Appeal No. UKEAT/0118/17/BA
UKEAT/0138/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 & 3 November 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

ST NICHOLAS SCHOOL (FLEET) EDUCATIONAL TRUST LTD — APPELLANT

MR P SLEET — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JULIAN ALLSOP (of Counsel) Instructed by: Messrs Willans LLP 28 Imperial Square Cheltenham Gloucestershire GL50 1RH
For the Respondent	MR ANGUS GLOAG (of Counsel) Instructed by: Messrs Tom Street & Co Solicitors 2B Bath Street Frome Somerset BA11 1DG

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

PRACTICE AND PROCEDURE - Perversity

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

UNFAIR DISMISSAL - Compensation

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Polkey deduction

Liability appeal - unfair dismissal - reason for dismissal - reasonableness of dismissal - perversity - adequacy of reasons

*Remedy appeal - compensation - contributory fault - **Polkey** deduction*

The Claimant, the Maintenance Manager at the Respondent school, was dismissed after it was found he had failed to draw the Respondent's attention to changes in use of a right of access across the school site, which raised potential child protection and safeguarding issues. On his complaint of unfair dismissal, the ET concluded that the Respondent had not made good its reason for dismissal (conduct), the Head Teacher (the relevant decision-taker) having demonstrated hostility towards the Claimant's continued employment when she had earlier issued him with a final written warning for performance concerns notwithstanding his 20 years of unblemished service; safeguarding issues were not the real motivation for the dismissal - had the Respondent genuinely held that concern it would have taken other steps (before and after the dismissal) to address the risks identified. Furthermore, the ET did not consider the Head Teacher sufficiently impartial: her knowledge of the use of the right of way was in issue and she was unreliable in her evidence; the investigation had also been inadequate and the decision to dismiss fell outside the range of reasonable responses. At a subsequent hearing, the ET

addressed remedy, declining to make any reduction for contributory conduct given its earlier conclusions on liability, and finding there should be no **Polkey** reduction - in part, because of its Liability Decision but, in so far as the Respondent sought to rely on other matters, it had either known of those before dismissing the Claimant but taken no action or had carried out no investigation and it would be too speculative to make any reduction.

The Respondent appealed against both Decisions.

Held: allowing the appeals and setting aside the ET's Liability and Remedy Judgments.

The ET's conclusion on reason was not supported by its findings of fact: it had not found that what the Head Teacher said she had in mind - which had caused her to decide the Claimant should be dismissed - was untrue; even if it thought she had wanted to be able to dismiss the Claimant, that did not mean she had not in fact done so for the conduct reason she relied on. The ET's conclusion on possible ulterior motive and/or impartiality could be relevant to the question of fairness but this was also not supported by the findings of fact and the inference drawn from the previous final written warning for performance issues was perverse/ inadequately explained. The ET had, further, fallen into the substitution trap in respect of fairness of investigation, process and as to sanction - in particular, in its focus on actual risk (rather than the anticipatory risk that had informed the Respondent's decision), in how it saw the issue of the Head Teacher's knowledge (the issue had been the change in use of the right of access, not - as the ET suggested - her knowledge of past use) and in its suggestions as to what the Respondent ought to have done in relation to its safeguarding concerns. In the circumstances, the finding of unfair dismissal could not stand.

In the light of the conclusions reached on the liability appeal, the ET's Remedy Judgment would also be set aside.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's joined appeals from two Judgments of the Reading Employment Tribunal (Employment Judge Vowles sitting alone; "the ET"). The first - UKEAT/0118/17/BA - arising from a Liability Hearing on 28 and 29 June 2016, sent to the parties on 17 August 2016 ("the Liability Judgment"). The second - UKEAT/0138/17/BA - relating to the subsequent Remedy Hearing before the ET on 6 January 2017, sent out on 15 February 2017 ("the Remedy Judgment"). Representation below was as it has been on the appeal.

2. By its Liability Judgment, the ET upheld the Claimant's complaint of unfair dismissal; it went on, in its Remedy Judgment, to award him £39,854.23 in compensation.

The Background Facts

3. The Respondent runs a school at Redfields House, Church Crookham, Fleet, Hampshire. It had bought the site in 1996 and was aware there was a right of way across it used by a Mr Potter, who used it to access his land.

4. The Claimant was employed as the Maintenance Manager, heading up a team of four, responsible for the maintenance of the school and the site. He had worked on that site since 1982, initially for the previous owner, but had started working for the Respondent from 1 January 1995 and continued to do so until his dismissal on 2 June 2015.

5. In 2013, another member of the maintenance staff had raised concerns about the Claimant's performance, which were discussed with him. After some improvement, similar concerns were again raised in 2014 and the Claimant was referred for an Occupational Health assessment which reported he was fit for work. In December 2014, the Respondent's Head Teacher (Mrs Whatmough) held a capability meeting with the Claimant about this poor performance and he was given a final written warning; that was the subject of an unsuccessful appeal by the Claimant, heard by the Respondent's Chair of Governors.

6. In 2015, Mrs Whatmough became aware that Mr Potter's use of the right of way had changed - something drawn to her attention when the Respondent instructed solicitors to provide advice regarding the right of way. Statements were taken from school staff, including the Claimant, as part of that exercise and from that information Mrs Whatmough became concerned that Mr Potter was no longer using the right of way himself, but his son and friends were accessing the land and holding clay pigeon shoots during the school day. It appeared that the Claimant had known of this, but had failed to inform Mrs Whatmough or the School Bursar about the apparent change in use, and there were concerns that this was a significant breach of the Respondent's child protection and safeguarding policy. Mrs Whatmough considered this should be taken further and instigated disciplinary proceedings against the Claimant.

7. After a disciplinary hearing on 1 June 2015, Mrs Whatmough concluded that the Claimant had failed to keep a careful check on unknown visitors in accordance with the Respondent's safeguarding policy - a friend of Mr Potter, together with his companion, had been accessing the school site during the school day whilst pupils were present, and the Claimant had failed to inform her (as Head Teacher) or the Bursar about this. Given the safeguarding and reputational risks arising, Mrs Whatmough concluded this amounted to gross

misconduct on the Claimant's part warranting his summary dismissal. She further considered the situation was aggravated by the Claimant already being subject to a final warning regarding performance issues and also by the fact that visitors to the site might have been bringing firearms with them during the school week (the latter being information provided by another member of staff, Ms Axton, in a statement given on the day of the disciplinary hearing).

8. Mrs Whatmough's decision was communicated to the Claimant by letter of 2 June 2015. He did not seek to exercise his right of appeal against dismissal, but subsequently presented his claim of unfair dismissal to the ET.

The ET's Decisions and Reasoning

Liability

9. The ET found the Respondent had not discharged the burden upon it to prove the reason for the Claimant's dismissal was his conduct. It considered Mrs Whatmough's motives "*were less about child protection and more about a predetermined intention to dismiss the Claimant*" (paragraph 30), finding her previous award of a final written warning for poor performance against the Claimant (the ET records it having been given in April 2015 but it can only mean the warning given following the capability hearing on 8 December 2014), after 20 years of unblemished employment, indicated a degree of hostility regarding his continued employment.

10. The ET also concluded that Mrs Whatmough was insufficiently impartial to conduct the disciplinary hearing: the charges against the Claimant involved allegations that he had failed to inform her personally of matters relating to the right of way and her knowledge, or lack of it, was a major issue in this matter; the minutes of the disciplinary hearing recorded her saying she was unaware of shoots occurring on Mr Potter's land, but that was not the case - on her own

evidence, she was aware of shoots taking place at weekends. It had, further, come out in evidence that Mr Potter's son had visited her around four months before June 2015 and discussed the issue of access; the Potters had, however, not been contacted during the disciplinary investigation. The ET was also sceptical that child protection issues were really a concern of the Respondent: had that been so, it was perverse for the Respondent to have taken no steps to fence, limit, restrict, or monitor the use of the right of way for over 20 years. It was also perverse to blame the Claimant, and no one else, for failing to report that persons other than Mr Potter and his family had been using the right of way (in particular, the ET referred to Ms Axton's account of seeing a man on site with a gun). The ET also noted that the Respondent had adduced no evidence of what action, if any, was taken after March 2015 to limit or monitor the right of way.

11. The ET concluded there was a breach of natural justice in Mrs Whatmough conducting the disciplinary hearing and a failure to carry out a reasonable investigation and insufficient evidence to determine that any failings by the Claimant warranted his dismissal. The dismissal fell outside the range of reasonable responses and the claim of unfair dismissal was made out.

Remedy

12. At the remedy stage, the ET rejected the Respondent's arguments that there should be reductions from any award made for the Claimant's contributory conduct and/or pursuant to **Polkey** (**Polkey v A E Dayton Services Ltd** [1987] IRLR 503).

13. On the question whether the Claimant was guilty of any culpable or blameworthy conduct which had caused or contributed to his dismissal, the ET referred back to its finding in the Liability Judgment that:

> **"4. I did not find that the Claimant was guilty of any culpable or blameworthy conduct which caused or contributed to his dismissal. On the contrary, at paragraphs 40 and 41 of the Judgment Reasons, it is stated:**
>
> > ***… There was a failure to conduct a reasonable investigation and insufficient evidence upon which to determine that any failings by the Claimant justified dismissal. … The dismissal fell outside the range of reasonable responses. No reasonable employer would have concluded that the Claimant was responsible, much less wholly and solely responsible, for the state of affairs about which it was concerned. Nor would any reasonable employer have treated the matter as sufficient to justify dismissal."***

14. As for **Polkey**, the ET found that, had a fair process been followed, the Claimant would not have been dismissed. As for the other matters relied on by the Respondent, the ET found that the first - Ms Axton's account of reporting to the maintenance staff that she had seen someone taking a gun out of the boot of a car on site - was known to the Respondent and taken into account as part of its decision to dismiss the Claimant in any event. The second matter relied on was a report of legionella in part of the Respondent's hot water system and a failure by the Claimant to take corrective action or bring the matter to Mrs Whatmough's attention; the ET found, however, that the Respondent knew of this at the time of the Claimant's dismissal, but had not investigated it, but instead determined to dismiss the Claimant for other reasons. The Respondent further sought to rely on various issues which it said showed significant failings on the Claimant's part, these included a failure to maintain the school's sewage treatment plant such that sewage had overflowed onto neighbouring land, and a failure to clean, maintain, or empty the chemical storage tank which was so full that in times of high rainfall, it caused chemicals to leach into the general surface water drainage. There were also various allegations of failings in the Claimant's role as Head of Maintenance, including a failure to conduct or communicate risk assessments, a failure to complete competency in training records, or to record formal safety inspections and so on and more specifically, a failure to ensure the school's security lights were properly functioning. In general terms, the Respondent contended that the erosion of trust and confidence in the Claimant was such that it was highly unlikely that he would have retained his employment especially given that he was already subject to a final

written warning. The ET, however, rejected these points. There was insufficient investigation by the Respondent such as would satisfy the requirement for a fair dismissal and the Claimant had not been given the opportunity to respond to the various allegations. It reasoned:

> **"12. The basis for the Respondent's submission was that because the Claimant was the head of the maintenance team, and all these matters involved maintenance, the Claimant must therefore be culpably responsible for all the alleged failures. That was the same broad approach taken by the Respondent in respect of the actual dismissal which was found to be unfair. It takes no account of the possibility of others being responsible or any explanation by the Claimant. In fact, the Claimant had a plausible explanation for many of these matters."**

15. Specifically, on the allegations relating to chemical storage and sewage overflow, the Claimant had said that he had arranged a responsible company to deal with both these issues. He had been advised that the chemical tank did not need emptying regularly, but had checked the levels in any event, and the sewage overflow had occurred well after he had been dismissed.

16. Referring to the EAT decision in **Software 2000 Ltd v Andrews & Ors** [2007] ICR 825, the ET considered:

> **"16. … in view of the lack of any sufficient investigation or reliable evidence which would support a fair dismissal, and the Respondent's tendency to pre-judge the Claimant as responsible for any maintenance related failure, the exercise of seeking to reconstruct what might have been was so uncertain that no sensible prediction based upon the evidence could properly be made."**

17. Concluding that there was no just and equitable reason to reduce the Claimant's compensation, and having regard to his mitigation and other relevant factors, the ET made a total award of £39,854.23.

The Liability Appeal and the Parties' Submissions

18. By its appeal against the ET's Liability Judgment, the Respondent contended that the ET had erred in law, alternatively misdirected itself, in determining the Claimant was unfairly dismissed, specifically in rejecting the Respondent's case as to the reason for the Claimant's

dismissal, and in its application of the range of reasonable responses test to the investigation and process applied; it had, further, substituted its own opinion for that of the Respondent and had made several central findings of fact that were perverse, thereby invalidating its conclusion of unfair dismissal; alternatively, it failed to give adequate Reasons for its Judgment, ignoring the Respondent's case, and adopting the Claimant's submissions wholesale. The Claimant resisted the appeal, essentially relying on the Reasons given by the ET.

The Respondent's Submissions

19. Taking first the various findings that the Respondent contended were properly to be characterised as perverse, the Respondent took issue with the ET's finding that the disciplinary proceedings should not have been conducted by Mrs Whatmough: it had failed to have regard to the procedural requirement for her to do so as Head Teacher and it was perverse to conclude she had not genuinely seen this as a misconduct issue - that was contrary to the ET's own finding of fact at paragraph 13 and contradicted by the contemporaneous documentation, Mrs Whatmough's evidence, and the Claimant's acceptance that she had a real and genuine concern about this as a safeguarding issue.

20. It was, further, perverse for the ET to conclude that the final written warning (wrongly dated) evidenced hostility towards the Claimant or that this was raised during the disciplinary hearing. There was a legitimate background to the final written warning as recorded in the findings of fact and the ET had made no relevant finding otherwise. The ET was wrongly conflating a warning with hostility. The previous warning for performance issues was not linked to the misconduct charges and the Claimant had not suggested that the fact of the earlier warning meant Mrs Whatmough should not conduct the disciplinary hearing. These matters also made good the Respondent's contention that the ET had fallen into the substitution trap.

21. Turning to the ET's further suggestion that Mrs Whatmough should not have conducted the disciplinary hearing because of her own knowledge of the use of the right of way was in issue. Contrary to the ET's suggestion, this had not been a major issue: it was not raised by the Claimant, who accepted he had not told Mrs Whatmough of the change in use and the evidence supported Mrs Whatmough's account that she was not aware of the changed circumstances until she read the statements in February/March 2015 (as the ET accepted in its findings of fact at paragraph 13), as further corroborated by the content of letters written to the Claimant at the time. Similarly, as for the ET's rejection of Mrs Whatmough's evidence as unreliable, this was apparently based on a note of a disciplinary hearing taken by the School Secretary, which suggested Mrs Whatmough had said she had not previously known of the shoots on the Potter's land. That, however, was obviously contradicted by all other evidence which showed Mrs Whatmough accepted she knew shoots had taken place at weekends. The other factors taken into account by the ET included Mrs Whatmough's meeting with Mr Potter Junior as part of the investigation into the use of the right of way, but there was nothing to suggest that provided her with information as to the change in use prior to her seeing the statements from staff.

22. The ET had further gone on to make findings as to what it considered the Respondent should have done to address its safeguarding concerns arising from the use of the right of way. That, however, failed to take into account the legal difficulties, as demonstrated by the deed granting the right of way, and was, in any event, an irrelevant consideration that further showed the ET's substitution mindset. Similar points could be made regarding the ET's apparent focus on whether any child had been put at risk, rather than considering whether the Respondent might reasonably have had an anticipatory concern in this regard.

23. More generally, on the issue of safeguarding, the Claimant's obligations had not been in dispute and it was accepted that he bore a responsibility for raising matters seen by the maintenance team. And that was the answer to the ET's apparent concern about Ms Axton's statement: she had raised the issue of what she had seen with the maintenance team and was entitled to expect them to take it forward; in any event, it did not detract from the Claimant's own responsibilities. Moreover, it was apparent from the evidence, not least the dismissal letter (see paragraph 18 of the ET's Decision), that Ms Axton's statement was not a matter taken into account in determining to dismiss the Claimant. It was an additional aggravating factor.

24. Specifically, on the reason for the Claimant's dismissal, the ET was required to determine the subjective reason in Mrs Whatmough's mind which, if honestly the reason for dismissal, could be a reason that was capable of being fair for the purposes of section 98(2) **Employment Rights Act 1996** ("ERA") even if wrongly held. Rather than focusing on the reason given by the Respondent for the purpose of the statute, the ET conflated its view of the reasonableness of the dismissal given what it found to be a predetermined intention to dismiss the Claimant; see by analogy, **JP Morgan Securities plc v Ktorza** UKEAT/0311/16 at paragraph 46. Further, given its findings at paragraph 13, its conclusion in this regard was perverse; alternatively, inadequately explained.

25. There was, further, no proper evidential basis for the ET's conclusion that there was a failure to conduct a reasonable investigation. In addition to the perversity points already made, the ET's conclusion ignored the generous margin of appreciation afforded to employers under the range of reasonable responses test, and strayed impermissibly into the realms of substitution. Generally, in its findings on fairness, the ET had referred to the relevant case law,

but failed to follow the guidance given and had fallen into the substitution trap; see **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387 CA at paragraphs 48 to 49.

The Claimant's Submissions

26. For the Claimant, it was emphasised that this had been a straightforward unfair dismissal case heard over two days. The Respondent's only witness had been Mrs Whatmough and the ET's view of her credibility was crucial and had permissibly informed its decision. The Claimant, an individual with limited means, was now faced with some 44 separate points of appeal. The Respondent taking pernickety points suggesting the ET had not understood the case before it on the facts. It was not suggesting it had erred in law.

27. The deed granting right of access and the school plan had showed that Mrs Whatmough would always have known of the right of access afforded to Mr Potter, his successors in title, and his "*servants and licensees*". It was further apparent from the evidence that Mrs Whatmough had been informed about the various uses of Mr Potter's land and the fact that shoots took place there at weekends. The ET had been entitled to conclude that the purported reason for the Claimant's dismissal, safeguarding, was not the honest reason and that Mrs Whatmough was not a reliable witness.

28. The ET had not misdirected itself on reason. It had made a finding of fact that the Respondent had not established that misconduct was the reason for dismissal, but had an ulterior motive. Specifically, the finding at paragraph 13 did not constrain the ET; in particular given its other findings of fact at paragraphs 7 to 11, which demonstrated Mrs Whatmough wanted to get rid of the Claimant (the motive behind the earlier reference to Occupational Health and the final written warning for performance issues).

29. As for the range of reasonable responses test, as explained in **Earl v Slater and Wheeler (Airlyne) Ltd** [1973] 1 WLR 51, the assessment of fairness in an unfair dismissal case is not a question of law. There was no misdirection or error of approach. The ET reached its decision based on evidence of a flawed and biased investigation and disciplinary process. Moreover, there was nothing to support the contention that the ET had fallen into the substitution trap.

30. Turning to the perversity challenges - as to which the Respondent faced a high hurdle (see **Yeboah v Crofton** [2002] IRLR 634 CA and **Stewart v Cleveland Guest (Engineering) Ltd** [1996] ICR 535 EAT) - it was not perverse for the ET to find that Mrs Whatmough was hostile towards the Claimant given her attempt to dismiss him earlier for health reasons and the final written warning after 20 years unblemished service. It was equally not perverse for the ET to conclude that her knowledge had been in issue. This was, after all, a dismissal of the Claimant for an alleged failure to advise Mrs Whatmough about the use of the right of way and it was open to the ET to find her evidence on this unreliable; see, in particular, the contradictory evidence recorded at paragraphs 33 and 34. It was also not perverse for the ET to consider inconsistency of treatment as between staff, no action having been taken against Ms Axton who had failed to report what she had seen to the Head Teacher or the Bursar. Ultimately, once the ET had found that Mrs Whatmough had dismissed for an ulterior purpose, the finding of unfair dismissal necessarily followed.

The Remedy Appeal and the Parties' Submissions

31. By its appeal in relation to the Remedy Judgment, the Respondent took issue with the ET's findings on **Polkey** and/or of contributory fault; specifically, it contended the ET failed to engage with the relevant questions, alternatively reached perverse conclusions, alternatively

failed to adequately explain its conclusions. Again, the Claimant resisted the appeal, seeking to uphold the ET's conclusions in both respects.

The Respondent's Submissions

32. Prior to the Remedy Hearing, the Respondent had written to the ET to ask whether it had addressed **Polkey** and contributory fault issues in its Liability Judgment. It had been told these issues still stood to be considered at the Remedy Hearing. In the Remedy Judgment, however, the ET had simply referred back to its Liability Judgment for contribution purposes, observing it had not found the Claimant was guilty of any culpable or blameworthy conduct which had caused or contributed to his dismissal. In determining the question of contributory fault, the ET had, however, needed to ask whether there was culpable or blameworthy conduct on the Claimant's part that had caused or contributed to the dismissal, and whether it was just and equitable to reduce the award (**Nelson v British Broadcasting Corporation (No. 2)** [1979] IRLR 346 CA). Had it carried out that task, the ET would have been bound to find the threshold for making a reduction to the basic and compensatory awards was met. Alternatively, the ET's conclusion was perverse/inadequately explained.

33. Similarly, on **Polkey** the ET had failed to show it had approached its task correctly. In particular, its reasoning (see paragraphs 16 and 17) suggested it had treated **Polkey** as an all or nothing assessment rather than one of a contingency. Each of the matters relied on by the Respondent was supported by contemporaneous evidence (witness and documentary) and by concessions made by the Claimant in cross-examination. The fact there was not sufficient investigation into each matter, such as to mean the Claimant could have been fairly dismissed at the time of his actual dismissal, was one evidential factor to weigh in the balance but the ET had approached its task on an all or nothing basis. The ET's reliance on **Software 2000** did not

mean it could avoid a finding on the issues raised for **Polkey** purposes (see paragraph 38, **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274 EAT): wholesale acceptance of the Claimant's case was insufficient explanation in these circumstances.

The Claimant's Submissions

34. For the Claimant, it was again stressed that the ET had found that the Claimant had been dismissed for an ulterior purpose. In those circumstances, it was neither perverse nor inadequately explained for the ET to find the Claimant had not contributed to, or caused, his dismissal. As for the matters relied on for the **Polkey** argument, these had only been raised in the course of the ET proceedings; the Claimant had not had the opportunity to defend himself while still employed. In the circumstances, the ET was entitled to find there was no proper basis for any reduction or that it would be entirely speculative. Moreover, in approaching its task under **Polkey** the ET had not adopted an all or nothing position (specifically, see paragraph 5), but had properly directed itself that a **Polkey** reduction should be made to reflect the chance of a fair dismissal in any event.

The Relevant Legal Principles

Liability

35. In a claim of unfair dismissal, the relevant provisions are contained in section 98 of the **ERA 1996**, in particular:

> **"(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 -**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(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.**
>
> **(2) A reason falls within this subsection if it -**
>
> **…**

(b) relates to the conduct of the employee,

…

(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

(b) shall be determined in accordance with equity and the substantial merits of the case."

36. As the Claimant has emphasised, the finding as to the reason for a dismissal and the assessment of fairness for section 98(4) purposes are matters for the ET. The EAT should be slow to interfere with any legitimate assessment by the ET under section 98; see, for example, **Hollister v National Farmers' Union** [1979] IRLR 238 CA at paragraph 17 and **Fuller v London Borough of Brent** [2011] IRLR 414 CA at paragraphs 29 to 31.

37. In determining the reason for dismissal, an ET needs to determine what was the set of facts known to the employer, or beliefs held by it, that caused it to dismiss; see per Cairns LJ at paragraph 13, **Abernethy v Mott, Hay & Anderson** [1974] IRLR 213 CA. When determining the question whether, having regard to that reason, the dismissal was fair or unfair, the question is not whether the ET itself considers that it would have dismissed - it is not for the ET to substitute its decision as to the right course to adopt for that of the employer - it is, rather, required to assess the reasonableness of the decision to dismiss against the objective standards of the hypothetical reasonable employer measured by reference to the band of reasonable responses (and see the various iterations of this principle in cases such as **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439 EAT, **Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden** [2000] IRLR 827 CA, **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23 CA, and **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387 CA).

Remedy

38. As for the question of any reductions in compensation for unfair dismissal, section 122(2) **ERA** provides in respect of the basic award as follows:

> **"(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."**

39. As for the compensatory award, section 123 relevantly provides:

> **"(1) Subject to the provisions of this section and [section] 124 … the amount of the compensatory award shall 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 in so far as that loss is attributable to action taken by the employer.**
>
> **…**
>
> **(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."**

40. In making any **Polkey** reduction relevant to the assessment to be made under section 123(1), guidance has been laid down by the EAT, Mr Justice Elias (as he then was) presiding, in the case of **Software 2000 Ltd v Andrews & Ors** [2007] ICR 825; see in particular paragraphs 53 to 54. On the question of contributory fault, section 123(6) requires an ET to consider the conduct of the employee and it is open to an ET to find that a Claimant's conduct has contributed to their dismissal, notwithstanding that it is for a reason other than conduct itself, albeit that the employees conduct must be culpable or blameworthy in some way; see **Nelson v British Broadcasting Corporation (No. 2)** [1979] IRLR 346 CA. Again, the ET will be best placed to make these assessments and the EAT should be slow to interfere (see, for example, the guidance given in **Hollier v Plysu** [1983] IRLR 260 CA at page 263 and **Yate Foundry Ltd v Walters** [1984] ICR 445 EAT).

41. More generally, where a perversity appeal is pursued, there is a high threshold: parties seeking to make good that contention on appeal must be able to show that the ET's decision was almost certainly wrong; see **Yeboah v Crofton** [2004] IRLR 634 CA.

Discussion and Conclusions

Liability

42. The ET had first to determine what was the reason for the Claimant's dismissal? Had the Respondent met the burden upon it of demonstrating it had dismissed for a reason that was capable of being fair for section 98 purposes? That required the ET to making findings as to the set of facts known to the relevant decision-taker (Mrs Whatmough), or beliefs held by her, that had caused her to dismiss the Claimant. If Mrs Whatmough had in mind the Claimant's failure to inform her of safeguarding issues arising from the change in use of the right of access, and that had genuinely caused her to determine he should be dismissed, that could be the reason for dismissal notwithstanding the possibility she was also pleased by this outcome as it suited an underlying desire to see the Claimant's employment end. Such an underlying desire might mean the fairness of the dismissal was tainted - the ET might find the Respondent had gone into the process with a closed mind - but would not necessarily mean the reason given was not the genuine reason (or principal reason) informing the decision to dismiss.

43. Here the ET's direct finding of fact as to what was in Mrs Whatmough's mind at the relevant time is recorded at paragraph 13 of its Reasons. That finding was entirely consistent with the Respondent's stated reason for dismissal. The ET might have found this was what Mrs Whatmough had said but it was not her true reason, but that is not what is said at paragraph 13: on its face, the ET accepted Mrs Whatmough's evidence as to what she had in mind; there is nothing else in the findings of fact that would cast any doubt on the Respondent's reason.

44. The Claimant contends the ET's findings at paragraphs 7 to 11 - as to the Claimant's length of unblemished service and what is said to have been an earlier attempt to dismiss him for ill-health reasons as well as the final written warning - provide the factual basis for the ET's subsequent rejection of the Respondent's reason. That, however, is not what those findings actually say. While the Claimant's service was a matter of record, the ET made no finding that there was an earlier attempt to dismiss for ill-health. On the contrary, the fairly neutral finding at paragraph 10 suggests only that, after concerns were raised about the Claimant's performance in 2013, Mrs Whatmough had given him the opportunity to improve and, when the issue was raised again in 2014, made sure he was physically fit for his work; there is nothing to support a suggestion that Mrs Whatmough was committed to getting the Claimant out regardless of reason. As for the final written warning - the matter specifically relied on by the ET in its conclusion on reason - the actual finding of fact in this regard is again neutral: there is nothing to suggest this was given other than in good faith and for cause (apparently also the view of the other decision-taker involved, when upholding the warning on appeal).

45. The ET's findings of fact thus do not provide the necessary foundation for the conclusion at paragraph 30. In any event, even if the ET had been entitled to find that Mrs Whatmough was hostile to the Claimant's continued employment, it would not necessarily follow that the issue regarding right of access was not the reason or principal reason that had caused her to dismiss (albeit she might have been pleased to do so). The ET needed to determine the facts or beliefs that had actually caused Mrs Whatmough to decide that the Claimant should be dismissed. Its findings of fact in this regard simply do not support the ET's conclusion that the Respondent had failed to demonstrate that the reason for dismissal was related to the Claimant's conduct in respect of the right of access issue; on the contrary, it had

A expressly accepted (paragraph 13) that this was what was in Mrs Whatmough's mind at the relevant time. The ET's conclusion on reason thus cannot stand.

B 46. That, however, is not the end of the matter. The ET went on, in any event, to consider the fairness of the dismissal, specifically finding that Mrs Whatmough was not sufficiently impartial to conduct the disciplinary hearing. Here, again, the ET's conclusion as to Mrs Whatmough's ulterior motivation comes in and it is, of course, possible that a decision-taker C might have a particular conduct issue in mind as the reason for dismissal, but dismiss unfairly because they have a closed mind to the possibility that the employee might be innocent, or that the conduct in issue might not justify dismissal.

D 47. Again, however, I am unable to see how the conclusion that Mrs Whatmough was not sufficiently impartial is justified on the ET's findings of fact. While she had interacted with the E Claimant about the previous performance issues, that was inevitable given she was his direct line manager and Head Teacher of the school. Equally, although she had given the Claimant a final written warning - in circumstances in which he had not had a previous warning, although his performance had been raised with him on two earlier occasions - given that was upheld on F appeal, it was perverse of the ET (or, at least, inadequately explained) to simply hold that showed insufficient impartiality for Mrs Whatmough, as Head Teacher, to undertake her responsibility as laid down in the disciplinary process in relation to the disciplinary hearing.

G 48. Yet further problems arise in respect of the ET's other findings on the question of fairness, in particular, as to the investigation. Here the real difficulty is that the ET fell into the H substitution trap: it focussed on what it considered was an important issue - whether there had been past cases of children being put at risk - instead of considering the Respondent's

anticipatory concerns; it failed to distinguish between Mrs Whatmough's understanding of past uses of the right of way and her concerns arising out of what she had learned to be the change in that use; and it focused on whether instructions had been given to the Claimant to monitor or restrict access, as opposed to whether it was in the range of reasonable responses to consider reporting the change in use to be part of his (accepted) general safeguarding responsibilities.

49. Given the ET's error in its determination of the reason for dismissal, the absence of proper evidential foundation or adequate explanation for its finding of preconceived mindset, and its errors of substitution, I am satisfied that the appeal on liability must be allowed and the decision on unfair dismissal set aside.

50. I appreciate that this will not be a welcome outcome for the Claimant, but where an ET has erred in these fundamental respects, I am bound to set aside its Judgment. In doing so, however, I do not go so far as to say that each of the Respondent's perversity challenges are made out. The clear result of my conclusion on liability is that the unfair dismissal claim must be remitted for rehearing and, given the criticisms I have made, that can only be undertaken by a differently constituted ET. In those circumstances, it is both unnecessary and potentially unhelpful for me to rule on each of the Respondent's perversity complaints; the ET on the remitted hearing will make its own findings and reach its own conclusions.

Remedy

51. Given my conclusions on liability, the Remedy Judgment must also be set aside. In particular, the conclusion on contributory fault could not stand once the ET's finding on reason had been found wanting. That is also true, at least to some extent, of the ET's conclusion under **Polkey**, although, on the matters relied on other than the issue which had caused the Claimant's

dismissal, I would not have agreed that the ET was necessarily at fault in its approach under **Software 2000**. It was open to it to find that the matters relied on by the Respondent were ultimately too speculative.

52. The real issue on the Remedy Judgment was, rather, one of adequacy of Reasons. In particular, on matters such as the legionella non-conformance report, the Respondent might not have relied on it at the time because it was dismissing the Claimant for another reason but that did not absolve the ET from the task required of it in addressing that issue under **Polkey**. Similar points could be made in relation to at least some of the other matters relied on but, again, I am not sure it is a helpful exercise for me to undertake at this stage.

53. I thus allow the two appeals and set aside the ET's Judgments on liability and remedy.