Appeal No. UKEAT/0179/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 February 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR D A GRAYSON — APPELLANT

PAYCARE (A COMPANY LIMITED BY GUARANTEE) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MS ROBIN WHITE (of Counsel) Instructed by: Banner Jones Solicitors 24 Glumangate Chesterfield S40 1UA
For the Respondent	MR NIGEL BROCKLEY (of Counsel) Instructed by: FBC Manby Bowdler LLP George House St Johns Square Wolverhampton WV2 4BZ

SUMMARY

UNFAIR DISMISSAL - Polkey deduction

Upon a remission by the EAT to reconsider its **Polkey** decision without any further evidence, the ET concluded that there was a 75% chance that the Claimant would have been dismissed on the same date in any event. The Claimant appealed on the basis that the ET had again not properly considered the remitted question and sought remission to a fresh Tribunal; the Respondent cross-appealed on the basis that the ET had fettered its decision by limiting the percentages to 'quarters' and that on its findings the appropriate deduction was 90%. The appeal and cross-appeal were dismissed.

THE HONOURABLE MR JUSTICE SOOLE

1. This is the Full Hearing of an appeal and cross-appeal by the Claimant (Mr Grayson) and the Respondent (Paycare) from the Judgment of the Employment Tribunal in Birmingham (Employment Judge Perry and lay members), sent to the parties on 9 March 2017, whereby it held in respect of the "**Polkey** issue" arising from its previous finding of unfair dismissal that "*If a fair process [had] been conducted there was a 75% chance the claimant would have been dismissed in any event by notice given on 6 September 2014 effective on 6 December 2014*". That issue had been remitted to it by decision of the Employment Appeal Tribunal (Kerr J) dated 5 July 2016. The relevant background of this matter can largely, and with gratitude, be taken from his precis of the ET's Liability Judgment of 29 May 2015, in which the ET held that the Claimant had been unfairly dismissed.

2. The Respondent is a non-profit company limited by guarantee, based in Wolverhampton. It provides help to families and businesses with health care costs and is duly subject to regulation by the Prudential Regulation Authority and the Financial Conduct Authority. At the material times it had 23 employees and an annual turnover of about £7 million.

3. From July 2010 until his dismissal on 6 September 2014 the Claimant was employed by the Respondent as Head of Sales and Business Development leading its External Sales Team ("EST"). As with other members of his team, and in contrast to those working on internal sales, his remuneration was a combination of salary and commission. Over the 19-month period January 2013 to July 2014, he earned £32,835 commission against a salary of £79,750. His take-home pay was in the range of £3,800 to £4,000 per month.

4. In February 2014 a board meeting was held. It was noted that the board had previously sought a review of the commission structure. It was agreed that there would be a review of the Senior Management Team ("SMT") "*with its focus on the [EST]*". The aim was to complete the review by the next board meeting. The minutes recorded that the long-term sustainability of the Sales Team was discussed and that redundancies were being considered and would have to be considered carefully.

5. However by June 2014 no review of the commission structure nor of the SMT had taken place. Despite that, at a board meeting in June 2014, it was decided that due to the Respondent's financial position the entire EST would be made redundant, and that after those dismissals the Respondent's business model would be reassessed and ways of generating new business would be considered. The board did not discuss any alternatives to dismissing the EST members for redundancy.

6. Meetings were later held with the EST members who were told that they were "*at risk of redundancy*". The Claimant was told that the Respondent had not asked for volunteers for redundancy because no one else was in the pool. The Claimant was among those dismissed. He was dismissed with pay in lieu of notice on 6 September 2014. He attempted to appeal, but a date could not be agreed and the appeal did not take place.

7. In its Liability Judgment, the ET found that there was a genuine redundancy situation and that the Claimant had been dismissed for that reason. However the procedure had been unfair. The Respondent had at first said it would consider alternatives to redundancy; had not explained why it did not then do so; nor why it had not called for volunteers, which had happened in previous redundancy exercises. All it had done was to consider whether there were

internal posts available. The Tribunal found that there had effectively been no consultation with those made redundant; and that the Respondent had simply decided at the June 2014 board meeting to dismiss all the EST members for redundancy. The limited discussions with those affected thereby did not amount to fair consultation. It advanced no good business reason for having failed to consider alternatives to redundancies such as calling for volunteers.

8. The ET had then considered the **Polkey** issue, namely as to the chance that such dismissal might have occurred in any event, even in the absence of the unfair procedure. The Tribunal concluded that, had a fair procedure been followed, the Claimant would have been dismissed in any event by the same date.

9. Kerr J allowed the Claimant's appeal from that conclusion on the essential basis that the Tribunal failed "*properly to evaluate, on the basis of evidence and with the burden firmly on the employer, the chance of the Claimant avoiding or suffering dismissal had a fair consultation process taken place*" (paragraph 51). He also held that the Tribunal's reasoning was not **Meek**-compliant. In reaching that conclusion, Kerr J in particular observed that:

> **"42. … I do not accept that once the Tribunal had found there was no alternative role for the Claimant to fill, that was the end of the matter. The Tribunal's finding that the Claimant had never worked for the Respondent outside the EST does not deal with whether that fact meant that there was a 100 per cent chance he would have been dismissed by the same date. To reach the latter conclusion, the Tribunal had to consider the effect of the Claimant's lack of non-EST experience within the Respondent.**
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> **43. The Tribunal did not do this. It must have assumed that the Claimant's lack of prior non-EST experience made him "un-redeployable", in contrast to Ms Keane. But would he have needed to be redeployed? If the review of commission structure had taken place, what would it have produced? Might the Claimant or others have been prepared to work for lower commission or none, with alternative and cost-saving pay arrangements? What if the reviews had produced recommendations that would have saved considerable costs?**
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> **44. None of these issues was discussed in the Tribunal's decision. Nor did it discuss what would have happened if a call for volunteers had taken place. Was the Claimant really "un-redeployable" to the position of a notional volunteer in a different role? The Tribunal must have assumed so. But it did not ask itself whether the Claimant was adaptable; whether he would have tried to persuade the employer that lack of experience did not matter; whether the reviews that were not done might have produced a restructured workforce with individuals mixing sales and non-sales work; and so forth.**
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> **45. It did not ask itself those questions for the very good reason that the Respondent did not call evidence to negate any of those (which are by way of example) or other hypothetical scenarios. There was therefore very little evidence on the basis of which to conclude that the**

Respondent had shown a 100 per cent chance that the Claimant would have been dismissed by the same date as he was in fact dismissed.

…

47. … nothing in the decision indicates that the Tribunal evaluated the chance that the Respondent would have done that, beyond saying that there would be no award of compensation and thereby implying that the chance must have been 100 per cent. …

48. There is no explanation of how the Tribunal came to assess the chance of that at 100 per cent. The language used … says nothing about the quantum of the chance …"

10. The Respondent had accepted that in the event of remission it could not be permitted to call further evidence. On that basis Kerr J concluded that the right course was simply to remit the **Polkey** issue to the same Tribunal for reconsideration and subject to further case management directions by the Tribunal.

11. At a telephone Preliminary Hearing on 1 September 2016 Employment Judge Perry took particular care to ensure that, given the remission was on the basis that there would be no further evidence, there were no issues as to whether something had been raised or not. He ordered the parties to serve an agreed schedule of legal and factual matters to be decided on the remission, together with written submissions. It was agreed that counsel would be available by telephone on the first of the two days listed for the hearing. In the event, there was no agreed schedule but each party presented its own.

12. In its Judgment of 9 March 2017, the ET rehearsed a number of its findings in the Liability Judgment which it considered relevant to the remitted **Polkey** issue. These included that by June 2014 there were only three members of the EST; Mr Grayson, Mr Simpson and Ms Keane, the latter being a long-standing employee who had worked in various other parts of the business.

13. As to commission, it had found the Respondent to hold a genuine concern as to how commission could continue to be paid, at least by reference to a link to the profitability of a policy, as a result of a concern on the part of its Regulator as to commission being paid in that way. That had been put into sharp focus by the emphasis of Messrs Grayson and Simpson on seeking policies (and the commissions they generated for them personally) irrespective of what the Respondent saw as the commercial realities of doing so.

14. The ET had found that there was a substantial deterioration in the Respondent's protected finances. Thus at the March 2014 Senior Management Team meeting some £70,000 worth of savings were identified as required. By the June 2014 board meeting the position had substantially deteriorated. The Respondent was running at a deficit of £245,000 against an income of £2.77 million. This had necessitated, contrary to usual practice, a board meeting in the month of June.

15. The Tribunal determined that the Respondent genuinely held the view in June 2014 that it needed on financial grounds to make savings and decided to dispense with the services of the EST. It had considered recruiting a new Sales Team but rejected that on the basis that the same problems would ensue; and that instead it would review its process for generating new business. Whilst the reviews did not take place, it found as to alternatives to the deletion of the EST that the Respondent had a legitimate concern that increasing its premiums to customers would lead to a corresponding loss of policy holders. Thus, the review of the existence of the EST was inextricably linked to the commission paid to staff. The Respondent had concluded that the EST was "*not fit for purpose*".

16. From these findings the Tribunal concluded that, had the Respondent conducted the reviews and did so with an open mind, there was a "*high chance*" that the Respondent would have reached the same view. The reason for that conclusion was that:

> **"31. … we find that it felt there was little or no alternative, the commission structure and EST were inextricably interlinked, commission formed a significant element of some of the pay of the EST and the respondent understood that the commission based payment system was at odds with the view of the regulator. We assess that chance below."**

17. The Tribunal then turned to the question of alternatives to Mr Grayson's redundancy. That required "*an evaluation, based on evidence, of what alternatives to redundancy the employer would have considered, had it acted fairly*" (paragraph 32). In the light of the EAT's decision, the Tribunal recognised that it could not assume that the Claimant's lack of prior non-EST experience made him "*un-redeployable*" in contrast to Ms Keane. The Tribunal then addressed the question of the Claimant's redeployability. In its view:

> **"36. … It was not a question that the claimant was unemployable but in our view the respondent would not have been able to offer any role at a level anywhere near approaching that he previously had and commensurate with Mr Grayson's expectations as to pay and status. We say that for the following reasons."**

The Tribunal noted that no suggestion had been made, in the skeleton submissions on his behalf, that the Claimant would have accepted a lower status and/or pay, but reminded itself that the **Polkey** burden was "*firmly on the respondent*". It then gave the reasons in support of its conclusion in paragraph 36. The Tribunal stated that any suggestion that Mr Grayson would have accepted a lower status and/or lower payment:

> **"37. … would have been at odds with Mr Grayson's evidence. Mr Grayson's original witness statement … was that Mr Rogers was jealous because he was so highly paid and referred us to Mr Rogers taking this up at the board meeting in December 2013 … The minutes of that meeting recorded the question of the pay of the Chief Executive in relation to the other members of the SMT needed to be addressed. Those matters relay how Mr Grayson saw himself.**
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> **38. In making our determination that the respondent had come to the view the EST was not fit for purpose we noted the view that Mr Biddell had come to as to where Mr Grayson's focus lay, namely on him achieving targets without any impact on the respondent's business … That view was reinforced by our other findings …**
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> **39. Mr Grayson's take home pay (per month) was agreed as within the range of £3,800-£4,000 … and over the 19-month period January 2013 to July 2014 he earned £32,835 by way of commission against a salary of £79,750 … We find given the respondent's financial state and**

> **its turnover of £7M it could not have offered him an equivalent role. Given his focus on sales and what he perceived as the Chief Executive's jealousy of his remuneration we find it was highly unlikely he would have accepted a reduced salary and/or a lower status role.**
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> **40. That view is reinforced by Mr Grayson's complaints before us that the respondent failed to allow him to maximise his earnings by not allocating additional staff … and that he wanted to be on the main board running the company jointly with the chief executive whom he felt had no experience of sales."**

18. Reminding itself that it must address the **Polkey** question "*on the basis of evidence and with the burden firmly on the employer*", it also cited the observation of Elias P (as he then was) in **Software 2000 Ltd v Andrews & Others** [2007] IRLR 568, namely that:

> **"… a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence" and "… it is for [the employer] to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. …" (Paragraphs 54(4) and 54(2))**

19. The Tribunal concluded that there was a 75% chance the Claimant would have been dismissed in any event by notice given on 6 September 2014. It stated:

> **"43. Assessing those matters in the round for the reasons we give above we conclude that had a fair process taken place it was highly likely that the claimant would have been dismissed in any event. It is impossible to apply precision to that exercise and so Tribunals have historically been encouraged to assess the chance by fractions. A starting point are quarters. We considered if the chance was less likely than 75% (¾) and formed the view it was not; the respondent's view as part of any consultation or review was unlikely to be changed to that degree. In our judgment the arguments would have had to be compelling given its financial position, the concerns it had about the commission based system from a regulatory perspective, and also on the effects that had on the fitness for purpose of the EST department. The chance of the respondent coming to a different view was in our judgment very small. We considered if the chance would exceed 75% and considered if Mr Grayson would have accepted what would have been on any account a substantially lower paid and lower status role. We concluded overall the chance was 75%.**
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> **44. We now address how long a fair process would have taken. Whilst no direct evidence has been led on that issue we are required to make an assessment based on the evidence we heard.**
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> **45. The decision was taken at [a] board meeting on 19 June. The first consultation meeting took place on 1 July and the claimant was dismissed on 6 September by a notice given on 5 September.**
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> **46. Given the review did not take place prior to the board meeting on 19 June to be fair the decision of the Board would have need [sic] to have been consulted upon. In order to be fair the EAT reminded us that the consultation process had to be carried out in good faith and with an open mind. We found there was a financial imperative in this case and thus this would have been progressed as quickly as a fair process allowed. Using our industrial relations experience as an Industrial Jury a fair process would have entailed the respondent putting its proposal to individuals and/or the business units affected following the board meeting on 19 June. Initial consultation could we envisage have taken place in two weeks and responses sought by a further two weeks (Thursday 17 July). We should add in many instances we have seen shorter time period [sic] than this. That of course does not make necessarily make [sic] those other procedures fair or unfair, it merely shows the process can be done in such a time frame if there is an imperative to do so. We have thus allowed a longer period.**

47. Allowing say a week or so later so the responses could be collated and fed to the Board, a further Board Meeting to form a view could have been held on Monday 28 July. Allowing a further 4 weeks for that to be relayed and responses to fed back [sic] and then a further week for a final decision to be taken and relayed takes us to Monday 1 September. That allows almost a full working week for some slippage on top of the generous two week periods we have allowed for initial consultation and feedback. Accordingly, had a fair process been adopted we conclude it could and given the financial imperative, would have been carried out by at least the same time. That is supported by the respondent's decision in this case to make a determination even though the claimant was unable to attend the final consultation meeting …

48. Accordingly, in our judgment had a fair process been conducted there was a 75% chance the claimant would have been dismissed in any event by notice given on 6 September 2014. The claimant's notice expired on 6 December 2014."

The Appeal

20. The Claimant's first two grounds of appeal are interlinked. Ground 1 states "*The ET has failed to assess the chance [that] fair consultations would have reversed the decision to dismiss. In failing to do this the ET have failed to apply the correct legal test and thereby committed an error of law*". Ground 2 states "*In deciding that the Claimant himself would not have accepted a lower status and/or lower paid role, the ET's reasons are unsupported by evidence before them at the remitted hearing*".

21. As to the first ground, counsel who appeared below, but does not appear today, contended in his written submissions that the conclusion that reasonable consultation would still have led to dismissal is not based on evidence produced by the Respondent. At the original liability hearing the Respondent had produced very little evidence of what a genuine consultation would have looked like, or of why if one had taken place there would still have been the closure of EST. The Judgment, in particular at paragraph 31, simply repeated the Respondent's preconceptions about what they wanted to do. The ET should have put these preconceptions through "an evidence based hypothetical consultation" based on what the Respondent had said would have happened in that consultation and what the likely outcome would have been. In short, the ET had "gone full circle" and simply reiterated the Respondent's stated reasons for the proposed redundancies. Likewise, there was no evidence to

support the conclusion of a 25% chance that proper consultation would not have led to dismissal.

22. As to the second ground, the reasons given for concluding there was little chance of the Claimant accepting a job with reduced salary and/or lower status did not address the reality of the situation; or what would have been the reality if fair consultation had taken place. In such circumstances, the question would have been whether the Claimant would have accepted a lower paid role or alternative employment if the alternative was dismissal. Citation of the Claimant's focus on sales and its perception that the Chief Executive - Mr Rogers - was jealous of his remuneration (paragraph 39) provided no evidential basis for the conclusion.

23. By the Notice of Appeal and the written submissions, the Claimant asked for the **Polkey** issue as remitted by Kerr J to be remitted again, but this time to a fresh Tribunal.

24. At the hearing today, the Appellant Claimant was represented by counsel Ms Robin White. Whilst adopting the written submissions of her predecessor, in particular as to the burden of proof and the lack of sufficient evidence, she took a more fundamental point. This was that the ET was not entitled to conclude that the Claimant would or might not have accepted an alternative job with lower pay and/or status, when the suggestion had never been put to the Claimant in the course of his evidence at the liability hearing. Whilst the Tribunal was making a judgment as to what would have happened in hypothetical circumstances, the Claimant's evidence on that point was evidentially relevant. Ms White submitted that the only way in which justice could be done was to remit the **Polkey** issue to a fresh Tribunal, but this time without a bar on adducing of further evidence. I suggested to Ms White that the logic of her argument was that there was nothing to remit; and that the allowing of further evidence

would be at odds with the decision of Kerr J. She accepted both points but contended that the just course overall was to remit and allow the parties to adduce further evidence on this issue.

25. In reply on this point counsel for the Respondent, Mr Nigel Brockley, who appeared below, placed particular emphasis on the schedules of fact and law and the written submissions which the parties had prepared at the request of the ET at the telephone Preliminary Hearing. His own schedule of 19 September 2016, post-dating Mr McNerney's schedule, in particular noted that there was no evidence either way as to whether the Claimant would have been content to be redeployed at a lower salary. The subsequent submissions to the ET of counsel for the Claimant (9 October 2016) did not take the point now raised.

26. Furthermore, the Notice of Appeal sought remission without further evidence being adduced on the issue "*if fair consultation, both in general terms as to the effect of consultation on the reviews and in particular alternative positions for the Claimant, had taken place*" (paragraph 22(b)). In any event, the absence of examination of the Claimant on the point was no bar to the ET's conclusion, but it was highly likely that he would not have accepted lower pay and status. As to the evidence, Mr Brockley emphasised a statement of the Claimant (appeal bundle page 182) which supported, in his submission, the Tribunal's conclusion and pointed to the small number of employees and the consequent greater difficulty in redeployment by voluntary redundancies or otherwise.

27. I am not persuaded that the Tribunal's approach or analysis involved any error of law nor therefore that its conclusion can be impeached. In my judgment, the written submissions gave insufficient weight to the critical feature of a **Polkey** assessment, namely that it depends on a hypothesis. The Tribunal had to reach its conclusion as to how both parties would or

might have reacted in the hypothetical circumstances of fair consultation. Evidence from the parties on that hypothesis is duly admitted but may be of limited weight in the final decision.

28. Thus, it is commonplace for Tribunals (and Courts making similar counterfactual judgments) to reach a conclusion that either or both parties would not have acted in the way that their honest evidence has asserted. In this case, the Tribunal correctly directed itself on the burden of proof, asked itself the correct hypothetical question and answered the question in the light of the evidence. In doing so it particularly recorded some of the questions which Kerr J has suggested; see paragraph 24. The following paragraphs (25 to 31) set out a range of evidence as to the Respondent's financial and regulatory concerns which had led to the conclusion that the EST and its linked commission payment structure could not continue. In my judgment that provided an ample basis to be satisfied that it was "highly unlikely" that the Respondent would have reached a different conclusion in the event of a fair process consultation. Putting it another way, that conclusion was not vitiated by the absence of evidence from the Respondent to that effect.

29. The same considerations apply to the second and linked ground of appeal. The Tribunal expressly considered the question of whether a fair process would or might have resulted in the Respondent offering and the Claimant accepting the position with lower pay and status. In considering this possibility the Tribunal had the advantage, which this Appeal Tribunal does not, of having heard and read the evidence of the Claimant and making its assessment of his character. In my judgment, it had ample evidence from which to reach the conclusion that it was highly unlikely that he would have accepted a reduced salary and/or lower status.

30. As to the new point raised by Ms White, I do not accept it for the following reasons. First, and as she accepted, this is not in the category of an allegation of e.g. dishonesty or some other allegation which must as a matter of law be put to the witness before any adverse finding can be made; i.e. as in the so-called rule of **Browne v Dunn** [1893] HL 67. Secondly, the matter was remitted by the EAT on the basis that no further evidence would be adduced and with the necessary implication that there was more than one answer to the **Polkey** issue. The parties and the ET then proceeded on that basis, with particular care being taken by the ET to ensure that the relevant facts and issues were before it. Even if the new point had force, which in my judgment it does not, it would not be right to review the ET's decision on the basis that it is at odds with the decision to remit and the subsequent conduct and stance of both parties. Thirdly, and in any event, for the reasons given in the response to the written submissions, I do not accept that the absence of evidence on the point from the Claimant was any bar to the conclusion which the ET was entitled to reach in the light of all the evidence.

31. The third ground of appeal is that "*In finding that there was a 25% chance that fair consultation in general, and in particular with the Claimant, as to alternative positions might not have led to dismissal, the ET should then have fixed a date employment would have continued beyond 6th September 2014*". The written submissions were that there is a contradiction between the conclusions that (1) that there was a 25% chance that the Claimant would have remained in employment and that (2) fair consultation would still have led to dismissal by the same date; i.e. 6 September 2014.

32. Citing Langstaff P in **Contract Bottling Ltd v Cave** [2015] ICR 146 (at paragraph 13), the starting point of the assessment of compensation in a case of unfair dismissal is that the loss is open-ended and at the full amount of the pay which that employee was receiving; but that this

is subject, amongst other things, to the question of how long the employee would have remained in that job. The submission was that the Tribunal had failed to establish to what date the employment (which had a 25% chance of continuing) would have continued. Ms White rightly did not press this submission. In my judgment, there is no contradiction in the Tribunal's conclusion. The Tribunal was simply assessing comparative chances. For the assessment of compensation, it will be necessary to identify an end date of employment if the 25% chance had occurred. However, that is the matter for determination within the next stage envisaged by the Tribunal's Order. I record the agreement of counsel reached in the course of this hearing that the Tribunal has yet to deal with the length of the award related to the 25% chance that the Claimant would have remained in employment.

Cross-Appeal

33. The Respondent cross-appeals the Tribunal's conclusion that the chance that the Claimant would have been dismissed in any event was 75%. Mr Brockley submits that the Tribunal erred in law in taking "quarters" as a starting point for a percentage reduction to reflect the chance that a fair process might not have led to dismissal. Having previously acknowledged that it had been wrong to assess a 100% chance of dismissal, in any event, the ET's approach had the automatic and erroneous effect of limiting the **Polkey** chance to a maximum 75%. In support, he cites **Countrywide Freight Group Ltd v Hobbs** UKEAT/0582/11 where His Honour Judge Peter Clark stated: "*The loss of the chance of the Claimant retaining his employment following a fair procedure will fall in the spectrum 0-100%*" (paragraph 11). Thus, the ET had fettered its decision by fastening on "quarters". He also submits that, given the Tribunal's judgment that "*The chance of the respondent coming to a different view was in our judgment very small*" (paragraph 43), a very appropriate reduction could not have been less than 90%.

34. I do not accept these submissions. As to "quarters", the Judgment makes clear that this was only a starting point and that the Tribunal had specifically considered whether the chance was more, alternatively less, than 75%. I do not consider that the Tribunal in any way fettered its approach to the assessment. As to the conclusion that the appropriate reduction was 75%, that was classically a matter for the Tribunal, as industrial jury, to assess in all circumstances.

35. For all these reasons I consider that the ET properly asked itself the question which had been remitted and reached an unimpeachable conclusion in the light of all of the evidence. Accordingly, I dismiss the appeal and cross-appeal.