absence of an error of law (including perversity), take over the ET's role as an 'industrial jury' with a fund of relevant and diverse specialist expertise.**
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> ...
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> **29. The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The**

appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing an error of law or reaching a perverse decision on that point.

30. Other danger zones are present in most appeals against ET decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.

31. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."

Discussion and Conclusions

37. When applying section 98 **ERA** the Employment Judge's first task was to decide whether the Respondent had established what the reason, or, if there was more than one, the principal reason, was for the dismissal. It is well established that section 98(1) is concerned with the reason that was present in the employer's mind at the time of giving notice of dismissal (see **Abernethy** at page 329D, Lord Denning MR). It is a set of facts known to the employer, or it may be of beliefs held by the employer, which cause him to dismiss the employee (see **Abernethy** again, at paragraph 330C, Cairns LJ).

38. The person responsible for dismissal was Mr O'Grady, and he had set out his reasons at the meeting on 29 June 2015 and in the letter of dismissal. At the risk of oversimplification, I shall summarise them as follows. The reasons centred upon the Claimant's actions on 31 October 2014. He found the Claimant ought not to have engaged in short-filling when it was the express domain of trading; he ought to have known that short-filling was the express domain of trading; and he ought to have known that a degree of risk was involved. The Claimant's final written warning was then taken into account in deciding that the appropriate

A sanction was dismissal. If Mr O'Grady was an honest witness in the account he gave, these were the main facts and beliefs that caused him to dismiss the Claimant.

B 39. The Employment Judge's next task was to decide whether the Respondent had established that the reason or principal reason fell within section 98(2) or was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position that the employee held. The Respondent's position was that the reason or principal reason C related to conduct. As the closing submission of leading counsel for the Respondent made plain, "some other substantial reason" scarcely had an independent life because the conduct of the Claimant on 31 October was at the heart of the reason for dismissal. Speaking for myself, D on the assumption that Mr O'Grady's evidence was honest, I consider it is plain that the reason related to conduct.

E 40. It is, to my mind, a remarkable feature of the Employment Judge's Reasons that there is no clear finding at any point as to whether the Respondent succeeded in showing the principal reason for dismissal or whether it related to conduct. I can see no sign that he rejected the honesty of Mr O'Grady's evidence on this point, although he found his conclusions F unreasonable. It is of course possible that the Employment Judge simply overlooked making the relevant finding and proceeded to state a conclusion concerning section 98(4) on the basis that he implicitly accepted the evidence of Mr O'Grady as to reason. Ms Romney suggested G when I asked her that this must have been the case.

41. Given the general lack of structure in the Employment Judge's Reasons, it would be easy for him to overlook an important finding, but I have reached the conclusion that the H Employment Judge made a more fundamental mistake. He concluded that it was for the

A Respondent to establish at the section 98(1) stage that the conduct was culpable, eliding section 98(1) and (4). It seems to me that he stated this expressly at paragraph 57 of his Reasons. Indeed, he appears to have gone further and said that the person accused must have subjective awareness that what they were doing would be subject to the disapproval of employer, clients or fellow employees, and he relied on at least one criminal case for that proposition.

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C 42. In my judgment the Employment Judge's approach was wrong in law. At the section 98(1) stage the Employment Tribunal is only concerned with establishing what the reason was and that it was a reason of the kind that section 98(1)(b) and (2) identify. In a conduct case the employer will no doubt generally believe that there is something to be criticised about the

D employee's conduct, otherwise the employer will not be putting it forward as the reason for dismissal at all. (Mr Carr suggested that there were cases where this would not be the position, for example repeated short-term absence, but these may be better regarded as dismissal for some other substantial reason.) However - and this is the key point - it is not a requirement at

E of section 98(1) and (2) that the employer establish the conduct to be culpable.

F 43. In **Donaghay** the ET corrected a similar mistake. The Employment Tribunal had decided that the Claimant did not satisfy the requirement of section 98(2) because "*the conduct must be in some way reprehensible*" and in their view it was not (see paragraphs 22 and 23). This was the wrong approach. The EAT said:

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> **"53. In particular, the Tribunal misdirected itself regarding the meaning of 'conduct' in terms of s.98(2) of the 1996 Act. It is for the employer to show that the reason for dismissal was one of the reasons specified in that subsection. There is, however, no requirement that the conduct in question be reprehensible before the employer can be shown to have established that dismissal was for a potentially fair reason. Anything that an employee does or fails to do is 'conduct' under s.98(2) and dismissal for a reason relating to that conduct may or may not be fair, depending on the application of s.98(4). Whilst it is likely that the more reprehensible the conduct, the greater the likelihood of the dismissal being found to be fair, the conduct does not need to be reprehensible before the employer can be found to have discharged the onus on him and attention turned to the test in s.98(4), at which stage, he does not bear any onus. That, however, was the Tribunal's approach and it was wrong."**

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44. Still less is it a requirement of section 98(1)-(2) that the person accused must be aware that what they are doing must be subject to the disapproval of their employer. That would be to import a criminal concept of dishonesty into a quite different area of law. An employee who does not read the rules or ignores the practice of an employer does not have an automatic answer to disciplinary proceedings if he can say that he was not aware that what he was doing might be subject to his employer's disapproval.

45. While paragraphs 40 and 99 of the Employment Judge's Reasons are not so clear, they are susceptible to the same interpretation and certainly do not succeed in correcting the error of law at paragraph 57. Likewise, at paragraph 24 the Employment Judge seems to have fallen into error, for he appears to have suggested that it was for the Respondent to establish then and now that the Claimant in fact knew that it was completely wrong for sales to take upon themselves to short-fill a client order. This was in fact not the issue, but even if it had been it would not be for the Respondent to establish the truth of it in an unfair dismissal claim. The Respondent must establish the reason, and it is then for the Employment Tribunal to decide whether the Respondent acted reasonably in treating the reason as sufficient for dismissal.

46. In effect, therefore, the Employment Judge has elided two different aspects of section 98: section 98(1), where it is for the Respondent to show the reason; and section 98(4), where the decision as to whether the Respondent acted reasonably in treating the reason as sufficient is one for the Employment Tribunal taking into account all of the circumstances and keeping carefully in mind that there may be a range of different ways in which an employer may act reasonably.

47. It is far from easy to tell what impact the error about reason for dismissal has had on the Employment Judge's reasoning, since he never stated a conclusion as to whether the Respondent established the reason for dismissal and if so whether it was a reason falling within section 98(1)(b) and (2). I have, however, found it inescapable that it must have played some part in the Employment Judge's reasoning.

48. This brings me to section 98(4) **ERA**. It is well established that the Employment Judge's task was to start with the reason given by the Respondent and review every aspect of it - investigation, fact finding, procedure and sanction - to decide whether taken as a whole the Respondent acted reasonably in treating it as a sufficient reason to dismiss. The Employment Judge must avoid reaching conclusions of his own and starting from his own conclusions when he asks whether the Respondent acted reasonably. To do so may demonstrate a substitutionary mindset.

49. I have reached the conclusion that the Employment Judge has to a significant extent fallen into this error. It is, I think, apparent from a number of passages in the Reasons.

50. At paragraphs 15 and 35 the Employment Judge stated his own conclusions on the question of whether partial-filling of an order involved running risk - he found at paragraph 15 that the Claimant "*must be right on this to some degree*"; however the correct approach for the Employment Judge would have been to start with the reasoning of Mr O'Grady, which was to a different effect, and ask whether Mr O'Grady's view was reasonable. There is in any event a tension between paragraphs 15 and 35 that it is not easy to resolve, but on either view it was not for the Employment Judge to start with his own findings. They do not appear to be restricted to the issue of contributory conduct.

51. I would add in parentheses on this point that the last two sentences of paragraph 99, which I have quoted, are problematic on the question of running risk. If the Employment Judge rejected the Claimant's case and found that short-fill sometimes amounted to running risk, and if the Claimant's case was that he knew sales could not run risk, then it is difficult to see why short-filling without reference to a trader was not thought by the Employment Judge to be at least to some extent culpable.

52. At paragraph 56 the Employment Judge made his own finding that, having regard to the existence of a live final written warning, "*It is more likely than not that the claimant was careful*". This was not Mr O'Grady's view, and it would not obviously be unreasonable for him to suppose that an employee who has been careless before would be careless again. The question for the Employment Judge was whether Mr O'Grady's view was reasonable, and in reaching his conclusion on that question it was not for the Employment Judge to start with his own finding. I cannot read this paragraph as relating only to contributory conduct; it was part of the reasoning for unfair dismissal.

53. At paragraph 57 the Employment Judge stated and applied his own view of what amounts to culpability. He said the person accused must be aware that what they are doing, would or have done, would or might be subject to the disapproval of their employer. An employer, however, would be entitled to take the view that an employee is culpable if he ought to know that what he did must be subject to the disapproval of the employer. This indeed appears to have been the view of Mr O'Grady, and the task of the Employment Judge was not to state his own view but to ask whether that of Mr O'Grady was reasonable. I cannot read paragraph 57 as relating only to a **Polkey** finding or a contributory conduct finding.

54. There are other, lesser instances of the Employment Judge stating facts for himself without asking whether these were the views held by the Respondent and whether they were reasonable (see for example paragraphs 9 and 16), but the three instances that I have given above persuade me that the Employment Judge's Reasons are to a significant extent affected by a substitutionary mindset. While I appreciate that in the last few paragraphs there is repeated use of the word "unreasonable" to describe the Respondent's conduct and conclusions, I consider that the Reasons must be read as a whole and demonstrate that the Employment Judge to a significant extent adopted an incorrect approach.

55. That is not to say that all the Employment Judge's conclusions were unjustified or incorrect. Indeed, points that he made about the process followed by the Respondent seem to me to have very considerable force. It is difficult to see why, given its size and administrative resources, the Respondent did not immediately hold a proper investigation, which would have involved an interview with the Claimant. It is difficult to see why once the Respondent found out that the Claimant's case was that he was unaware of the change of practice and then conducted further interviews it did not give the Claimant an opportunity to comment, especially since the nature of the misconduct alleged against him shifted and allegations of want of trust and confidence were made. It is also difficult to see why, once it found out the Claimant's case, the Respondent did not interview the other salespeople who had attended the "Project January" training.

56. Ms Romney submitted that these, and other, findings were so compelling that I ought to allow the finding of unfair dismissal to stand. Here, however, I must remind myself of the limited remit of the Employment Appeal Tribunal. If the Employment Tribunal erred in law, I cannot uphold the result unless, without any factual assessment of my own, I can say that the

A error cannot have affected the result (see **Jafri v Lincoln College** [2014] ICR 920 at paragraph 21). Evaluation of a case under section 98 is holistic. Procedure and substance must be considered together (see **Taylor v OCS Group Ltd** [2006] ICR 1602, to which Ms Romney helpfully referred me). I do not think that that is a task that I can effectively say must result in the same conclusion if it is carried out without the errors of law made by the Employment Judge.

C 57. It follows that the appeal must be allowed. I have no doubt that remission must in the circumstances of this case be to a freshly constituted Employment Tribunal, given the strength of the views that the Employment Judge has expressed.

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