Appeal No. UKEAT/0071/18/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 June 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR B SINGH — APPELLANT

GLASS EXPRESS MIDLANDS LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK STEPHENS (of Counsel) Instructed by: Aspect Law Solicitors Newhall Works 58 George Street Birmingham B3 1QA
For the Respondent	MR MUGNI ISLAM-CHOUDHURY (of Counsel) Instructed by: Thomas Horton LLP Strand House 70 The Strand Bromsgrove B61 8DQ

SUMMARY

UNFAIR DISMISSAL - Polkey deduction

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Mitigation of loss

*Unfair dismissal - compensation - **Polkey** reduction - contributory fault - mitigation of loss*

The ET found the Claimant had been dismissed from his employment by reason of his conduct, after he had initiated an altercation with the Managing Director of the Respondent (albeit after some provocation), which had resulted in the latter ending up on the floor. The Respondent admitted that the Claimant's dismissal had been procedurally unfair but contended that a fair process would have made no difference, that any award should be reduced by reason of the Claimant's conduct and that the Claimant had failed to take reasonable steps to mitigate his losses. The ET agreed, making nil basic and compensatory awards. The Claimant appealed.

Held: *allowing the appeal in part*

The Claimant had been wrong to suggest that the ET had failed to apply the different tests required in respect of reductions to a basic award (under section 122(2) **Employment Rights Act 1996**) and to a compensatory award (under section 123(6)); it was apparent that the ET had understood the test it was required to apply in respect of the basic award, had had regard to the relevant factors and had reached a permissible conclusion that it was just and equitable to make a nil award under this head, giving adequate reasons for that decision.

The ET's decisions in respect of the compensatory award did not, however, demonstrate that it had correctly applied the requisite tests. When making a **Polkey** reduction (relevant to the assessment of compensation under section 123(1)), the ET had moved from a finding that summary dismissal was "*an appropriate course of action*" to its conclusion that "*no reasonable employer could have tolerated*" the Claimant's conduct, wrongly assuming that dismissal was inevitable (contrary to the guidance provided by the EAT in **Brito-Babapulle v Ealing**

Hospital NHS Trust [2013] IRLR 854). It had, further, failed to consider what a fair procedure might have entailed in these circumstances, which was relevant to its assessment whether the implementation of a fair process would have been likely to have led to the same result. As for the question of a reduction in respect of the Claimant's contributory conduct under section 123(6), there was no indication that the ET had considered whether it was just and equitable to make a nil award under this head; it had, rather, apparently assumed that no award should be made given its conclusion that the Claimant was entirely responsible for the dismissal but that failed to allow for the possibility that it might still not be just and equitable to reduce the award by 100% (**Lemonious v Church Commissioners** UKEAT/0253/12 applied). Although it was possible that its conclusion in this regard might be the same as that reached in respect of the basic award, that was not inevitably so.

Finally, the ET's conclusion on mitigation did not demonstrate that it had kept in mind that the burden of proof remained on the Respondent throughout; the fact that the Claimant had not demonstrated that he had acted reasonably did not necessarily mean the Respondent had satisfied the burden of showing that he had acted unreasonably.

The issues arising in respect of the compensatory award would therefore be remitted to the ET for reconsideration.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the Birmingham Employment Tribunal (Employment Judge Pitt, sitting alone on 3, 4 and 5 July 2017, and in chambers on 26 July; "the ET"), sent to the parties on 28 July 2017. Both parties were represented before the ET by counsel, although Mr Stephens did not then appear.

2. The Claimant's claim before the ET had been of having been unfairly dismissed. The Respondent conceded that the dismissal was procedurally unfair but issues arose as to the actual reason for dismissal and also as to remedy. The ET found that the principal reason for the Claimant's dismissal had been his conduct. It further concluded that he should receive neither a basic nor a compensatory award and, in the alternative, that he had not taken reasonable steps to mitigate his loss. The Claimant appeals against that Judgment, on the following grounds:

(1) That the ET erred in its approach to the question of contribution, failing to apply the different tests applicable to the basic and the compensatory awards, and failing to consider all necessary factors when making a reduction of 100%, alternatively reaching a perverse conclusion in this regard, or failing to provide adequate reasons for the same;

(2) The ET had further erred in concluding that a reasonable employer would have dismissed the Claimant in any event, misdirecting itself that an assault by an employee would have to result in dismissal;

(3) In addition, the ET had applied the wrong test when considering mitigation.

The Background Facts and the Employment Tribunal's Decision and Reasoning

3. The Respondent is a company that supplies double-glazing. As has been established in separate High Court Proceedings, the Claimant has a beneficial interest in the Respondent and an associated company. In any event, the Claimant was employed by the Respondent as Production Director from 7 January 2008, until his dismissal on 19 August 2014.

4. Relevantly, the Claimant's brother had also been an employee of the Respondent but was dismissed on 23 March 2014 and it seems that the Respondent's Managing Director, Mr Salinder Singh, became suspicious that the Claimant had begun to work with his brother in a rival company. This, coupled with the Claimant's assertion of his beneficial interest in the Respondent, gave rise to friction between the Claimant and Mr Salinder Singh, which ultimately resulted in an incident between the two on 18 August 2014.

5. In determining what precisely happened on 18 August 2014, the ET noted that the evidence of the two protagonists was unsatisfactory. It did not accept Mr Salinder Singh's suggestion that he had been calm and mild, and the Claimant aggressive. That said, it considered that the Claimant was not a reliable witness, not least as he had engaged in a deceit on HM Revenue and Customs and had not given an honest account of what he had done to mitigate his losses after his dismissal. Considering the evidence in the round, the ET concluded that on 18 August the Claimant had stormed into Mr Salinder Singh's office and there had been a heated argument; as the Claimant left, Mr Salinder Singh had pushed him - although not as hard as the Claimant claimed - and that had caused the Claimant to stumble. The Claimant had then re-entered the office and engaged in a tussle with Mr Salinder Singh, as a result of which the latter ended up on the floor. The ET was satisfied that the Claimant had initiated the violent

behaviour that had resulted in Mr Salinder Singh ending up on the floor but did not accept that either had been entirely innocent in the exchange.

6. The Claimant had returned to work after this incident but was dismissed the following day. The ET accepted that the principal reason for the Claimant's dismissal was his conduct on 18 August, albeit there was an underlying reason, in that Mr Salinder Singh had seized the opportunity to rid himself of a troublemaker, seeing the Claimant as someone who was undermining his authority and claiming an interest in the business as well as suspecting him of assisting a rival company.

7. It having been accepted that Claimant's dismissal was procedurally unfair, the ET turned to the question of remedy. It considered first the question of contribution, finding it clear that the Claimant had contributed to his dismissal by his conduct. Although the ET had found that Mr Salinder Singh had an underlying motive of wishing to rid the business of someone who he did not trust, it concluded that, but for the incident on 18 August, "*the claimant would in all probability have remained in employment*" (ET paragraph 6.3.1). The ET took into account that the first push had come from Mr Salinder Singh but considered the Claimant had acted inappropriately in re-entering the office, instead of walking away, and in assaulting the Respondent's Managing Director, and concluded that his contribution should be assessed at 100%. In the circumstances, the ET did not consider it just to make an order for reinstatement, as the Claimant had sought.

8. The ET then turned to the question of a basic award but, given its conclusion that the Claimant had been entirely at fault for his dismissal and had assaulted a senior manager at the Respondent, it did not consider it just and equitable to reward him for an assault, even taking

account of the mitigation of the push beforehand; that gave the Claimant "*neither a defence in the criminal law or such mitigation in the employment tribunal*" such as to mean "*it would be anything other than just and equitable to reduce the basic award to zero*" (ET paragraph 7.1.1).

9. As for the compensatory award, the ET first considered the **Polkey** reduction question (see **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344 HL): what would have happened had a fair procedure been followed? The ET asked itself whether a reasonable employer faced with the relevant facts would have considered dismissal appropriate and concluded that the only answer was "yes". On the facts found, the ET considered no reasonable employer could have tolerated the Claimant's conduct; summary dismissal was "*an appropriate course of action*" (ET paragraph 7.2.2).

10. In the alternative, the ET went on to consider whether the Claimant might reasonably have mitigated his losses. He had apparently gone from a full-time position with the Respondent to part-time employment but had given different reasons for this and the ET was not satisfied it was given a credible explanation as to what he had done since his dismissal. It concluded that he had not taken reasonable steps to mitigate his loss.

The Relevant Legal Principles.

11. The appeal concerns the ET's decision to reduce any monetary award in respect of the Claimant's unfair dismissal to nil. The relevant statutory provisions are found at sections 122 and 123 of the **Employment Rights Act 1996** ("the ERA"). Specifically, section 122(2) of the **ERA** provides, in respect of the basic award, as follows:

> **"(2) Where the tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**

As for the compensatory award, section 123 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.**
>
> **…**
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> **(6) Where the tribunal finds the dismissal was to any extent is caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

12. The **Polkey** reduction relevant to the assessment to be made under section 123(1) allows that there is no need for an all-or-nothing decision on a finding that there has been an unfair dismissal. If there is a doubt whether or not the employee would have been dismissed, that can be reflected by reducing the compensation by a percentage, representing the chance that the employee would still have lost their employment (see **Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91, per Browne-Wilkinson J (as he then was) at page 96, cited with approval by Lord Bridge of Harwich in **Polkey** at page 163).

13. In cases where there was a finding of unfair dismissal, the process to be undertaken by the ET has been described as follows (see the Judgment of His Honour Judge Hague QC in **Dunlop Ltd v Farrell** [1993] ICR 885, at page 892B-C):

> **"… First, the tribunal must ask itself the question: If the proper procedure had been followed … would it have resulted in the employee still being retained or would it have made no difference? If the answer is reasonably clear one way or the other there is no difficulty, but in many cases … the answer may be uncertain. … the tribunal should as the second stage of the process make a percentage assessment of the possibility or probability of the employee being retained which must then be reflected in the award of any compensation."**

14. In determining what would have happened in a case involving dismissal by reason of gross misconduct, it would be wrong to simply assume, however, that summary dismissal would have been the only outcome (see per Langstaff P in **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854 at paragraphs 38 to 41).

15. As for the question of any reduction in respect of the employee's conduct, in **Steen v ASP Packaging Ltd** [2014] ICR 56, Langstaff P provided the following guidance when applying sections 122 and 123:

> **"11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.**
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> **12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.**
>
> **13. (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).**
>
> **14. This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.**
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> **15. In any case, therefore, a tribunal needs to make the findings in answer to questions (1), (2), (3) and (4) which we have set out above. …"**

16. Thus, as observed in **Steen**, the tests to be applied under sections 122 and 123(6), in terms of any reduction in respect of the employee's conduct, are different. In respect of the basic award, the question is simply whether it would be just and equitable to reduce the award. Under section 123(6) there is a prior consideration whether the conduct in question caused or contributed to the dismissal to any extent. Only if it does will the ET move to the question whether the compensatory award should then be reduced and, if so, by what amount. The ET may well consider that the same percentage reductions should be made under both heads, but that is not inevitable.

17. In **Lemonious v Church Commissioners** UKEAT/0253/12, again Langstaff P presiding, it was observed that it is unusual to hold that there should be a reduction of 100%; whilst there is no principle of exceptionality, that result would be rare. On the question of any reduction for contributory fault, the EAT in that case opined as follows:

> **"35. … even if the conduct were wholly responsible for the dismissal, it might still not be just and equitable to reduce compensation to nil. Though there might be cases where conduct is so egregious that that is the case, it calls for a spelling out by the Tribunal of its reasons for taking what is undoubtedly a rare course. In particular, it must not be the case that a Tribunal should simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case. But the percentage might still require to be moderated in the light of what is just and equitable."**

18. As for mitigation, by section 123(4) **ERA** it is provided that, in calculating an employee's loss, the ET shall apply "*the same rule concerning the duty of a person to mitigate his loss as to damages recoverable under the common law*".

19. In reviewing the case law relevant to this question, the EAT in **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15 laid down the following guidance at paragraph 16 (I summarise):

(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove they have mitigated their loss.

(2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.

(3) What has to be proved is that the Claimant acted unreasonably; the Claimant does not have to show that what they did was reasonable.

(4) There is a difference between acting reasonably and not acting unreasonably.

(5) What is reasonable or unreasonable is a matter of fact.

(6) That question is to be determined taking into account the views and wishes of the Claimant as one of the circumstances but it is the ET's assessment of reasonableness - and not the Claimant's - that counts.

(7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

(9) In cases in which it might be perfectly reasonable for a Claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

20. More generally, I bear in mind that Parliament has made it clear that it is for an ET to determine questions of remedy; the ET will be best placed to make these assessments and the EAT should be slow to interfere (see, for example, the guidance given in **Hollier v Plysu Ltd** [1983] IRLR 260 CA at page 263 and **Yate Foundry Ltd v Walters** [1984] ICR 445). I further bear in mind that, where a perversity challenge is pursued, there is a high threshold; parties seeking to make good that contention on appeal must be able to show that the ET's decision was almost certainly wrong (see **Yeboah v Crofton** [2002] IRLR 634 CA).

The Parties' Submissions

The Claimant's Case

21. The Claimant first addresses the ET's approach to contribution. He contends, noting the ET's reference to both awards in the opening sentence at paragraph 7.1.1, that the ET failed to

distinguish between the approach required under section 122(2) of the **ERA** and that under section 123(6). The statutory provisions are, however, different, and the reductions made under each need not necessarily be the same (see **Rao v Civil Aviation Authority** [1994] ICR 495 and **Charles Robertson (Developments) Ltd v White** [1995] ICR 349). Moreover, a 100% contribution reduction under section 123(6) was not a permissible option unless the employee's conduct was the sole effective cause of the dismissal (see **Gibson v British Transport Docks Board** [1982] IRLR 228). The ET here had failed to demonstrate that it applied the relevant staged approach to the assessment of fault (see as laid down in **Steen** above) and had further failed to acknowledge that to deprive an unfairly dismissed employee of the entirety of his compensation was both unusual and draconian (see **Steen** and also **Lemonious v Church Commissioners**). Moreover - given the finding that the Respondent had seized the opportunity to dismiss the Claimant, with the underlying motive of getting rid of any employee who was not trusted and who was claiming part of the business and also that Mr Salinder Singh had himself pushed the Claimant first - it was perverse for a 100% reduction to be made.

22. Alternatively, the Judgment failed to provide adequate explanation why these factors had been ignored or found to have no causative potency. Even if the ET's reasoning at paragraph 7.1.1 was taken to solely apply to the basic award, it still failed to demonstrate it had properly taken into account the gross breach of the Claimant's right not to be unfairly dismissed when determining whether it was just and equitable to make no award. A basic award was the principal compensatory remedy on a claim of unfair dismissal. It was insufficient to fail to have regard for wrong done when determining whether this award should be reduced to nothing.

23. The ET's failure to have regard to the multiple causal factors that had led the Claimant to misconduct himself also infected its approach to the question of any **Polkey** reduction. The ET erred in finding there was only one answer to the question whether a reasonable employer would have dismissed the Claimant in these circumstances, falling into the error identified in **Brito-Babapulle**. It had further asked itself the wrong question, failing to ask what would have been the probable result of a fair process - which would necessarily imply there had been consideration of the Claimant's conduct, in the round, by someone with no emotional involvement in the case; the ET had instead focused on whether summary dismissal would have been an appropriate course of action.

24. In the alternative, in considering mitigation, the ET had failed to address the relevant legal framework, in particular failing to acknowledge that the onus was on the employer to establish a failure to mitigate.

The Respondent's Case

25. On the question of the Claimant's conduct, the Respondent submitted that the ET had correctly identified the different statutory provisions applicable and correctly differentiated between the two tests. It had considered the basic award separate to the compensatory award and had permissibly reached a view as to what it considered just and equitable in the circumstances (see paragraph 7.1.1). As for any reduction for contributory fault under section 123(6), the ET had held that the principal reason for the Claimant's dismissal was his conduct on 18 August, though it had noted that there were other underlying reasons; that had been a significant finding, as the ET had been required to make a finding as to the *principal* reason for dismissal if there was more than one (see section 98(1) **ERA**). The ET had thus considered whether there was causation, and it was inherent in its findings that it had identified the conduct

that had contributed to the dismissal and found this to be blameworthy and had made an assessment as to the extent to which the compensation award should be reduced; see, in particular, paragraph 6.4 of the ET's Reasons where, dealing with reinstatement, the ET had found that the Claimant was entirely responsible for his own dismissal; further note the balancing exercise carried out by the ET at paragraph 6.3.1.

26. As for the ET's the approach to **Polkey**, it had been entitled to make a percentage reduction to reflect the likelihood that the Claimant would have been dismissed, even if a fair process had been completed. Here, the ET had permissibly concluded that he would; it had effectively found that the answer to the question identified in **Sillifant** was reasonably clear (the first stage identified in **Dunlop**): in all likelihood, the Claimant would have been dismissed after a fair procedure had been carried out. That meant the ET did not need to go on to the second stage (the assessment of likelihood on a percentage basis). On the facts found, there could be no suggestion that this was a perverse conclusion. The ET had, moreover, avoided the trap identified in **Brito-Babapulle**; it had not assumed that dismissal was inevitable, but had asked whether it was within the band of reasonable responses - that was what the ET had meant by asking whether it was appropriate.

27. As for mitigation, although the burden of proof was on the Respondent to prove a failure to mitigate, it had discharged that burden through cross-examination of the Claimant, thus establishing that the Claimant had no valid reason why he was not working full-time. The ET had, in practical terms, applied the correct test (see the guidance provided in **Wilding v BT plc** [2002] ICR 1079).

Discussion and Conclusions

28. Having found that the principal reason for the Claimant's dismissal related to his conduct, the ET had then turned to the question of remedy. Doing so, it first considered the question of the Claimant's conduct, because that was relevant to its assessment of his claim to be reinstated into his former employment. On this question, the ET found that there had been other underlying reasons why the Respondent wanted the Claimant out, but had expressly found that - but for his conduct on 18 August 2014 - he would not have been dismissed. It therefore concluded that this was the principal reason for the Claimant's dismissal: he was entirely responsible. Having reached that conclusion, the ET turned to the question whether it was appropriate to make any reduction to the basic award.

29. The Claimant suggests that the ET considered the question of reduction in respect of both the basic and compensatory awards together, that being the inference drawn from the reference to both awards in the first sentence of paragraph 7.1.1. It seems to me, however, that that is simply a slip. The relevant paragraph appears under the subheading "*Basic Award*", and its content makes plain that it was indeed the basic award that the ET was considering at this stage; it did not confuse the different tests to be applied and, specifically, did not lose sight of the particular test it was to apply in respect of the basic award. On the contrary, the ET expressly asked itself whether it was just and equitable to reduce the basic award, thus applying the test required under section 122(2) **ERA**. The ET was clear that assaulting the Managing Director of the Respondent did mean that it was just and equitable to reduce the award in this case; even taking into account the mitigating circumstances, the ET was satisfied these provided no defence and that it remained just and equitable to reduce the award to nil.

30. The Claimant objects that the ET's reasoning fails to take into account the wrongdoing suffered by the Claimant himself, in particular the breach of his right not to be unfairly dismissed and, further, the fact that the basic award in an unfair dismissal case is the primary monetary remedy; he contends that the ET effectively did that which the EAT in **Lemonious** had said it should not: it had assumed that the award should be zero, rather than properly assessing whether this was the just and equitable outcome.

31. I am, however, not persuaded that this is a fair characterisation of the ET's reasoning on the basic award. It had expressly reminded itself of the test it had to apply and asked the question whether it was just and equitable to reward someone for an assault. It was plainly aware that this was a case where the Claimant's right not to be unfairly dismissed had been breached but, at this stage, it was concerned with the Claimant's conduct and whether it was just and equitable that he should receive an award under section 122 **ERA**; the ET concluded that it was not. Whether, or not, I would have reached the same view, I am unable to say that the ET thereby erred in law. It applied the correct legal test and had regard to the relevant factors, including the mitigation that the Claimant could rely on. It did not expressly remind itself that it would be unusual to reduce an award to nil, but I do not infer that it lost sight of that fact. Ultimately, the ET had found that a relatively minor push as the Claimant was leaving the office had caused him to re-enter and initiate a tussle with the Respondent's Managing Director, pushing him to the ground. Allowing that there was an element of provocation - which the ET expressly took into account - I cannot say that the conclusion that it would not be just and equitable to make a basic award in these circumstances was perverse. Nor can I say that the ET's reasoning on the basic award discloses an error in terms of the test applied or a failure to provide adequate reasons.

32. That then leads me to the criticisms made of the ET's approach to the compensatory award. The ET plainly reached a view that the ultimate decision would have been the same had a fair procedure being followed, but apparently did not consider what that fair procedure might have entailed, or how long it might have taken. More than that, it moved from describing summary dismissal as an appropriate course of action to a finding that no reasonable employer could have tolerated the Claimant's conduct on 18 August. That does not suggest to me that the ET had in mind the need to avoid an assumption that summary dismissal will be inevitable in cases of gross misconduct (**Brito-Babapulle**) but that would be a relevant consideration in determining whether the implementation of a fair procedure would have led to the same result.

33. Moreover, even allowing that the ET had found that the Claimant was entirely responsible for his dismissal, the ET needed to go on to carry out the further assessment as to whether it was just and equitable to reduce his compensatory award for unfair dismissal to nil. I can see that it might be said that it was entitled to take this view given that it had already so concluded in respect of the basic award, but as the case law makes clear (see **Steen**), it is not inevitable that the reductions to be made in under each head should be the same. The ET's reasoning in the present case does not, however, disclose any separate consideration of this question at the stage when it was considering the compensatory award. Indeed, it simply moves from its explanation of its approach to the **Polkey** reduction and the issue of mitigation to its broad summary conclusion that "*The actions of the claimant caused his dismissal and it is just and equitable to reduce his compensatory award to nil*" (paragraph 8.7). Even returning to the ET's earlier conclusion at paragraph 6.3.1, I cannot see a separate consideration of the question whether it was just and equitable to make a nil award of compensation - an assessment that is separate from the question of causation or contribution itself, and one that should not assume

A that if the conduct in question is the reason for the dismissal, then the reduction has to be 100% (**Lemonious**).

B 34. That means I therefore agree with the Claimant that the ET has not provided an adequate explanation as to why it has taken the unusual, albeit potentially permissible, step of making a nil award of compensatory loss in this case. I am also not satisfied that the ET correctly approached its task to the **Polkey** reduction, specifically in asking what a fair procedure would

C have entailed and thus whether applying such a fair procedure or implementing such a fair procedure would have led to the same result.

D 35. That then brings into play the ET's conclusion on mitigation. Here I consider that there is a question as to whether the ET appreciated that the burden of proof was on the Respondent; its reasoning suggests that it saw the burden as entirely on the Claimant, when that was not the

E case. The Respondent says it discharged the burden through cross-examination of the Claimant. Even if it is possible for a Respondent to discharge the burden in this way, the ET needed to be clear that the burden remained on the Respondent throughout, and its reasoning needed to demonstrate that it had not confused what might have been the failure to take

F reasonable steps by the Claimant with the establishment by the Respondent that he had acted *unreasonably* in mitigating his losses; the two questions are not automatically the same (see **Cooper Contracting Ltd v Lindsey**).

G 36. I therefore allow the appeal insofar as it relates to the compensatory award and to the **Polkey**, the contributory fault, and the mitigation issues that arise in that respect.

H

37. I therefore turn to the question of remission. The Claimant accepts that this matter must now be remitted to the ET but contends that, in the circumstances of this case, that should be to a different ET. I disagree. Having regard to **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763, I do not consider this is a case where there has been a wholescale error of approach or whether the ET's approach was fundamentally flawed. Rather, it seems to me that the ET needs to complete its task in respect of the assessment of compensation, and, having taken the initial steps in respect of finding the reason for dismissal and also assessing this question in respect of the basic award, needs to proceed to demonstrate that it has applied the correct test and carried out the appropriate assessment in respect of the **Polkey** reduction, the question of contributory reduction in respect of the compensation award, and, if appropriate, the question of mitigation. On that basis, I remit the questions raised in respect of the compensatory award to the same ET so far as that remains reasonably practicable.