Appeal No. UKEAT/0236/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 March 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

TALON ENGINEERING LIMITED — APPELLANT

MRS V SMITH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GERAINT PROBERT (of Counsel) Instructed by: Porter Dodson LLP Telford House, The Park Church Street Yeovil Somerset BA20 1DY
For the Respondent	MS JOANNE SEFTON (of Counsel) Mitchell Law Ltd 5 Wicker Hill Trowbridge Wiltshire BA14 8JS

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Polkey deduction

An Employment Tribunal was entitled to find that a Claimant employee had been unfairly dismissed when the Respondent employer refused a request to postpone a disciplinary hearing for two weeks to enable the Claimant's full-time union official to accompany her at the hearing. That the refusal of the postponement request did not breach the Claimant's accompaniment rights under section 10(5) did not affect the fairness of the decision. The disciplinary hearing had previously been postponed for three weeks because of the Claimant's annual leave and ill-health. The Tribunal had not substituted their view for that of a reasonable employer. The provisions of section 10 do not act as a fetter on the Tribunal's discretion or circumscribe the meaning of the words of section 98(4) **Employment Rights Act 1996**. Whilst a breach of the section 10 **Employment Relations Act 1999** accompaniment right at a disciplinary meeting which results in the dismissal of an employee could well, and perhaps almost always will, result in a finding of unfair dismissal for an eligible employee, the corollary cannot be right. The case was analogous to **Royal Surrey County NHS Foundation Trust v Drzymala** UKEAT/0063/17 in the context of the **Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002**.

There was no misapplication or misunderstanding of the **ACAS Disciplinary and Grievance Code** and the Tribunal correctly understood the nature of its task in relation to an assessment of contributory fault and a **Polkey** reduction pursuant to sections 122 and 123 **Employment Rights Act**.

The Tribunal Decision was upheld and the appeal dismissed.

HER HONOUR JUDGE STACEY

1. This is an appeal against the Decision of an Employment Tribunal sitting at Bristol, heard by Employment Judge Reed sitting alone, which, for the Reasons sent to the parties on 14 June 2017, upheld the Claimant's, Mrs Smith's, complaint that she had been unfairly dismissed by the Respondent, Talon Engineering Ltd. I shall continue to refer to the parties by their titles and status below.

2. The Employment Tribunal did not permit a late application to add a complaint of wrongful dismissal, and the only cause of action before the ET was unfair dismissal. The Claimant was found to have been unfairly dismissed but to have contributed to her dismissal to some extent, resulting in a 15% reduction to both her basic and compensatory awards, and in addition a further reduction of 15% was also made to her compensatory award under the **Polkey** principle. At a subsequent Remedy Hearing, when the Claimant elected for compensation only, she was awarded a basic award of £11,554.69 and a compensatory award of £10,702.59. The Tribunal refused both parties' application for an adjustment to be made pursuant to section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**.

3. In brief, the Claimant was employed in a product/systems capacity by the Respondent, a specialist manufacturer of motorcycle racing parts in Yeovil, which was a medium sized family business. She had been employed from 1994 until her summary dismissal on 30 September 2016, when she was aged 59. The Tribunal found that the Respondent had a genuine belief in the Claimant's misconduct as set out in the dismissal letter in that she had sent unprofessional emails to Tina Syrad, a contact in a company with whom the Respondent traded. She had referred to an unnamed colleague as a "*knob*" and a "*knob head*" in the emails. She had also

attempted to delete some emails between her and Ms Syrad which the Respondent had since managed to retrieve. The content of the various emails was said to have the potential to bring the company into disrepute and to breach the Respondent's bullying and harassment policy.

4. The Tribunal found that although the Respondent had shown a potentially fair reason for dismissal pursuant to section 98(2)(b), pursuant to section 98(4), the decision to dismiss was unfair procedurally and fatally flawed by the refusal of the Respondent to postpone the already once postponed disciplinary hearing to enable the Claimant to be represented by her trade union official.

5. The chronology of the internal disciplinary procedure was as follows. The Claimant was suspended on 29 July 2016 and attended an investigation meeting on 9 August, when she was not shown any evidence against her. On 26 August, she was invited to a disciplinary hearing on 5 September 2016, which was postponed because of the Claimant's sickness followed by a period of annual leave. On 19 September she was invited to a rescheduled disciplinary hearing ten days later on 29 September 2016.

6. Throughout the disciplinary proceedings, the Claimant had intended to be represented by her trade union regional official from Unite the Union. Her union official emailed to explain that due to a conference in London he was unable to represent her during the week of 29 September 2016 and provided his earliest availability, which was just under two weeks later on 10, 13 or 18 October. In his email the trade union official expressed the hope that one of those three alternative dates would be suitable. The Respondent refused to postpone the rescheduled disciplinary hearing. They explained in an email to the trade union official that given the considerable period of time and the impact on the business, a further delay would add strain to

both the Claimant and the staff covering her work which would make it a significant delay that they were not prepared to tolerate (page 68). In further correspondence (at page 71) the Respondent asserted it was entitled to reject the adjournment request because the union official could not attend within five days of the date set. The Claimant then wrote to the Respondent explaining that she was not prepared to attend in the absence of her chosen representative. The Respondent proceeded in her absence and decided to summarily dismiss her.

7. The dismissal letter was dated 30 September, the day after the meeting, and set out that the three following allegations had been found as proven: firstly, that the content and professionalism of the emails to a key contact, Ms Syrad, had the potential to bring the company into serious disrepute; secondly, that such comments about a colleague are abusive and disrespectful and amount to a breach of the company's bullying and harassment policy; and thirdly, that the deletion of the metrics, or some of the metrics, emails was a deliberate attempt to conceal their contents and that in so doing she had removed sensitive company information.

8. Mr Sartin, the Managing Director and dismissing officer, explained in the dismissal letter that the problem was that:

> **"… by you not attending your disciplinary hearing or providing written representations … I have not been able to take into consideration any arguments which run contrary to Cheryl Musgrave's [the investigating officer] findings. On considering those findings I note that there is evidence to support the allegations against you. On the strength of the evidence it appears to me that those findings and associated recommendations are not unreasonable. …"**

9. In relation to the fourth allegation of a general attitude to the Respondent that amounted to a breakdown in the obligation of trust and confidence, the finding was not upheld in full. Mr Sartin explained that he was conscious that it was a close knit team and that people needed to work effectively and well together. He also acknowledged that the Claimant felt she had been victimised for a period of time. But he stated that he only partially upheld the allegation, in that

A the relationship had been very seriously damaged and described it as being perhaps fatally wounded. He did not explain which aspects of the relationship had been damaged or why exactly he reached that conclusion, but summarised that it was allegations 1 to 3 that he considered collectively and individually amounted to gross misconduct for which the Claimant was being summarily dismissed.

B

10. An appeal hearing took place, which was not a rehearing as the Tribunal found that the approach of the appeal officer was to see if there were good reasons to interfere with the dismissal decision. The appeal officer decided that there were not, and the summary dismissal decision was upheld.

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11. The Employment Tribunal found that the failure to postpone the disciplinary hearing to enable the trade union representative to accompany the Claimant made the dismissal unfair. Its reasons for that conclusion were as follows:

E

> **"13. It goes without saying that it is far preferable if an employee such as Mrs Smith attends her disciplinary hearing. It is her opportunity to put her case to the decision maker. All reasonable steps should be taken in order to ensure she can do so.**
>
> **14. There will be cases where it is reasonable to proceed in the absence of the employee, for example where she is being difficult or trying to inconvenience her employer. There will also, no doubt, be situations where, even without bad faith on the part of the employee, proceedings have gone on for long enough and a decision must be taken. Put shortly, none of those situations applied here. There had been no sort of misbehaviour on the part of Mrs Smith, proceedings had not been on foot for a particularly lengthy period and the further delay that would have ensured her attendance was a short one.**
>
> **15. I took the view that no reasonable employer would have refused a further short postponement and gone ahead in the absence of Mrs Smith."**

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12. The Employment Tribunal did not refer to section 10 of the **Employment Relations Act 1999** or the emails at pages 68, 70 and 71 in reaching its decision. Having decided the dismissal was unfair, the Tribunal next considered, as part of its Liability Decision, the question of contributory fault and also, separately, assessed in percentage terms the chance the Claimant would have been dismissed if a fair procedure had been followed.

H

13. In its analysis of contributory fault, by reference to the Respondent's concerns, the Tribunal found that the contents of the emails included "highly critical remarks about a number of her [unnamed] colleagues" which clearly amounted to misconduct (paragraph 18), but which did not breach the company's bullying and harassment policy, since they were not made to the individual concerned. The Tribunal considered that the policy was limited to behaviour made to, rather than about, another individual. The third concern of the Respondent was that the Claimant had attempted to delete some of the emails. The Employment Tribunal concluded (in paragraph 21) that there had been an insufficient investigation into this allegation such that it was insufficient for the Respondent reasonably to conclude that the deletions amounted to a deliberate attempt by the Claimant to cover her tracks.

14. On the final allegation that the Claimant's general attitude to the company and her colleagues demonstrated a breakdown in trust and confidence, the Tribunal concluded that it amounted to little more than a broad criticism of the Claimant's rather negative attitude, which the Respondent itself did not consider to be especially important as the dismissal letter stated that it only partially upheld the concerns in that regard, does not identify which part and it did not appear to be a reason for the dismissal.

15. The Employment Tribunal concluded that no reasonable employer would have dismissed the Claimant. At paragraphs 23 to 26 it found and concluded as follows:

> **"23. The totality of what Mr Sartin [the dismissing officer] might reasonably have concluded amounted to misconduct on the part of Mrs Smith was that she had sent improper emails to a third party. Any reasonable employer would have been bound to reach that view. There was nothing within the disciplinary code that would have alerted an employee in Mrs Smith's position to the prospect that the commission of this act might be regarded as gross misconduct.**
>
> **24. The Company pointed out that the recipient of the emails in question was a representative of a key business contact and furthermore Mrs Smith could not have known who would become aware of the contents of the emails at the other end. It seemed to me that, even in the absence of a "surrogate warning" in the disciplinary code, there was a prospect that a reasonable employer might consider that this amounted to gross misconduct. However, that would be most unlikely. It would be a relatively small proportion of such employers that**

> **would take the view what that [sic] Mrs Smith had done would warrant dismissal, particularly in the light of her long service.**
>
> **25. The same issues fell to be considered in the context of contribution. The only contribution that the claimant had made to her dismissal was the sending of those emails. That was misconduct for which she was bound to have been disciplined.**
>
> **26. The issues of contribution on the one hand and the prospect of dismissal are two separate matters but they clearly relate to each other. I had to consider the interaction of the two and make a sensible declaration under each head, taking into account the aggregate effect. I concluded that Mrs Smith had contributed to her dismissal such that it would be just and equitable for any award of compensation to be reduced by 15%. In addition, the compensatory award will be reduced by a further 15% to reflect the likelihood that she would have been fairly dismissed if a fair procedure had been adopted."**

16. The Tribunal thereby arrived at its 15% contributory fault deduction to both elements of the award and a further 15% **Polkey** reduction to the compensatory award.

17. The Remedy Hearing took place on 22 June 2017, and Reasons for the Tribunal's Judgment were sent to the parties on 22 August. Relevant for the purposes of this appeal is the question of an adjustment under section 207A of the **Trade Union and Labour Relations (Consolidation) Act**. It appears that both sides had sought at the Remedy Hearing to argue that the other was in breach of the **ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015**. The Claimant argued the Respondent was in breach by not postponing the disciplinary hearing to enable her representative to attend and for proceeding in her absence, and the Respondent arguing that the Claimant was in breach by not attending. They referred to paragraphs 25 and 12 of the **Code of Practice** respectively, which provide as follows:

> **"12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.**
>
> **…**
>
> **25. Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available."**

18. The Tribunal found at paragraph 30 of its Remedy Decision that the Claimant could not be regarded as having been persistently unable or unwilling to attend the disciplinary hearing when the Respondent had unreasonably refused to postpone it for the short period of time required to enable her representative to attend and she was not therefore in breach of paragraph 25 the **ACAS Code**. Nor did the Tribunal find the Respondent to have been in breach of the **ACAS Code**, notwithstanding its finding that its behaviour in refusing to postpone the hearing was unreasonable. The Tribunal concluded that it amounted to procedural unfairness due to a poor judgment call by the company but fell short of a breach of the **Code**, that would pave the way to an uplift in compensation for the Claimant. There is no appeal by either side against any aspect of the Remedy Hearing Judgment.

Grounds of Appeal

19. Ground 1 of the grounds of appeal seeks to attack the finding that it was unreasonable not to postpone the disciplinary hearing to enable the trade union representative to attend and the consequential conclusion that the Claimant was entitled not to attend in the absence of her chosen representative. There are two grounds to this challenge: (1) that the Tribunal have fallen into the substitution mindset trap; and (2) failed to take account of section 10(5) of the **Employment Relations Act** and the **ACAS Code** (neither of which was referred to in the Liability Decision) in reaching its decision that the dismissal was procedurally unfair because the disciplinary hearing was not postponed.

Substitution Mindset

20. The Tribunal have self-evidently not fallen into the substitution mindset in relation to the postponement request. They have quite properly directed themselves (see paragraphs 14 and 15 set out already) and expressly directed themselves by reference to a reasonable employer

and the Tribunal has not imagined itself to be a manufacturer of specialist motorcycle parts in Yeovil. Paragraphs 17 and 18 of the case of **JJ Food Service Ltd v Kefil** [2013] IRLR 850 is on point in which Langstaff P set out the proper approach:

> **"17. A substitution mindset is all too easy to allege. There is a great danger which is readily apparent to those of us who sit day by day in this tribunal that employers who do not like the result which a tribunal has reached, but cannot go so far as to say it is necessarily perverse, seek to argue that the very fact of the result in the circumstances must indicate a substitution. That is not, in our view, a proper approach. We bear in mind that s.98 of the Employment Rights Act 1996 in sub-section 4 provides as follows:**
>
> > **'… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
> >
> > > **(a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> > >
> > > **(b) shall be determined in accordance with equity in the substantial merits of the case.'**
>
> **18. In other words, the very business of the employment tribunal is considering whether once the employer has established the reason for the dismissal the decision to dismiss for that reason was fair or unfair. In order to see if a tribunal has stepped beyond the permissible and gone outside the scope of its duty as set out in s.98(4), it is necessary to have regard to a tribunal's decision as a whole, but what one is looking for is some indication that the tribunal has, in dealing with a complaint of unfair dismissal, asked not whether what the employer did was fair but asked instead what it would have done in the light of the basic and underlying facts."**

21. In this case it is clear that the Tribunal has been punctilious in assessing matters by reference to a reasonable employer and not their own views. I appreciate that by reaching a different view as to the reasonableness of the decision, it might be perceived as a substitution of the Respondent's view. However, the process by which the Tribunal has arrived at that conclusion is not by operation of the substitution mindset, but by operation of considering how a reasonable employer would have behaved and the Tribunal's conclusion that after 21 years' service the Respondent was unduly hasty in not accommodating a further short delay to enable the Claimant to be represented by Mark Richards, Unite the Union's regional officer.

22. The section 10 **Employment Relations Act** accompaniment rights point is an interesting argument. Section 10 provides a statutory right to accompaniment and a small

penalty for non-compliance which is a quite separate right from provisions concerning unfair dismissal: they are two distinct statutory provisions which serve different functions. Section 10 has its source in trade union rights stemming from Article 11 of the **European Convention on Human Rights** and, broadly speaking, section 98 **Employment Rights Act 1996** protects employees with sufficient service from being unfairly dismissed. It is wrong to conflate the two provisions. Whilst a breach of section 10 accompaniment right at a disciplinary meeting which results in the dismissal of an employee could well, and perhaps almost always will, result in a finding of unfair dismissal for an eligible employee, the corollary cannot be right. If it was, it would undermine and weaken unfair dismissal rights and over 40 years' worth of case law as explained by Kerr J in the case of **Royal Surrey County NHS Foundation Trust v Drzymala** UKEAT/0063/17 in the context of the **Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002**, which is analogous for these purposes. There is no substitute for applying the actual words of section 98(4) when considering whether a dismissal is fair or unfair, and compliance with, for example, other obligations under the **Fixed-term Employees Regulations** is not an answer to whether a dismissal was, or was not, unfair.

23. Section 10(4) and (5) **Employment Relations Act 1999** provides that:

> **"(4) If -**
>
> **(a) a worker has a right under this section to be accompanied at a hearing,**
>
> **(b) his chosen companion will not be available at the time proposed for the hearing by the employer, and**
>
> **(c) the worker proposes an alternative time which satisfies subsection (5),**
>
> **the employer must postpone the hearing to the time proposed by the worker.**
>
> **(5) An alternative time must -**
>
> **(a) be reasonable, and**
>
> **(b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer."**

24. The Respondent appears to have thought from the emails at pages 68, 70 and 71 that given the union representative's inability to attend a reconvened hearing within five working days, they were under no obligation to consider the adjournment of the hearing and determined to press ahead on the original date without further consideration. If the claim had been for breach of the accompaniment rights then there would have been no error in that approach, but the claim is for unfair dismissal. The Tribunal have directed themselves correctly by reference to the statutory test by considering the broad wording of section 98(4) **Employment Rights Act** in assessing whether it was reasonable or not to dismiss. The Tribunal was entitled to conclude that it was unreasonable for the Respondent not to postpone the hearing after the Claimant had returned from annual leave for a short period of time and that the Respondent's response fell outside the range of reasonable responses available to an employer and the dismissal was unfair.

25. There is therefore no error of law by the Tribunal not to refer to section 10(5) **Employment Relations Act** when there is no breach of the right to accompaniment duty being alleged, and the Tribunal was entitled, probably sensibly, to make no reference to section 10(5) and thereby ensured they did not made the mistake of conflating two quite different statutory provisions. Nothing turns on their failure to mention it and it does not bring in any issues of **Meek**-compliance or such like. The provisions of section 10 **Employment Relations Act** do not act as a fetter on the Tribunal's discretion or circumscribe the meaning of the words of section 98(4) **Employment Rights Act**.

26. Similarly, there is no error in the Tribunal not mentioning the **ACAS Code**. They clearly had it in mind, as can be seen from paragraph 14 of their Judgment:

> **"14. There will be cases where it is reasonable to proceed in the absence of the employee, for example where she is being difficult or trying to inconvenience her employer. There will also, no doubt, be situations where, even without bad faith on the part of the employee, proceedings**

> **have gone on for long enough and a decision must be taken. Put shortly, none of those situations applied here. There had been no sort of misbehaviour on the part of Mrs Smith, proceedings had not been on foot for a particularly lengthy period and the further delay that would have ensured her attendance was a short one.**
>
> **15. I took the view that no reasonable employer would have refused a further short postponement and gone ahead in the absence of Mrs Smith."**

27. In other words, the Respondent was too impatient and hasty, which was a conclusion the Tribunal was entitled to reach on the facts. The lack of reference to the **ACAS Code** in the Liability Decision does not take the Respondent's argument any further, especially since there has been no challenge to the Tribunal's Remedy Judgment which considered the **ACAS Code** in some detail.

28. In light of the Tribunal's conclusion that the Respondent was unreasonable in not postponing the hearing, it must follow that the Claimant was not at fault in failing to attend the hearing. It would be unreasonable to require her to do so when the meeting had been unfairly proceeding in the absence of her chosen union representative who could not be present to accompany her. The Tribunal therefore correctly applied section 98(4) in accordance with the well-known authorities going back as long as **British Home Stores Ltd v Burchell** [1978] IRLR 379 and **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17. It was a fundamental defect that was not cured in the appeal process as the Tribunal rightly noted.

29. The Employment Tribunal's conclusion that the dismissal was unfair must therefore stand.

Appeal Against the Tribunal's Finding on Contributory Fault and *Polkey* Deduction

30. Grounds 2 to 5 to seek to challenge the Tribunal's findings as to the consequence of the procedurally unfair dismissal. I shall take grounds 2 and 4 together since they address the issue

of contributory fault. The Employment Tribunal was required to make findings on contributory fault, see **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 and the judgment of Mummery LJ paragraph 44:

> **"… the ET was bound to make findings of fact about [a Claimant's] conduct for the purpose of deciding the extent to which [the Claimant's] conduct contributed to his dismissal. …"**

which is a different issue to the question of whether the Trust unfairly dismissed the Claimant for misconduct. Contributory fault only arises for decision if it is established that the dismissal was unfair.

31. The contributory fault decision is one for an Employment Tribunal to make on the evidence that it had heard. It was never a decision for the Respondent to make, unlike the decision to dismiss which was for the Respondent to make. It is an important distinction which is sometimes overlooked, but was not in this case by Employment Judge Reed.

32. In that light, there is then no puzzlement in a reading of paragraph 24 of the Employment Tribunal's Judgment (set out above at paragraph 15) when one appreciates that it is a discussion of the level of contributory fault and **Polkey** deduction, not whether the dismissal was unfair. The Tribunal was entitled to conclude that in light of the Claimant's long service of 21 years and the facts and context of the emails, that her compensatory award should be reduced by 30%. In light of the finding of unfair dismissal the Tribunal was required to make its own findings: the percentage of contributory fault reduction to be made is a question of fact for the Employment Tribunal to make. That has been the law since at least 1983 and the case of **Hollier v Plysu** [1983] IRLR 260, more recently recognised at paragraph 59 of **Okoro v Compass Group** UKEAT/0055/08. As His Honour Judge Richardson stated in that case:

> **"59. … A Tribunal's percentage finding of contributory fault is very much a matter of fact for the Tribunal …"**

I accept that it may be somewhat infelicitous and confusing wording for the Tribunal to have made reference to a reasonable employer in paragraph 24 of its Judgment, when it is a finding of fact for the Tribunal to make, but it does not demonstrate any legal error on the part of the Tribunal, since it is clear elsewhere in the Judgment that the Tribunal understood its role in relation to the assessment of contributory fault.

Interpretation of the Bullying and Harassment Policy

33. Appeal ground 3 raises the question of whether it was an error of law for the Tribunal to have concluded that the Respondent's bullying and harassment policy was not breached. Paragraph 19 of the Tribunal's Decision is relevant in that regard:

> **"19. The second allegation was that the criticisms themselves in those emails amounted to breaches of the Company's bullying and harassment policy. It was not clear how that might be the case, since the recipient of the emails was not the person being criticised and those being criticised would not, on the face of it, ever hear about the criticism. …"**

The policy statement provides, in so far as is relevant, as follows:

> **"1.** ***Policy Statement***
>
> **1.1. The purpose of this policy is to ensure that all employees are treated and treat others with dignity and respect, free from harassment and bullying. …**
>
> **…**
>
> **1.3. Employees must treat colleagues and others with dignity and respect, and should always consider whether their words or conduct could be offensive. Even unintentional harassment or bullying is unacceptable.**
>
> **1.4. We will take allegations of harassment and bullying seriously and address them promptly and confidentially where possible. Harassment or bullying by an employee will be treated as misconduct under our Disciplinary Procedure. In some cases it may amount to gross misconduct leading to summary dismissal.**
>
> **…**
>
> **4.** ***What is bullying?***
>
> **4.1. Bullying is offensive, intimidating, malicious or insulting behaviour involving the misuse of power that can make a person feel vulnerable, upset, humiliated, undermined or threatened. Power does not always mean being in a position of authority, but can include both personal strength and the power to coerce through fear or intimidation.**
>
> **4.2. Bullying can take the form of physical, verbal and non-verbal conduct. Bullying may include, by way of example:**

(a) shouting at, being sarcastic towards, ridiculing or demeaning others;

(b) physical or psychological threats;

(c) overbearing and intimidating levels of supervision;

(d) inappropriate and/or derogatory remarks about someone's performance;

(e) abuse of authority or power by those in positions of seniority; or

(f) deliberately excluding someone from meetings or communications without good reason."

34. It could be said that there has been an over-literal reading of the bullying and harassment policy by the ET and that denigration behind a person's back can be just as undermining as when it is said to one's face. In some situations it may be more serious and the effects more insidious and isolating. The policy statement makes reference to "*inappropriate and/or derogatory remarks about someone's performance*" as an example of a breach of the policy (paragraph 4.2(d) on page 27 of the policy, page 89 of the bundle). The parties have explained today that it is impossible to identify who was being referred to in the emails and the Respondent does not know who it was.

35. It is apparent from the emails that the Claimant and Ms Syrad are very close friends who share lots of personal information in very chatty and informal emails, such as about what they have been doing at the weekend, what they have had for lunch, and even conversations about washing and ironing in great detail. In one the Claimant describes in very complimentary terms the really superb and delicious barbeque lunch cooked by her boss Mr Sartin on a weekday, which is said in all sincerity and in flattering terms.

36. In the overall context of the emails, the derogatory reference to a colleague and abusive term used, was accurately described by Ms Sefton as venting to a close friend about an unnamed colleague thought by the Claimant not to be pulling his or her weight, in other words an everyday workplace moan. It is not clever and it is not funny, and it may amount to a breach

of the policy, but the Tribunal was entitled to conclude that it did not amount to serious gross misconduct that puts the business reputation of the Respondent at risk. It is significant that the person is not named and identifiable, that it forms a small part only of the email correspondence, and that the communication is to someone who is seen as a close friend. I agree with Ms Sefton's submissions that even if it was possible and correct to conclude that it amounted to a breach of the bullying and harassment policy and the workplace communications policy, it would not advance the Respondent's case or make an unfair dismissal fair or effect either the contributory fault finding or **Polkey** reduction, since the Tribunal was entitled to find that it was not a serious matter and the Claimant could not have known that unguarded comments could result in her summary dismissal. The Tribunal makes clear that the Claimant could have expected to be disciplined for her ill-judged emails, but not dismissed (see paragraph 25).

37. The Tribunal's decision was, in effect, that it was a gross overreaction on the part of the Respondent to dismiss the Claimant for those emails after 21 years' service with an unblemished record, having failed to allow a short further adjournment of less than two weeks for the disciplinary hearing. They then considered the matter for themselves and found that she contributed to her dismissal to the extent of 30% by her behaviour and made a corresponding percentage deduction to her compensatory award, and a 15% deduction to her basic award. On the facts before the Tribunal it was a conclusion that they were entitled to reach.

38. The final ground 5 is that **Polkey** has been misapplied and the Tribunal failed to view the disciplinary process as a whole when calculating the **Polkey** reduction. As re-iterated in **Croydon Health Services NHS Trust v Beatt** [2017] EWCA Civ 401 by Underhill LJ at paragraphs 97 to 101, the **Polkey** exercise is simply to make an assessment of what will fairly

A often be a broad-brush nature about what might have happened in a hypothetical situation which never in fact transpired. The Employment Tribunal analysed the issues in some detail and was fair to the Respondent. Having suggested in paragraph 24 that it would be unlikely for a reasonable employer to dismiss the Claimant in the circumstances pertaining to this case, particularly in light of her long service, to the benefit of the Respondent, the Tribunal goes on to allow a 15% **Polkey** reduction, in addition to the 15% contributory fault reduction. There is some imprecision in the grounds of appeal and argument before the Tribunal as to the distinction between the contributory fault findings and **Polkey** deduction, and in deference to the Respondent I have adopted their categorisation, but for the sake of accuracy paragraph 24 of the Tribunal's Judgment addresses **Polkey** and paragraph 25 contributory fault, but it does not affect the outcome of the appeal or discussion of the substantive issues.

39. Much of the material relied on by Mr Probert to support the contention of a breakdown of trust and confidence comes from the appeal hearing which took place after the Respondent had unreasonably refused to postpone the disciplinary hearing and had summarily dismissed the Claimant at a hearing held in her absence. One can imagine that the Claimant might not have been feeling best motivated towards her employer after those two events had already taken place, and it could have affected her attitude towards her employer at that stage. But the role of the Tribunal was to imagine the world as it might have been had a fair procedure been followed.

40. Accordingly, the Employment Tribunal's decision that the Claimant's dismissal was unfair by the unreasonable refusal to adjourn the hearing of 29 September for less than two weeks, to enable the trade union representative to attend after the Claimant had had an unblemished career of 21 years, discloses no error of law and the Tribunal have correctly applied section 98 of the **Employment Rights Act**. Section 10 of the **Employment Relations**

Act adds nothing to the Employment Tribunal's decision. In considering compensation and sections 122 and 123 the **Employment Rights Act** as the Employment Tribunal was required to do, the Tribunal correctly applied the law and were entitled to assess the level of both contributory fault and **Polkey** reduction in this case from the information before it.

41. The appeal is dismissed.