Appeal No. UKEAT/0251/17/JOJ
UKEAT/0252/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 March 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

UKEAT/0251/17/JOJ

MR D WALKER SMITH	APPELLANT
PERRYS MOTOR SALES LIMITED	RESPONDENT

UKEAT/0252/17/JOJ

PERRYS MOTOR SALES LIMITED	APPELLANT
MR D WALKER SMITH	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Mr D Walker Smith	MR MARTIN BUDWORTH (of Counsel) Instructed by: Woodcocks Haworth & Nuttall Solicitors 12-14 Manchester Road Bury BL9 0DX
For Perrys Motor Sales Limited	MR TIMOTHY WILKINSON (of Counsel) Instructed by: rradar limited Suite 4B, 4th Floor West Wing, Platform New Station Street Leeds LS1 4JB

SUMMARY

CONTRACT OF EMPLOYMENT - Written particulars

UNFAIR DISMISSAL - Dismissal/ambiguous resignation

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Polkey deduction

The Tribunal erred in concluding that there had been no statement of particulars. The employee had been provided with a Service Agreement, which included his job title. There was no material change to his job title. Accordingly, the Service Agreement satisfied the requirements of sections 1 and 4 of the **Employment Rights Act 1996**. The award of two weeks' pay is set aside.

The Tribunal erred in concluding that the employee could withdraw an unambiguous resignation. Even if the resignation had been given "in the heat of the moment", the employee did not seek to withdraw the resignation until some 12 days later after he had been dismissed for gross misconduct. By that stage, it was too late. The finding that there would be no **Polkey** limitation on compensation would be set aside.

The Tribunal erred in its assessment that the employee's contributory conduct warranted a 50% reduction in compensation. This was one of those rare instances where it could be said that the Tribunal's assessment was wholly inconsistent with its findings as to the employee's conduct and was perverse. Any contribution was undoubtedly at the lesser end of the scale. Based on the facts found, the Employment Appeal Tribunal felt able to substitute an assessment of 15%.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. Both the Claimant and the Respondent below appeal against the Decision of the Employment Tribunal, sitting in Manchester, upholding the Claimant's claim of unfair dismissal. The Claimant appeals against the reduction of his compensatory award and basic award by 50% to reflect what the Tribunal described as "culpable conduct". The Respondent appeals against two aspects of the Decision. The first is in relation to the Tribunal's finding that the Respondent failed to provide particulars of employment contrary to section 1 of the **Employment Rights Act 1996**. The second is in respect of the Tribunal's finding that the Claimant had resigned in the heat of the moment and was thereby entitled to withdraw his resignation subsequently. The significance of that ground of appeal was that, if successful, compensation in respect of the unfair dismissal would be limited by reason of the expiry of the notice period upon resignation.

Factual Background

2. The Claimant was employed by the Respondent as a General Manager. He had been employed for some 25 years before his dismissal for gross misconduct on 13 June 2016. It was not in dispute that the Claimant had an unblemished career and an exemplary working history up to that point.

3. The Tribunal found that the Claimant had never been issued with a statement of conditions of employment or a job description. It found his role and responsibilities had expanded and developed over time, but were never reduced to writing. As General Manager, the Claimant was responsible for the operation of five dealerships: three operating under the Peugeot franchise, and two operating under Nissan and Nissan-Citroen franchises.

4. There was a dispute before the Tribunal as to whether the Claimant had line management responsibility for the Financial Manager of his region. The Tribunal found, having accepted the Claimant's evidence in this regard, that the Financial Manager did not report to the Claimant. Instead, it was found that the Financial Manager reported to the Group Financial Controller.

5. In June 2015, a Mr Thexton joined the Respondent as Group Financial Controller. He identified that vehicle debt had reached unacceptable levels across the whole business and set about taking active steps to reduce the debt. The Financial Manager in the Claimant's region at that time was Mr Midgley. Mr Midgley found himself struggling with the workload as a Financial Manager and, indeed, was subsequently dismissed for his shortcomings. Mr Midgley sent the Claimant some emails setting out action that needed to be taken in order to recover the debt position. The Claimant accepted that he did receive these emails, but did not appreciate the substantial amount of debt involved.

6. By January 2016, Mr Midgley was still pressing Branch Managers, including the Claimant, for a response to his call for action to be taken in relation to debt. The Tribunal accepted the Claimant's evidence that whilst he knew that Mr Midgley was chasing the recovery of debts, he was not aware that Mr Midgley had started to use any monies coming in to pay off debts.

7. On 26 May 2016, Mr Thexton and Mr Viluns (the Regional Director) met with Mr Midgley to do an accounts review. It quickly became apparent to them that there were serious irregularities with the accounts, and both Mr Midgley and the Claimant were suspended pending investigation.

8. Following the investigatory hearing on 4 June 2016, the Claimant was invited to a disciplinary hearing on 8 June to answer six specific allegations of misconduct. These included allegations that he did not take sufficient or adequate action to resolve the issue of aged bonus debts highlighted by Mr Midgley. There was also a specific allegation in relation to a Peugeot clawback bonus. The issue here was that a bonus from Peugeot was subject to a clawback in the event that certain trading standards had not been achieved by the relevant branch. The Claimant's contention was that he had been told by a Mr Moscrop at Peugeot that the Respondent would not be subject to clawback, but this was not confirmed in writing. It later transpired that the dealership was subject to an attempted clawback of some £60,000. It was alleged that once the Claimant had become aware of the potential clawback in March or April 2016, he failed to take appropriate action to inform his managers of the loss, and did not in fact do so until May 2016. There were two further allegations relating to a bonus from Nissan. One was following a mistake in the accounting elements of the Nissan bonus; it was said that the Claimant failed to raise this with senior management. And the final allegation was that he intended to use the Nissan bonus from 2016 to offset 2015 losses, thereby deliberately distorting profitability figures.

9. Following notification of the disciplinary hearing, the Claimant tendered his resignation on three months' notice. The Tribunal found that the Respondent refused to accept the resignation and proceeded with the disciplinary hearing.

10. Following the disciplinary hearing, the Claimant was dismissed on 13 June on the grounds that he had:

> **"… failed to exercise appropriate control on the financial management of the sites under your control. As General Manager, you are responsible for the management of all operational aspects of the sites, including the proper financial management and the safeguarding of the company's assets. It is therefore my decision that you have acted**

negligently in failing to properly perform your duties and as such, I no longer have trust and confidence in your ability to carry out our role to the required standard. For this reason, my decision is that your actions amount to gross misconduct and you are therefore summarily dismissed."

11. The dismissal letter of Mr Viluns also said as follows:

> **"I acknowledge your email of Saturday 4th June 2016 tendering your resignation with notice, however given the seriousness of the allegations against you, I do not feel it is appropriate to accept your resignation."**

12. On 16 June, the Claimant lodged an appeal against his dismissal. In doing so, he sought to withdraw his earlier resignation as follows:

> **"As a side issue in respect of my resignation, this was in the heat of the moment. As you will recall on 26th May I was suspended at that point this caused me a lot of stress and anxiety. I was left in 'limbo' for quite some time, and when I received the invitation to the disciplinary, I handed in my resignation due to the stress and anxiety and the mistaken belief that if I handed my notice in, I would not simply be called to a disciplinary meeting and have my car taken off me and be left in the middle of Bury, but I would have sufficient time to work my notice one way or the other.**
>
> **Having reflected on this and insofar as my appeal is successful, my resignation, is withdrawn, as it was not a valid resignation, given it was in the heat of the moment at an acute time of stress and anxiety."**

13. The Claimant's appeal was heard on 22 June, but was dismissed.

The Claim before the Tribunal

14. The Claimant lodged a claim for unfair dismissal. Following a two-day hearing on 2 and 3 May 2017, the Tribunal found as follows:

(a) The Respondent had established a potentially fair reason for dismissal, namely conduct.

(b) However, the Tribunal found the decision to dismiss the Claimant for conduct fell outside the range of reasonable responses open to a reasonable employer in the circumstances, because the Claimant did not have line management

responsibility for Mr Midgley and he had not been aware of Mr Midgley's activities.

(c) The Tribunal considered that, in relation to the Peugeot clawback matter, the Claimant's conduct in not obtaining written assurance from Peugeot was culpable and blameworthy and exposed the Respondent to financial risk. This was one of the matters that Mr Viluns relied upon in reaching his decision to dismiss and, in the circumstances, the Tribunal considered it just and equitable to reduce the Claimant's basic and compensatory award by 50% to reflect that contributory fault.

(d) The Tribunal rejected the Respondent's contention that there should be any limitation on compensation by reason of **Polkey**. In particular, the fact that the Claimant had tendered his resignation did not serve to limit any compensatory award, as the Tribunal accepted the Claimant's explanation that the resignation was in the heat of the moment and had subsequently been withdrawn.

(e) The Tribunal found that the Respondent was in breach of its duty to provide written particulars of employment and awarded compensation in the minimum amount of two weeks' pay in accordance with section 38 of the **Employment Act 2002**.

(f) The Claimant's conduct did not amount to a fundamental repudiatory breach of the implied term of trust and confidence entitling the Respondent to terminate his employment contract summarily. The matter was listed for a remedy hearing and directions given.

The Grounds of Appeal

15. The Respondent was the first to appeal, having lodged its Notice on 12 July 2017. There are broadly two grounds of appeal:

(1) The first relates to the finding that there was a failure to provide a statement of written particulars. The Respondent submits that this finding is perverse, given that the bundle before the Tribunal did contain a written Service Agreement, which satisfied the information requirements of section 1 of the **1996 Act**. It is further said that the reasons given in respect of this finding were inadequate, and that in any event, the Tribunal appears to have reached the decision on a point which was not in fact pursued before the Tribunal.

(2) The second ground relates to the finding that the resignation was in the heat of the moment and could therefore be withdrawn. As to this finding, the Respondent contends:

(i) That the Tribunal erred in its conclusion, given that the evidence before the Tribunal was that the Claimant had had an opportunity to reflect before submitting his resignation and he could not therefore say that he resigned in the heat of the moment.

(ii) The Tribunal's finding that the Respondent had refused to accept the resignation is perverse in the light of an email sent to the Claimant acknowledging his resignation and confirming that he would remain an employee during his notice period.

(iii) The Tribunal erred in finding that the resignation had been withdrawn. There were no special circumstances to justify departure from the usual contractual position that a clear and unambiguous notice under the contract takes effect.

(iv) The failure to find that the compensation should be limited in accordance with **Polkey** was an error of law and perverse.

(v) The finding was inadequately reasoned.

16. The Claimant lodged his Notice a couple of days later, on 14 July 2017. His grounds of appeal centre on the 50% reduction for contributory fault. The specific grounds relied upon in the Notice are that:

(1) This was in reality a capability dismissal and it was wrong to reduce for a contributory fault.

(2) There was no sound evidential link between the alleged conduct and the dismissal, and none was articulated by the employer.

(3) It cannot be said that the Claimant was at fault in this case.

(4) The reduction of 50% was perverse, given that this would suggest that the employer and employee were equally to blame for the dismissal.

(5) The Tribunal failed to demonstrate that it had properly considered all the circumstances.

17. Permission was granted by His Honour Judge Barklem to proceed on all of the grounds of appeal relied upon by both parties. I shall deal first with the Respondent's grounds, and then with the Claimant's grounds.

Respondent's Ground 1: Statement of Particulars

18. The straightforward submission here is that the Tribunal failed to take account of a Service Agreement dated 1 January 1996, which confirmed that the Claimant would be General Manager. In the circumstances, submits Mr Wilkinson, the Tribunal failed to take into account

a material and relevant factor, and the finding that the Claimant was never issued with the terms and conditions of employment is simply wrong. Mr Budworth, for the Claimant, submits that even if the Tribunal was incorrect to say that there had been no statement of particulars, it was right to say that the role and responsibilities had changed, but that no statement had kept up with those changes such that there was a breach of section 4 of the **1996 Act**.

19. In my judgment, the Tribunal did fall into error in this regard. The requirement under section 1 of the **1996 Act** is that, "*Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment*". The relevant information can be provided by way of an alternative document, such as a contract of employment (see section 7A). The information to be provided includes (under section 1(4)(f)) "*the title of the job which the employee is employed to do or a brief description of the work for which he is employed*". It is clear in this case that the Tribunal did have before it a Service Agreement which contained the required particulars; in particular, the title of the job which the employee was employed to do. Changes to those particulars are to be notified in accordance with section 4. However, the requirement under section 1(4)(f) is disjunctive, in that either the title was to be provided or a brief description. There is no need to provide both the title and the description. The Claimant's title was and had remained since 1996 that of General Manager; there was no material change to that title which needed to be communicated by way of a statement pursuant to section 4.

20. Insofar as the Tribunal did not have the Service Agreement specifically drawn to its attention at the hearing, that is not altogether surprising given that there appeared to be no pleaded claim under section 1 of the **1996 Act**. As it was not a pleaded issue, any decision by the Tribunal to make a finding on it ought to have been preceded by an invitation to the parties

to make submissions on it. Had that been done, the likelihood is that the Tribunal would have been alerted to the existence of the Service Agreement and the error might have been avoided.

21. Ground 1 of the Respondent's appeal is therefore upheld. The Tribunal's decision is substituted with a decision that particulars have been provided and that there was no breach of section 1 or section 4 of the **1996 Act**. That means that there is consequently no requirement on the part of the Respondent to pay the two weeks' compensation that was ordered in respect of that breach.

Respondent's Ground 2: Resignation

22. The Respondent's submission here is that the Tribunal was wrong to say that the Respondent had rejected the Claimant's resignation, that the Tribunal had erred in finding that the Claimant withdrew his resignation and that it erred in finding that the resignation was communicated in the heat of the moment. Reliance is placed on the cases of **Harris & Russell Ltd v Slingsby** [1973] IRLR 221 and **Ali v Birmingham City Council** UKEAT/0313/08. In **Ali**, it was held that where unambiguous words are used and understood, the proper conclusion was that the employee has resigned. The Tribunal should not be astute to find otherwise. Exceptions to the general rule are justified only in highly exceptional circumstances.

23. In the present case, submits Mr Wilkinson, there was evidence before the Tribunal suggesting that the Claimant's resignation was tendered in circumstances in which he had had a chance to reflect before sending the email. Furthermore, he did not seek to withdraw his resignation until some 12 days after his resignation when he had already been dismissed. It is further said that the Respondent did not refuse to accept the resignation and that there is clear evidence in this regard, which the Tribunal failed to take into account. In any event, submits

Mr Wilkinson, the acceptance of the resignation is not required in order for the notice to take effect.

24. In **Harris & Russell Ltd v Slingsby**, Sir Hugh Griffiths, of the then National Industrial Relations Court, said as follows:

> **"3. Although it appears that there is no direct authority on the point in the case of a master and servant relationship, the Court is satisfied that where one party to the contract gives a notice determining that contract he cannot thereafter unilaterally withdraw the notice. It will of course always be open to the other party to agree to his withdrawing the notice, but in the absence of agreement the notice must stand and the contract will be terminated upon the effluxion of the period of notice. …"**

I was also taken to a passage in paragraph 10:

> **"10. … That he was unfairly dismissed just before the middle of January in no way affected the fact that he was due to leave, in accordance with the notice he had given, at the end of January. He was in fact paid his wages for the remainder of January even though he had been dismissed. …"**

25. Mr Budworth's response to this ground is that the Employment Judge made findings of fact that the resignation was in the heat of the moment and that it had been withdrawn. He also points to the fact that the Respondent did not ask for the resignation to be treated as effective because, had it done so, that would have been dispositive of the resignation point, thereby rendering academic the undertaking of a full-blown analysis of the unfair dismissal point. He also argues that there is a contractual difficulty for the Respondent in that the notice of resignation did not comply with clause 10 of the Service Agreement, which requires that notice be in a particular form in writing and be sent to the head office by registered post or recorded delivery. Mr Budworth also relies upon that part of the dismissal letter in which Mr Viluns said in terms that he did not feel it was appropriate to accept the Claimant's resignation.

Analysis and Conclusions

26. The effect of the dismissal letter, it seems to me, cannot be that the Claimant's resignation was rejected in the sense relied upon by Mr Budworth.

27. As to Mr Budworth's first point - namely that this matter was not properly an issue before the hearing - I cannot accept that submission. The issue was clearly pleaded in the Respondent's Notice of Appearance. The Tribunal has, in identifying the issues, referred to whether the **Polkey** principles apply to his dismissal, and whilst it did not refer specially to the notice of resignation and the effect that that would have in a **Polkey** sense, it is clear from that and the Judgment (which deals expressly with this issue) that that was one of the **Polkey** matters which the Tribunal had in mind.

28. As to the contractual point, that was, it appears, not a point taken below. All parties and the Tribunal appear to have proceeded on the basis that the notice given by Mr Walker Smith was effective in the circumstances, notwithstanding the non-compliance with the contract. Certainly, the Tribunal made no findings that the notice was not in compliance with the contract. In any event, it seems to me that it was open to the employer in the circumstances to treat the notice as effective, notwithstanding the failure to comply with the contract. Mr Budworth says that clear words would be required for that. The various responses to the resignation - both in the 4 June email from Ms Carter and in the dismissal letter - seem to me to be an adequately clear indication that the resignation was being treated as effective on its face.

29. Coming back to whether or not the Tribunal was right to say the Respondent had rejected the resignation, as stated in **Harris & Russell Ltd v Slingsby**, where a notice is communicated in unambiguous terms, it remains effective unless there is a mutual agreement

that it shall not have that effect. In this case, there was no mutual agreement that the resignation could be withdrawn. The Tribunal did not refer at all to the email of 4 June sent by Ms Carter. This was sent by one of the recipients to the resignation email. She was the Human Resources Director with whom the Claimant had just had a conversation about his options. It seems to me that she was in just as good a position to respond authoritatively in respect of the resignation as Mr Viluns, to whom the resignation was primarily directed. Furthermore, the terms of the email are, it seems to me, reasonably clear. They amount to an acknowledgement of the resignation notice, but they also go on to refer to the fact that the Claimant shall remain an employee during the "notice period". It seems to me that that is an indication that the resignation and the notice period under that resignation continue to have effect and is accepted as doing so by the employer.

30. Mr Viluns' reference to resignation not being accepted as he stated in the dismissal letter has to be read in the context of a decision having already been made by him by that stage to dismiss the Claimant. In saying what he did, he was effectively saying that the Respondent had found Mr Walker Smith guilty of gross misconduct and that in those circumstances, it was not appropriate to allow his employment to terminate by resignation and the summary dismissal would take effect. That analysis is supported by the appeal letter, in which it says that "*gross misconduct supersedes your resignation*". Again, what this means is that the contract would not terminate upon the effluxion of the notice period, but would be terminated immediately by reason of the gross misconduct.

31. In the circumstances, it is my judgment that the Tribunal's conclusion that the Respondent rejected the letter of resignation is unsustainable. It was reached without having regard to what was clearly a material piece of evidence and is not consistent with the proper

A contractual position in respect of what is, on its, face a clear and unambiguous notice of resignation.

B 32. As to whether that notice, notwithstanding its clarity, was in the heat of the moment, that was a finding of fact, which, it seems to me, the Tribunal was entitled to reach. It was based on the evidence which it heard and the Tribunal had the inestimable advantage of hearing the witnesses give evidence. Its conclusion was based on that evidence.

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33. It is true that there is a file note of a conversation at 1.50pm on 4 June 2016. The Respondent submits that the file note indicates that the Claimant's eventual resignation was not

D in the heat of the moment, but tendered after a period of reflection. The timings do not really support that contention. The file note indicates a conversation of several minutes in length and the resignation appears to have been tendered at 2.08pm on the same day. In the email, the

E Claimant refers to his health having suffered and him not being prepared to put himself through this anymore.

34. Given that the resignation appears to follow immediately after the conversation with Ms

F Carter, it cannot be said that the Tribunal's conclusion that the resignation was in the heat of the moment was perverse. However, when a resignation is tendered in the heat of the moment and the employee wishes to withdraw it, such withdrawal should be communicated promptly. In

G this case, it was not. It seems to me that the Tribunal's finding that the notice of resignation had been withdrawn did amount to an error of law. That finding was not open to the Tribunal because at that stage, when the withdrawal was attempted, the Claimant had already been

H dismissed. There was therefore no longer any effective resignation to be withdrawn.

35. For these reasons, it seems to me ground 2 of the Respondent's appeal must be upheld. The Tribunal erred in law in its approach to the effectiveness of the resignation, and, notwithstanding that it was entitled to conclude that the resignation might have been given in the heat of the moment, it was not correct to conclude that it was properly withdrawn. There was a significant period of time between the initial communication of the resignation and the eventual attempt to withdraw it, in which the employee could have sought to withdraw his resignation, but did not do so. In fact, he only did so after his employment had terminated.

36. In those circumstances, the Tribunal's finding, at paragraph 42 of the Reasons, relating to the **Polkey** effect of the resignation, must be set aside.

The Claimant's Appeal

37. I turn now to consider the Claimant's appeal. Mr Budworth did not pursue in oral submissions the first of his contentions, which was that the dismissal letter indicates that the real reason for dismissal was more to do with the incompetence and capability. I reject that submission as set out in the skeleton argument. The Tribunal made a clear finding that the reason for dismissal was to do with conduct and that reason is wholly supported by the dismissal letter, which refers to various matters amounting to gross misconduct.

38. As such, the principles of contributory fault can be said to apply. The question is whether the Tribunal erred in its approach to that analysis. The Claimant's contention here is that if there was blameworthy conduct, it must be shown to have had a causative effect on the dismissal. In particular, it is said that Mr Viluns, the dismissing officer, did not articulate any link between the conduct, namely the failure to obtain written assurance from Peugeot as to the clawback, and the dismissal. I do not accept that submission. The Tribunal expressly found

A that Mr Viluns had formed a genuine reasonable belief that the Claimant had not obtained the appropriate written assurance to protect the business and that this formed part of his rationale for dismissing the Claimant. The Claimant expressly refers at paragraph 41 to this being one of the matters that Mr Viluns relied upon in reaching his decision to dismiss. In those circumstances, it seems to be that there was material on which there could be said to be a linkage between the conduct and a dismissal.

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39. As to the 50% contribution, I was referred to the case of **Hollier v Plysu Ltd** [1983] IRLR 260, where an assessment of 75% contribution was appealed. Lord Justice Stephenson held in that case that the Appeal Tribunal was not entitled to substitute its percentage for those of the Industrial Tribunal and said as follows.

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> **"19. … I … cannot say that … an Industrial Tribunal, which found in her favour that she was unfairly dismissed, cannot have had proper regard to what was just and equitable in reducing the awards of compensation for her dismissal by 75%. In a question which is so obviously a matter of impression, opinion, and discretion … there must be either a plain error of law, or something like perversity, to entitle an appellate Tribunal to interfere with the decision of the Tribunal which is entrusted by Parliament with the difficult task of making the decision."**

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40. In my judgment, this is one of those rare cases where it can be said that in reaching an assessment of 50% contribution, the Tribunal reached a conclusion which was perverse. At paragraph 41 of the Reasons, the Tribunal simply says that the Claimant's conduct in not obtaining written assurance from Peugeot was culpable and blameworthy and exposed the Respondent to financial risk. It says no more about it in that paragraph than that. Further explanation as to how that culpable or blameworthy conduct came about has to be gleaned from paragraphs 24 through to 26; but when those paragraphs are read it does not lead to the conclusion that there was any blameworthy conduct on the part of the Claimant at all.

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41. The Tribunal accepted at paragraph 26 of the Reasons that Mr Moscrop of Peugeot had said something to the Claimant which led him to believe that no clawback would be imposed. That was a finding of fact as to the Claimant's state of mind and about what he believed he had been told. There was no default evident on the part of the Claimant in that finding.

42. It was then clear from paragraph 25 that whilst the Claimant was on holiday, he learned that Peugeot had decided to claw back the £60,000; so insofar as there was an oral reassurance given, it was Peugeot that went back on that assurance. The Claimant then sought to remedy that position by arranging a meeting to discuss the issue with Peugeot for mid-June. The Tribunal noted that Mr Viluns subsequently accepted, once he became aware of the issue, that the Claimant took steps to deal with it by arranging the meeting with Peugeot and arranging to meet with Mr Viluns to discuss the matter with him at the earliest opportunity. Once again, there is no indication of default there. The only fault is the failure to obtain written assurance from Peugeot about the concession in respect of clawback. In the circumstances, where a senior manager is speaking to another senior manager of a trading partner who gives an oral reassurance, and where the Tribunal has found that something was said to that effect, it seems in my judgment wholly perverse to conclude that the Claimant was about 50% to blame for his eventual unfair dismissal. The findings of fact at paragraphs 24 to 26 simply do not support that conclusion.

43. I bear in mind that perversity is a high threshold to cross. However, reading this Judgment as fairly as possible and taking into account all the background facts, and not just the conclusion expressed at paragraph 41, it seems to me that this *is* one of those cases where it can be said that the conclusion was perverse and/or that the reason for finding such a substantial

level of contribution is inadequately explained and/or is inconsistent with what is said in paragraphs 24 to 26. That aspect of the Claimant's appeal is therefore upheld.

44. I am invited to substitute a finding of contribution. I bear in mind the cautionary note expressed in the **Hollier v Plysu Ltd** case, where it was said that the Appellate Tribunal should be slow to substitute its findings on percentage contribution, particularly given that this is a matter of impression, opinion and judgment. However, having concluded that the 50% contribution was perverse, it seems to me that the suggested contribution by Mr Budworth of some 15% more accurately and correctly reflects the findings of fact made by the Tribunal at paragraphs 24 to 26. In my view, those findings can only support a level of contribution far lower than the 50% found by the Tribunal. Accordingly, contribution at 15% is substituted.

Conclusion and Disposal

45. The Respondent's first ground of appeal succeeds. I substitute the decision that there was no failure to provide particulars within the meaning of section 1 of the **1996 Act** and that therefore the award of compensation of two weeks' salary falls away. The Respondent's second ground also succeeds. The Tribunal's conclusion as to the **Polkey** limitation in paragraph 42 is set aside.

46. The Claimant's appeal is upheld in respect of the assessment of contribution at 50% and this Tribunal substitutes an assessment of 15%.