Appeal No. UKEAT/0256/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 April 2018
Judgment handed down on 4 July 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

LANCASTER & DUKE LIMITED — APPELLANT

MS V WILEMAN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NATHANIEL CAIDEN (of Counsel) Direct Public Access
For the Respondent	MR NICHOLAS BIDNELL-EDWARDS (of Counsel) Instructed by: Lawson West Solicitors Limited 4 Dominus Way Meridian Business Park Leicester LE19 1RP

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

UNFAIR DISMISSAL - Polkey deduction

Effective date of termination - application of section 86(6) ***Employment Rights Act 1996***

Polkey *reduction - section 123(1)* ***Employment Rights Act 1996***

The Claimant had been summarily dismissed in circumstances that meant that she had just short of the necessary two years' qualifying service to bring a claim of unfair dismissal. She argued that the deeming provision under section 97(2) **Employment Rights Act 1996** meant her length of service was extended by the statutory minimum notice period provided by section 86(1), which would mean that she had the requisite service. The ET agreed, rejecting the Respondent's argument that the Claimant's right to rely on her statutory minimum notice entitlement was displaced by virtue of section 86(6), which allowed that the section did not affect an employer's right to dismiss summarily by reason of an employee's conduct. Going on to determine the merits of the Claimant's complaint, the ET upheld the claim of unfair dismissal and declined to make any **Polkey** reduction, referring to the fact that it had found the dismissal to have been substantively, not merely procedurally, unfair. The Respondent appealed against the ET's Judgment on both the qualifying service and the **Polkey** reduction points.

Held: *allowing the appeal*

The qualifying service point:

In allowing for the determination of the effective date of termination to be extended by the statutory minimum notice period, section 97(2) **Employment Rights Act 1996** referred to "the notice required by section 86" and thus incorporated the entirety of that section, including subsection (6). That meant the deeming provision was subject to the employer's right to give no notice in the circumstances allowed by section 86(6) and the ET had been wrong to hold otherwise. The question was whether this was a material error, given the ET's findings in this

case. The ET had made no express finding that the Claimant had been guilty of gross misconduct such as would entitle the Respondent to summarily terminate her contract. It had, however, only been concerned with the questions arising on the Claimant's claim of unfair dismissal and its conclusion on the question raised by section 86(6) could not be assumed and the issue would need to be remitted for determination.

*The **Polkey** point*:

As for the ET's refusal to make a **Polkey** reduction, it had expressly stated that no question of such a reduction arose given it had found the dismissal to have been "substantively unfair". That was contrary to the approach laid down in cases such as **Lambe v 186K Ltd** [2005] ICR 307 CA and **W M Morrisons Supermarket plc v Kessab** UKEAT/0034/13 and suggested the ET had wrongly limited its approach to the question whether there should be a just and equitable reduction in compensation. This was also a matter that would need to be remitted.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter raises two questions: first, whether an employee who is summarily dismissed can nevertheless claim a statutory extension of the notice period under section 86(6) **Employment Rights Act 1996** ("ERA") ("*the qualifying service point*"); second, whether a section 123(1) **ERA** "**Polkey**" reduction (see **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344) is inapplicable where a dismissal is found to be substantively unfair ("*the **Polkey** point*").

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Reserved Judgment of the Leicester Employment Tribunal (Employment Judge Clark, sitting alone on 25 May 2017, with a day for deliberations in chambers on 16 June 2017; "the ET"), sent to the parties on 15 July 2017. The Claimant was represented then, as now, by Mr Bidnell-Edwards of counsel. Before the ET, the Respondent appeared by one of its directors (Mr Weaver) but is now represented by Mr Caiden of counsel. The ET upheld the Claimant's claim of unfair dismissal, relevantly finding that the effective date of termination of her employment, for the purposes of the **ERA**, was 27 September 2016. It went on to make basic and compensatory awards, subject to a 25% reduction in respect of the Claimant's conduct, but declined to make a **Polkey** reduction on the basis that this was inapplicable in the circumstances of the case.

The Facts

3. The Respondent is a small employment agency business, operated by two directors (husband and wife) with three other employees. The Claimant had been one of those other

employees, having started her employment with the Respondent as a recruitment consultant on 22 September 2014.

4. On successfully completing her probationary period, the Claimant was given the title recruitment manager. As the ET found, the Claimant's experience enabled her to fulfil her role in a competent manner, contrasting with the management style of Mr Weaver, one of the Respondent's directors, which the ET described sometimes bordering on "*feckless*". This created a challenging relationship between the two. That said, the Claimant was a productive worker who made money for the business. Although the Respondent claimed she had to be spoken to on several occasions about what was said to have been her "*offensive behaviour*", the ET was satisfied that was not how the Respondent characterised the Claimant's conduct at the time and noted there had been no formal action taken against her; indeed, the Respondent's contemporaneous assessment of the Claimant's contribution had been extremely positive.

5. The ET did, however, accept there were aspects of the Claimant's manner in dealing with others that could give rise to difficulties, observing:

> **"5.10 … the complaints now levelled at the claimant … have taken on a new light in hindsight following the decision to terminate the claimant's employment. The employer's reference to various "reprimands" and "warnings" are also retrospective descriptions of what I find was at best no more than passing discussions and, in some cases, I cannot be satisfied that discussion on the issues now referred to in fact took place … However, that is not to say that there were not aspects of the claimant's personality and demeanour that could give rise to issues in the workplace generally and particularly in respect of her relationship with Mr Weaver. I have seen complaints from third parties, such as the Respondent's landlord … who emailed Mr [Weaver] on 9 August 2016 complaining about the claimant's rude attitude to one of his staff. I have seen an email from Mr Paine, who was employed for a matter of days in August 2016 who would describe her as "quite toxic" and "behaving like a playground bully", albeit not until after he was contacted after the claimant's dismissal … I had also heard the evidence of the respondent's witnesses. Each of them sets out their own experience of the claimant's demeanour in the workplace. It is not insignificant that a distinction was drawn by the other employees between the claimant's demeanour in work and out of work because the claimant was friends with both other employees and they continued to meet socially even after her dismissal. I find it highly likely that the claimant's work ethic (something for which she is otherwise praised) and experience in this industry is of a type that could come across as potentially abrasive in certain situations and is probably one aspect of why she was so good at the job she did. Nevertheless, that could leave her open to being perceived as rude and demanding. I am also satisfied that her experience and work ethic would lead to frustration when she felt systems of work needed to be challenged but such changes were quashed by the directors. Mr Weaver recalled how he and the claimant had clashed over work issues and she had**

said things to him in a raised tone ending with outbursts such as "because it's your fucking business". The claimant accepted in evidence that towards the end of her time with the respondent she was aware Mr Weaver "had issues with her"."

6. More specifically, the ET noted there had been a heated exchange between the Claimant and Mr Weaver on 25 August 2016, during which the Claimant said she was looking for another job and Mr Weaver responded by suggesting that "*maybe we should be looking for an exit strategy as this has to be the last time, we cannot continue like this*" (although the ET rejected the Respondent's suggestion that this had constituted a "final warning").

7. The Claimant had continued to work for the Respondent for a further four weeks or so, during which time, another employee, Mrs Thomas, resigned. Mrs Thomas was friendly with the Claimant and the two had spoken about Mrs Thomas' future with the Respondent (and the possibility that she might leave) in a personal context. When Mrs Thomas handed in her notice, she referred to her conversation with the Claimant and this triggered a discussion between the Weavers and the other two employees about the Claimant's future, which led to the decision that the Claimant should be summarily dismissed for gross misconduct. This was communicated to the Claimant by Mr Weaver in a telephone conversation on 20 September 2016 (confirmed by email on the same day), in which he said that, as she had less than two years' service, she was only entitled to one week's notice. No process was carried out before the Claimant's dismissal and she was not given any right of appeal against the decision. Although the Claimant lodged a grievance during the evening of 20 September 2016 - in particular, disputing the summary termination of her contract and the failure to afford her the statutory minimum notice - no grievance hearing took place.

The ET's Decision and Reasoning

8. As a preliminary issue in its response to the Claimant's complaint of unfair dismissal, the Respondent contended she did not have sufficient qualifying service to bring that claim. The ET noted it was common ground that the Claimant's employment had commenced on 22 September 2014 and she had been summarily dismissed on 20 September 2016, observing that in most contexts that would be the effective date of termination ("the EDT") and would result in a length of service two days' short of the necessary two years' required. The question was whether the Claimant's statutory minimum notice entitlement meant that the EDT should be deemed to fall on a later date. The ET addressed the relevant statutory provisions as follows:

> **"2.3. By section 94 of the Employment Rights Act 1996 ("the Act"), an employee has the right to bring a claim of unfair dismissal against his employer subject to sections 108-110 of the Act. Section 108(1) disapplied section 94 where the employee has not been continuously employed for a period of not less than two years ending with the EDT. The EDT is defined by s.97(1) as either (a) the date on which notice expires, (b) termination takes effect, or (c) a fixed term contract expires. If that were all it provided, s.97(1)(b) would mean 20 September 2016 was the EDT. However, s.97(2) goes on to create a deeming provision to determine a different EDT in a limited number of statutory contexts, one of which is s.108(1). That provides that:-**
>
> > **97(2) Where (a) the contract is terminated by the employer and (b) the notice required by s.86 of the Act to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination as defined by s.97(1) of the Act, for the purpose of s.108(1), 119(1) … the later date is the effective date of termination.**
>
> **Section 97(3)(b) of the Act defines the "material date" as the date when the contract of employment was terminated by the employer.**
>
> **2.4. As at 20 September 2016, the provisions of s.86(1) of the Act entitled that claimant to a statutory right to notice of one week. The material date is 20 September 2016 and that period of statutory notice was not given. Had it been given, the notice would have expired on 27 September 2016. The effect of s.97(2) is that that later date is to be treated as the EDT for the purpose of calculating the period of qualifying service required by s.108(1). At that date, the claimant had 2 years and 5 days' continuous service and is therefore entitled to bring a claim of unfair dismissal."**

9. The Respondent argued that section 86(1) **ERA** was displaced in this instance by the application of section 86(6), which provides that section 86 does not affect the right to treat the contract as terminable without notice by reason of the conduct of the other party. The ET disagreed, reasoning as follows:

> **"2.6. That provision does not, in my judgment, alter the analysis set out above. Firstly, there is no reference to s.86(6) in any of the other relevant provisions by which the otherwise clear effect could have been qualified. Secondly, there is no mention in any of**

> **the deeming provisions that they are subject to this provision. Thirdly, the purpose of s.86(6) is in my judgment merely there to make clear that the statutory regime does not alter the common law. It would be odd for a party to be released from his contractual obligations in the face of a repudiatory breach at common law, but to remain bound by it under the statute. A clear statutory purpose for such an effect would be necessary and is not found here. For those reasons I reject the respondent's argument and conclude that the ordinary EDT of 20 September 2016 is in this case deemed to be 27 September 2016 for the purpose of s.108(1) (and s.109) with the result that the claim for unfair dismissal may proceed."**

10. Having found that the Claimant had sufficient qualifying service to bring a claim of unfair dismissal, the ET concluded the motivating factor for her dismissal was Mr Weaver's view about the Claimant and her interactions with him and others. In the absence of any investigation with the Claimant about such concerns, however, the ET did not accept that the Respondent's belief was reasonable; it was founded on no reasonable investigation and was unfair. The ET further found that the decision to dismiss in these circumstances fell outside the range of reasonable responses of the reasonable employer and, even allowing for the Respondent's limited size and resources, there was no regard to the general procedural requirements for a fair dismissal or to the minimum standards expected under the **ACAS Code of Practice**. In the circumstances it was just and equitable to make an uplift to any award of compensation of 25%.

11. The ET considered whether there should be any reduction on **Polkey** grounds, but concluded that, as it had found the dismissal to have been substantively unfair, "… *questions of any Polkey reduction insofar as there is any procedural unfairness do not arise*" (see the ET at paragraph 7.14).

12. The ET did consider, however, that there were elements of culpability in the Claimant's conduct. Although it was reluctant to draw that conclusion in respect of her interactions with others at work (albeit recognising she could present as rude, abrupt or abrasive), it did consider that this was, to some extent, an appropriate way of describing her intervention in Mrs Thomas'

case: the Claimant's own sense of disillusion with the Respondent having informed her approach to her discussion with Mrs Thomas. In the circumstances, the ET considered the appropriate level of a reduction in respect of the Claimant's conduct was 25% in relation to both basic and compensatory awards.

The Relevant Statutory Framework and Case Law

The Qualifying Service Point

13. An unfair dismissal claim falls to be addressed under Part X of the **ERA**. By section 94 it is provided that:

> **"(1) An employee has the right not to be unfairly dismissed by his employer.**
>
> **(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) …"**

14. Section 108(1) **ERA** provides:

> **"(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years] ending with the effective date of termination."**

15. The "effective date of termination" is defined by section 97(1) **ERA** as follows:

> **"(1) Subject to the following provisions of this section, in this Part "the effective date of termination" -**
>
> > **(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,**
> >
> > **(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and**
> >
> > **[(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.]"**

16. Section 97 further provides, however, that:

> **"(2) Where -**
>
> > **(a) the contract of employment is terminated by the employer, and**

> **(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),**
>
> **for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.**
>
> **(3) In subsection (2)(b) "the material date" means -**
>
> **(a) the date when notice of termination was given by the employer, or**
>
> **(b) where no notice was given, the date when the contract of employment was terminated by the employer."**

17. Section 86 **ERA**, which falls within Part IX **ERA** - dealing with the termination of employment - provides as follows:

> **"86.** ***Rights of employer and employee to minimum notice***
>
> **(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more -**
>
> **(a) is not less than one week's notice if his period of continuous employment is less than two years,**
>
> **(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and**
>
> **(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.**
>
> **(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.**
>
> **(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.**
>
> **(4) Any contract of employment of a person who has been continuously employed for three months or more which is a contract for a term certain of one month or less shall have effect as if it were for an indefinite period; and, accordingly, subsections (1) and (2) apply to the contract.**
>
> **(5) …**
>
> **(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."**

18. These provisions essentially replicate earlier legislative definitions of the effective date of termination (a purely statutory concept) and equivalent deeming provisions allowing for this to be extended in particular circumstances by the importation of the statutory minimum notice period and counsels' researches initially suggested there was no material difference in the

language used, at least in relation to the relevant provisions relating to unfair dismissal. That said, during the course of the hearing, I noted there was a difference in the relevant provisions relating to the determination of an employee's entitlement to a redundancy payment. Section 145(5) **ERA** provides for a possible extension to the determination of "*the relevant date*" for these purposes by importing "*the notice required by section 86*" (so using the same language in this respect as section 97(2)(b)), whereas formerly (see section 90(3) **Employment Protection (Consolidation) Act 1978** ("the EPCA")) the reference was limited to "*the notice required ... by section 49(1)*" (section 49 being the equivalent provision under the **EPCA** to section 86 **ERA**). For the purposes of unfair dismissal, however, section 55(5) **EPCA** (the predecessor to section 97(1) **ERA**) simply referred back to "*the notice required ... by section 49*".

19. Section 55(5) **EPCA** was the provision in force when this point was considered by the EAT (sitting in Edinburgh, Lord Mayfield MC presiding) in **Lanton Leisure Ltd v White and Gibson** [1987] IRLR 119. In that case, the ET had rejected the employer's argument that, because the reason for their dismissals had been characterised as 'gross misconduct', the employees were unable to rely on section 49(1) **EPCA** to import the statutory minimum notice period for the purpose of determining the effective date of termination of their employment. Dismissing the employer's appeal, the EAT agreed the employer's designation of the reason for dismissal as gross misconduct was insufficient to bring section 49(5) **EPCA** (the predecessor to section 86(6) **ERA**) into play; this had to be a question for the ET. The first step was, therefore, for the ET to determine:

> **"7. … by means of an enquiry on the merits whether there was in fact such conduct which would enable an employer to terminate without notice. …"**

20. Even then, however, the EAT did not definitively hold that section 49(5) **EPCA** would apply so as to mean that the employees could not rely on section 49(1). Observing that there appeared to have been no decided case on the point, the EAT concluded:

> **"8. … In our view, it is necessary to first of all decide whether or not there has been such conduct as would warrant termination without notice within the terms of s. 49(5).**
>
> **9. … If such conduct is established it will, of course, then be necessary for the [Employment] Tribunal to consider whether s.49(5) elides the provisions of s.55(5)."**

21. Somewhat surprisingly, it appears there remains no authority determining the point raised both in **Lanton Leisure** (under the **EPCA**) and now on this appeal (under the **ERA**). In **Duniec v Travis Perkins Trading Company Ltd** UKEAT/0482/13, it was assumed that section 86(1) **ERA** must be read subject to section 86(6) when determining whether the effective date of termination is extended by the statutory notice period for the purposes of section 97(2), but that was not the issue before the EAT in that case. Notwithstanding this absence of direct authority, however, the learned authors of the leading texts in the employment law field have also taken the view that, in cases that genuinely involve gross misconduct (i.e. where an employer could lawfully dismiss without notice), section 86(6) **ERA** will apply so as to mean there will be no statutory minimum notice period and thus no extension to the effective date of termination, see *Harvey on Industrial Relations and Employment Law* Division DI at [746], *IDS Employment Law Handbooks* Volume 2 at [1.29] and *Tolley's Employment Handbook* (31st edn) at [52.13].

22. Having said there is no further authority on point, it is right to record that in **Secretary of State for Employment v Staffordshire County Council** [1989] IRLR 117 - in the context of an appeal relating to transitional provisions relating to redundancy rebates - the Court of Appeal was concerned with the determination of the "relevant date" for the purposes of entitlement to redundancy pay, and thus with the question whether the effective date of

termination might be extended by virtue of section 90(3) **EPCA**, by importing the statutory minimum notice provision under section 49(1). Specifically, it was argued that section 90(3) **EPCA** did not apply when the employee had waived his or her right to notice, section 49(3) providing that "… *this section shall not be taken to prevent either party from waiving his right to notice on any occasion, or from accepting a payment in lieu of notice*". The Court of Appeal disagreed, holding that, per Glidewell LJ, at paragraph 30:

> **"30. … The fact that an employee has waived his right to notice, or accepted a payment in lieu of notice, under s.49(3) is relevant only to his rights in contract. It has no relevance to his rights to a redundancy payment. The reference in s.90(3) to the notice required under s.49(1) is merely a way of describing the period of notice. It does not import any part of s.49 into the redundancy payment apparatus."**

See also per May LJ, at paragraph 24.

23. The equivalent provision within the **ERA** to section 49(3) **EPCA** is now section 86(3). Although that subsection is expressed in materially the same language as section 49(3) **EPCA**, as I have already noted, section 145(5) **ERA** now refers back to "*the notice required by section 86*" rather than adopting the more limited reference found in section 90(3) **EPCA**, i.e. to "*the notice required … by section 49(1)*".

*The **Polkey** Point*

24. Where a claim of unfair dismissal is upheld, the ET may make a compensatory award under section 123 **ERA**, which relevantly provides:

> **"(1) Subject to the provisions of this section … 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."**

25. What is referred to as "the **Polkey** reduction" is an application of section 123 **ERA** (see, for example, the observations made by Buxton LJ at paragraph 19 **Gover v Propertycare Ltd** [2006] ICR 1073 CA).

26. Although in **Polkey**, the House of Lords was concerned with a dismissal that might be characterised as "procedurally" unfair, it is clear that the possibility of a **Polkey** reduction is not limited to such cases. Applying section 123 **ERA** - making an award of such amount as the ET considers "*just and equitable*" in the circumstances of the particular case "*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*" - may lead an ET to conclude that compensation should be limited to a particular period, or reduced by a particular percentage, to allow for the possibility that the employment might have ended at some future point, absent any unfair dismissal. For these purposes there is, therefore, no sensible distinction between dismissals that are "procedurally" or "substantially" unfair (and see, to this effect, cases such as **Lambe v 186K Ltd** [2005] ICR 307 CA, at paragraph 59, and **W M Morrisons Supermarket plc v Kessab** UKEAT/0034/13, at paragraph 42).

The Appeal

27. The Respondent's appeal has been pursued on two grounds: (1) that the ET erred in its interpretation and application of section 86(6) **ERA**, wrongly concluding it had jurisdiction to determine the Claimant's claim of unfair dismissal; (2) that the ET further erred by misdirecting itself in relation to section 123(1) **ERA**, stating that a **Polkey** reduction was inapplicable, in particular as failing to make any reduction was inconsistent with its earlier findings.

28. The Claimant resists the appeal on both grounds, essentially relying on the reasoning of the ET but further contending that the ET's findings meant that any such error as identified under either ground of appeal could make no difference to the outcome of the case in any event.

Submissions

The Respondent's Case

(1) The Qualifying Service Point

29. On the first point raised by the appeal, the Respondent makes the following submissions:

> (1) The legislative intention behind section 86(6) **ERA** is to ensure there is no minimum notice in circumstances where an employee has committed a repudiatory breach of contract; it thus provides for one uniform approach to determination of wrongful dismissal issues, whether arising under a statutory provision or at common law (and see **Westwood v Secretary of State for Employment** [1985] 1 AC 20 HL). This is evident because: (i) the ordinary and natural interpretation of section 86 makes clear that subsections 86(1) and 86(6) are mutually exclusive: an employee either has a right to minimum notice or no right; (ii) such interpretation is consistent with section 97(2) **ERA**, which refers to the entirety of section 86 and only provides for extensions if there is a longer period of notice required by that section, which is not the case where section 86(6) applies; (iii) anticipating the Claimant's argument: this is not the importation of an ouster clause - as concerned the House of Lords in **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147 - but the implementation of one unified statutory scheme, see **A v Director of Establishments of the Security Service** [2010] 2 AC 1 SC; (iv) the contrary interpretation would create absurdities, allowing recovery for notice under statute and meaning that the qualifying period is in

fact one year and 51 weeks in all cases, even where the gross misconduct that had led to the dismissal was obvious; (v) the Respondent's construction is supported by all texts and commentaries on this provision and was apparently assumed to be correct insofar as it has been addressed in the case law (see **Duniec v Travis Perkins Trading Co Ltd** UKEAT/0482/13 and **Lanton Leisure Ltd v White and Gibson** [1987] IRLR 119 EAT); and (vi) there is nothing in any Parliamentary debates to point to the contrary.

(2) As the Claimant was summarily dismissed for gross misconduct, section 86(6) and section 97(2) **ERA** meant there was no minimum notice period and no minimum notice period extension. Accordingly, the ET did not have jurisdiction to determine the Claimant's complaint of unfair dismissal as she did not have sufficient qualifying service to bring such a claim.

(3) The error of law in this case was material. The ET had analysed everything through the lens of unfair dismissal and had failed to address the question whether the Respondent had been contractually entitled to dismiss the Claimant without notice (requiring the ET to apply a different test).

*(2) The **Polkey** Point*

30. As for its case under section 123(1) **ERA** - the **Polkey** reduction point - the Respondent contends that the ET erred in its approach:

(1) Because it failed to appreciate that a **Polkey** reduction is mere shorthand for there being the possibility of a fair dismissal at some point in time, notwithstanding the actual dismissal having been found to have been unfair.

(2) As the case law made clear, labelling a dismissal as being "substantively unfair" does not preclude a **Polkey** reduction.

(3) The error was material as evidence was adduced (and referenced by the ET) that supported a **Polkey** reduction at some level (whether due to the Claimant's conduct and thus the likelihood of her (fair) dismissal, or to the likelihood of her future resignation).

The Claimant's Case

(1) The Qualifying Service Point

31. On the approach to section 86(6) **ERA**, the Claimant contends as follows:

(1) The ET's approach was correct as a matter of statutory interpretation. For section 97(2) to operate so as to deem the EDT, there must have been a date on which "*the contract was terminated by the employer*"; the ability of a party to terminate a contract of employment without notice was therefore necessary for section 97(2) to have any effect and section 86(6) simply preserved the right of either party to do so. It would be perverse if a section concerning the termination of a contract of employment were to be construed so that it precluded the operation of a deeming provision, which expressly depended upon the ability of the employer to terminate the contract without notice

(2) The determination of the EDT was a matter of statute and not contract; section 86 allowed for a distinction to be drawn between a statutory right to minimum notice and a contractual right to dismiss summarily, but section 86(6) did not alter the statutory minimum notice periods applicable when determining the EDT under section 97(2) - it merely provided that the right to a statutory minimum notice period will not preclude an employer dismissing summarily for reasons to do with conduct. Had the intention been to carve out an exception to the statutory minimum notice period to be taken into account when determining the EDT, it would have been stated that

"*subsections 86(1) and (2) do not apply when subsection 86(6) applies*". Section 86(6) stated that it did not affect "*any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party*"; it thus only related to the rights of the parties to treat the contract as terminable; it did not state that there was any effect on the separate question of the EDT or the ET's jurisdiction to hear a claim. If Parliament had sought to modify the deeming effect of section 97(2) then section 86(6) would have expressly stated that it did so. The EAT was thus invited to find that section 86(6) related only to the ability of the parties to treat themselves as discharged from their obligations under the contract (such as the payment of notice pay, wages or, conversely, the obligation to attend work).

(3) In reality, the Respondent was seeking to rely on section 86(6) as an ouster clause, precluding the ET from having the jurisdiction conferred on it by section 97(2) to hear a claim. As such, any ambiguity in section 86(6) must mean that it should be construed so as to preserve the ordinary jurisdiction of the ET (see **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147 at page 170).

(4) The premise underlying the Respondent's argument was that the date on which the contract terminates is always the EDT. That, however, was wrong: the EDT is purely a statutory question and can thus be different from the date on which the contract of employment ends for contractual purposes (which meant, for example, that if an employee waived notice rights, that would be relevant for contractual entitlements but the minimum notice periods would still apply for statutory purposes, see **Secretary of State for Employment v Staffordshire County Council** [1989] IRLR 117 CA, albeit that case was concerned with transitional provisions relating to redundancy rebates and thus with the redundancy provisions of the **EPCA**).

(5) To the extent that the EAT in **Lanton Leisure** suggested that the Respondent's argument was correct, it was wrongly decided.

(6) Finally, and in any event, the findings of the ET did not support any conclusion that there had been gross misconduct in this case, see in particular paragraph 7.11 (read against the background findings at paragraphs 5.5, 5.9 and 5.10).

*(2) The **Polkey** Point*

32. On the **Polkey** point, the Claimant contends:

(1) The ET's Judgment contained no misdirection or misinterpretation of the law. Although it used the term "procedural unfairness", taken in the round (and see the requirement to do so as identified by the Court of Appeal in **Brent LBC v Fuller** [2011] ICR 806 per Mummery LJ at paragraph 30) the ET could be taken to have applied the correct test.

(2) The correct approach to a **Polkey** reduction required that an ET ask itself the question, what was the percentage chance of a finding of a fair dismissal following a fair procedure? One possibility was that ET could conclude there should be no reduction.

(3) The use of the term "substantively unfair" by the ET at paragraph 7.14 was evidently shorthand for the conclusion that there was no chance of a fair dismissal as a result of the conduct in question; it did not inevitably disclose an error of approach (and see **Lambe** at paragraphs 58 and 59). The ET had not fallen into the error identified in the **Morrisons** case; in that case the ET had failed to go through the relevant process, whereas in the present case paragraph 7.11 showed that this ET had done so. If the EAT concluded, however, that this was not the case, then the Claimant accepted that the appeal would have to be allowed.

(4) Before reaching any conclusion as to the ET's approach, regard should also be had to the reasoning provided on the issue of future loss, see paragraph 7.23 of the Judgment, where the ET concluded that compensation for future losses should be limited to an eight-week period given the Claimant was dissatisfied with her employment and thus was likely to obtain alternative employment after that period in any event.

Discussion and Conclusions

(1) The Qualifying Service Point

33. The first question raised under this head is a pure point of statutory construction. It is a question that is, in my judgment, straightforwardly answered by section 97(2) **ERA** itself. By referring back to "*the notice required by section 86*", section 97(2) brings the entirety of section 86 into play and that inevitably includes section 86(6) just as it includes section 86(1). Had Parliament wished to avoid the incorporation of section 86(6) into the definition of the effective date of termination for specific statutory purposes, section 97(2) could simply have referred to "*the notice required by section 86(1)*" - thus taking the same approach as previously adopted in respect of the determination of an entitlement to a redundancy payment under section 90(3) **EPCA** - but it does not.

34. By referring back to section 86 as a whole, section 97(2) **ERA** provides for the effective date of termination to be deemed to be the later date allowed by the statutory minimum period of notice provided by section 86(1), but that will be subject to the employer's right to give no notice, as expressly acknowledged by section 86(6). This approach does not ignore the fact that the effective date of termination is a purely statutory concept; the relevance of the contractual right to dismiss without notice only arises because the statutory definition provided by section

97 allows for this, by importing the entirety of section 86. Section 86(6) is thus not being used as an ouster clause; it is, rather, part and parcel of the definition of the effective date of termination by virtue of its importation through section 97(2).

35. There is, moreover, no reason to read section 86(6) **ERA** as limited to rights of a purely contractual nature. The right to terminate the contract summarily by reason of the conduct (the repudiatory breach) of the other party is not stated to be limited to entitlements arising only under the contract itself and there is no reason to read section 86(6) as other than of general application to both common law and statutory rights, not least as it makes plain that section 86 ("This section") does not affect the right to terminate the contract without notice. The language of section 86(6) can, furthermore, be contrasted with that of section 86(3), which expressly limits the effect of a contractual right to give shorter notice by making clear that this will be subject to subsections (1) and (2).

36. I take some comfort in my interpretation of these provisions from the fact that this approach seems to have been assumed in the cases of **Lanton** and **Duniec**. I do not, however, read either of those cases as definitively determining the point. Although it was the question raised by the appeal in **Lanton**, the EAT's judgment cannot be said to have reached a firm conclusion in this regard. My approach has thus been informed by my reading of the relevant statutory provisions; I would not have considered myself bound by either of these authorities on this question.

37. Similarly, I do not consider that the answer to the question raised by the current appeal can be said to have been provided by the Court of Appeal in **Secretary of State for Employment v Staffordshire County Council**. Although that case was specifically concerned

with transitional provisions relating to rebates for redundancy payments in certain circumstances, I understand why the Claimant has placed reliance on the Court's approach to the way in which "the relevant date" should be approached. There dealing with the question of waiver of notice (then addressed under section 49(3) **EPCA**; now by section 86(3) **ERA**), the Court of Appeal rejected the argument that this meant that the determination of "the relevant date" would not include the minimum statutory notice periods (then provided by section 49(1) **EPCA** and imported by the deeming provision at section 90(3) **EPCA**). In that case, the Court took the view (see per May LJ at paragraph 23 and Glidewell LJ at paragraph 30) that, whether or not there had been any waiver of notice for contractual purposes, the minimum statutory notice periods provided by section 49(1) were still imported into the determination of the relevant date for the purpose of section 90(3) **EPCA**. As earlier observed, however, section 90(3) **EPCA** referred only to section 49(1); it thus specifically deemed that the relevant date should be determined by the statutory minimum notice periods laid down by section 49(1), without incorporating any other aspect of section 49. That was not the approach adopted by the analogous provisions relating to the determination of the effective date of termination for unfair dismissal purposes (specifically, see section 55(5) **EPCA**) and it is no longer the approach adopted under the equivalent provisions relating to "the relevant date" for the purpose of any entitlement to a redundancy payment under section 145 **ERA**.

38. For the reasons I have thus given, I respectfully differ from the ET in my approach to the determination of the effective date of termination under section 97(2) **ERA**. The question then arises as to whether this makes any difference in this case. As the Respondent observes, the ET was not concerned with a claim of wrongful dismissal and it did not, as it might otherwise have done, specifically make a finding as to whether the Claimant had been guilty of gross misconduct such that the Respondent would have been entitled to terminate the contract

of employment without notice. The Claimant says that such a conclusion would simply be incompatible with the findings of fact that the ET made in this case; reading the decision in the round, it is apparent that there is only one possible answer: she had not acted in repudiatory breach of contract.

39. Although I see merit in the Claimant's objections in this regard, ultimately I do not consider that the ET's findings are so clear that I can be sure there is only one answer. It is right that the ET found the dismissal to have been outside the range of reasonable responses and that it otherwise rejected the various allegations of misconduct made by the Respondent. Those findings were, however, reached through the prism of unfair dismissal and I do not think that I can assume that the ET would obviously have found that the Respondent had not made good its right to summarily terminate the contract as a matter of common law. This is a question for the ET to determine.

*(2) The **Polkey** Point*

40. The second question raised by the appeal involves no novel question of law. As the case law makes plain, the "**Polkey** reduction" is merely an application of section 123 **ERA**; there is no requirement that it be limited to cases that might be characterised as "procedurally" unfair. Although some of the earlier authorities on the point suggested that the **Polkey** reduction should only apply if the dismissal was procedurally unfair (see **Steel Stockholders (Birmingham) Ltd v Kirkwood** [1993] IRLR 515 EAT and **King v Eaton Ltd (No. 2)** [1998] IRLR 686 IHCS), the weight of authority is now against seeking to draw any distinction in this regard between "procedurally" and "substantively" unfair dismissals (see the Court of Appeal's judgment in **Lambe v 186K Ltd** and the decision of the EAT in **W M Morrisons v Kessab**) and neither party has sought to suggest that this is an issue that should be re-visited.

41. The real question on the present appeal is whether the ET's approach was in fact limited in the way its reasoning might seem to suggest when the Employment Judge stated (see paragraph 7.14): "*I have found the dismissal to have been substantively unfair. Consequently, questions of any Polkey reduction insofar as there is any procedural unfairness do not arise*". The Claimant contends that, reading the ET's Judgment as a whole (including its conclusion on future losses), I can be satisfied that the ET in fact approached its task correctly: by saying that the dismissal was substantively unfair, the ET was effectively saying it had found that there was no possibility of a fair dismissal in this case.

42. I am not persuaded that I can have the confidence in the ET's reasoning that the Claimant urges. The ET plainly erred in its self-direction on the **Polkey** reduction. Taking the Judgment as a whole - as I am bound to do - I am unable to be confident that the ET properly considered the question whether there should be a just and equitable reduction in compensation in this case. I would also therefore allow the appeal on this ground.

Disposal

43. Given the conclusions I have reached, the appeal must be allowed and it is inevitable that this matter will need to be remitted to the ET. Should the parties wish to make submissions as to the precise terms of my Order on disposal, in particular as to whether the remission should be back to the same or a different ET, they should exchange and lodge written representations on this and any consequential Orders within 14 days of the handing down of this Judgment.