Appeal No. UKEAT/0070/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 June 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MR A HAWKES APPELLANT

AUSIN GROUP (UK) LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant

MR RAD KOHANZAD
(of Counsel)

For the Respondent

MR JEFFREY BACON
(of Counsel)
Instructed by:
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Warnford Court
29 Throgmorton Street
London
EC2N 2AT

SUMMARY

UNFAIR DISMISSAL - Exclusions including worker/jurisdiction

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Polkey deduction

The Claimant was a Reservist in the Marines. He was dismissed without warning for some other substantial reason in that he had committed to undertake a seven-week training exercise abroad which was not something that the Respondent, a small employer, could accommodate. The ET found that the dismissal was not unfair. The Claimant contended that the ET erred in that in assessing fairness, it had considered questions relevant only to whether there ought to be a **Polkey** reduction. There was also a challenge to the ET's finding that there was nothing to indicate that if the Claimant had been warned that he might be dismissed he would have changed his mind.

As to the first ground of appeal, the EAT found that the ET had not erred in assessing fairness. Reading the Judgment as a whole it was clear that the ET had the correct test under section 98(4) **Employment Rights Act 1996** in mind and had applied it correctly. Furthermore, the ET had made an express finding of fact that by the time of the dismissal meeting, the Claimant had already decided that he would be attending the exercise. In those circumstances, it was open to the ET to conclude that the failure to hold an earlier meeting would not have changed the position, and its analysis did not amount to an impermissible application of **Polkey** to the question of unfairness. The second ground was a challenge to a finding of fact in circumstances where there was ample evidence to support the ET's conclusions.

For these reasons, the appeal is dismissed.

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THE HONOURABLE MR JUSTICE CHOUDHURY

1. This appeal is concerned with whether the Employment Tribunal ("ET") sitting in London (Central) erred in its application of section 98(4) of the **Employment Rights Act 1996** ("ERA") in dismissing the Claimant's application for unfair dismissal.

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Factual Background

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2. The Respondent is a property and investment services business. Its main focus was on introducing clients from China to invest in London and the UK generally. The Claimant worked for the Respondent as a Business Development Manager. His role involved regular trips to China. During his interview for the position, the Claimant informed the Respondent that he was a Royal Marine volunteer reservist, that he would be required to undertake 28 days' training per year and that he would also require an additional week's unpaid holiday in order to fulfil his training requirements. He also informed the Respondent that there was always a risk that he would be called out for active service.

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3. The Respondent, although a relatively small organisation in the UK, decided that it could accommodate the Claimant's commitment as a Royal Marine reservist and appointed him to the role of Business Development Manager commencing on 7 September 2015. His contract expressly provided that he was entitled to a week's unpaid holiday a year provided that he remained a Royal Marine reservist. As is to be expected, he was required to obtain the approval of his manager, Ms Alexandra Stuart-Robertson, or another senior staff member in advance of taking holiday.

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4. At the beginning of June 2016, the Claimant put his name down with the Marines to be considered for a training exercise in California, known as Exercise Black Alligator ("the exercise"). The exercise would last for seven weeks continuously from 26 August until 16 October 2016. The Claimant was not obliged to undertake the exercise but volunteered to do it as an additional duties commitment. However, if he was accepted on to the exercise, he would be required to sign an additional duties commitment form, which would mean that he was obliged to attend the exercise.

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5. On 28 June 2016, the Claimant received an email requiring him to attend a shooting range exercise on 30 June and five days' training from 4 to 8 July 2016, as a precursor to taking part in the exercise. The Claimant approached Ms Stuart-Robertson on the same day and requested leave in order to attend the shooting range and the five days preparatory training. He mentioned that he would also need to have time off for seven weeks from the middle of August to the middle of October.

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6. He did not inform Ms Stuart-Robertson that he had volunteered for the seven-week training exercise and that it was not mandatory. The Tribunal found that the Claimant presented the exercise to Ms Stuart-Robertson as something that he had to do and she interpreted what he said to mean that he had been called up for active service, that being something which the Respondent had to accept. She told him that the Respondent would require something in writing.

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7. On 1 July 2016, the Claimant completed an application form for leave on 30 June and from 4 to 8 July 2016. That leave was approved. The Claimant did not fill in any application form for leave regarding the exercise. On 15 July 2016, the Claimant received confirmation

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that he would be able to take part in the exercise. Accordingly, he completed the additional duties commitment form on 22 July 2016. By doing so he became obliged to attend the exercise.

8. Meanwhile, Ms Stuart-Robertson had made some enquiries as to the Respondent's obligations when reservists are called up for active service. Her enquiries led to her speaking to the Claimant's training officer, Captain Burlton, who explained that the exercise was voluntary and that there was no obligation on the employer to agree to it.

9. By 25 July, Captain Burlton had sent Ms Stuart-Robertson a letter to which the Claimant had contributed explaining the benefits of the exercise to the Claimant as a Marine and to his employer. On Monday 1 August 2016, the Claimant sent Ms Stuart-Robertson an email telling her of the need to take the following Wednesday off as there were some things that he needed to complete prior to leaving for the exercise on 26 August.

10. Ms Stuart-Robertson approved his leave for the Wednesday but expressed concern about the request for extended unpaid leave. She said that when he had first mentioned his need for leave, he had presented it to her as something which he was obliged to do. The Claimant responded by an email dated 2 August 2016. In that email he stated that he was obligated to undertake the training exercise and disagreed that he had presented his request in any other way than as part of the training he was required to undertake during the year.

11. The Tribunal found that the nature of the response was such that he had made it clear that regardless of any concerns that his employer had, he was going to undertake the seven weeks' training. On 5 August, Ms Stuart-Robertson invited the Claimant to a meeting. At the

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meeting she told him that the Respondent had decided to make his role redundant. She also said that they had not expected his commitment to the Marines to be as significant as it had turned out to be and that the Respondent could not accommodate his absence from the business for seven weeks.

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12. She also mentioned that they would never have approved seven weeks' leave to be taken in one go. If she had appreciated that he was merely making a request for voluntary training,

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she would not have approved it. She also said that it was not sustainable for the business to have the most experienced person in sales out of the business for that period of time. The meeting concluded with Ms Stuart-Robertson informing the Claimant that his employment was

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terminated as of that date and that he would be paid in lieu of notice. She handed him a letter confirming the termination of his employment. That letter stated as follows:

> **"The reason for the termination of your employment because [sic] there is considerable cross over between the work that you do and that which I do and the upside that you would be independently developing leads and other opportunities has not taken place to the extent anticipated.**

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> **This, coupled with your commitment to the Marines, which is far more extensive than we understood when we recruited you (1 weeks' [sic] extra leave unpaid), has meant that we, as a small employer in the UK, cannot sustain continuing your employment."**

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13. The Claimant was advised of his right to appeal. Whilst initially stating on 13 August that he would not be exercising his right to appeal, on 25 August he sent a further email to the Respondent saying that he had decided to exercise the right. However, the terms in which he

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sought to exercise a right of appeal appeared to the Respondent to be an invitation to enter into a financial settlement coupled with veiled threats as to the consequences of not doing so. On that basis, the Respondent declined to entertain his appeal.

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14. The Claimant lodged proceedings in the ET claiming that he had been unfairly dismissed. The matter came before Employment Judge Grewal at a hearing held on 6 and 7

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April 2017. In a Reserved Judgment, the Employment Judge concluded that the reason for dismissal was that the Claimant was going to be absent from work for a period of seven weeks at a crucial time for the business and that the Respondent could not sustain such an absence. This was found to be some other substantial reason.

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15. However, the Judge also found that the reason was connected with his membership of a reserve force. Accordingly, pursuant to section 108(5) of the **ERA**, the Tribunal concluded that it did have jurisdiction to consider his complaint of unfair dismissal, notwithstanding the fact that he did not have two years' service.

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16. The Tribunal then went on to consider whether the dismissal was fair or unfair. As to this the Tribunal said as follows at paragraphs 42 to 46 in the Judgment:

> **"42. I then considered whether the reason for the dismissal (set out paragraph 38 above) amounts to some other substantial reason of a kind such as to justify dismissal of the Claimant. The Respondent's case was that that reason, together with other reasons, amounted to some other substantial reason. I concluded that it was a substantial reason, in that it was a serious and potentially valid reason for terminating someone's employment. I also considered whether it fell within section 98(2) or outside it, in other words, whether it was a reason relating to conduct or something different from that. I concluded that it was more appropriately classified as "some other substantial reason" rather than a "reason relating to conduct" because although there were some concerns about the manner in which the Claimant had approached the whole issue and they fed into the decision to dismiss, the primary concern was the Claimant's absence from the business for seven weeks. The main issue was not whether the Claimant had behaved improperly, but whether the Respondent could continue to employ someone in the Claimant's role at his salary if he was going to be absent from seven weeks at a crucial time for the business.**
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> **43. Having concluded that there was a potentially fair reason for the dismissal, I considered whether the Respondent acted reasonably in all the circumstances of the case as treating it as a sufficient reason for dismissing the Claimant. In doing so, I took into account the following factors. In his emails of 1 and 2 August the Claimant made it clear to the Respondent that he was going to be absent from work from 26 August to 16 October that year. It was clear that nothing was going to make him change his mind about that. Although the Respondent was not aware of it at the time, he had on 22 July signed and returned his Additional Duties Commitment form and had thereby committed himself to the exercise. At that stage the Respondent had been in business for only one year and it was not performing as well as had been expected. It had only four employees, of whom the Claimant was the most senior and the most expensive. It was coming up to the busiest time of the year for the business and the Claimant's absence would have an impact on the business beyond the period of his absence. A small, new, not very successful business could not continue to employ a Business Development Manager at £70,000 a year if that Manager was going to be away from work for seven weeks at a crucial time for the business.**
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> **44. I considered whether the failure to hold a meeting before the decision to dismiss was made or to give the Claimant notice of the meeting on 5 August made the dismissal unfair. By the time the decision to dismiss was made, the Claimant had already decided that he was going to undertake the exercise and had committed himself to it. It is difficult to see what a meeting**

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before the decision to dismiss was made would have achieved. There was nothing in the evidence to indicate that if the Claimant had been warned that he would be dismissed if he insisted on going to the exercise in the US, he would have changed his mind. He did not at any stage in the meeting of 5 August say that he would not attend the exercise if that would prevent his dismissal. Holding a meeting before the decision to dismiss was made would not have made any difference to the outcome. Equally, had the Claimant been given more notice of the meeting on 5 August or the purpose of the meeting, it is difficult to see what difference it would have made. The parties had come to an impasse. The Claimant was going to the exercise in the US for seven weeks. The Respondent could not continue to employ him if he was going to be away for that length of time at that juncture. A parting of the ways was inevitable.

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45. In considering whether the Respondent acted reasonably in all the circumstances, in treating the Claimant's impending absence as a sufficient reason for dismissing him, I also took into account the way in which he had approached the issue with his employers. He did not discuss the matter with his employer before putting his name down for the exercise. He first informed his employer of it in passing and conveyed it as something which he had to do as opposed to something which he had chosen to do. He never filled in a leave application form for the period. He did not provide anything in writing from the Royal Marines to confirm that they required his presence elsewhere at that time. He committed himself to the exercise on 22 July without having sought and obtained permission from his employer to be away for that period.

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46. Having taken into account all those circumstances, I concluded that the Respondent acted reasonably in treating the Claimant's impending absence of seven weeks from work as a sufficient reason for dismissing him and that the dismissal was fair. In case I am wrong in that decision and any procedural flaw (such as the failure to hold a meeting before deciding to dismiss) makes the dismissal unfair, I would not have awarded any compensation on the basis that rectifying that flaw would not have had any impact on the outcome."

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17. The Claimant appealed against that Decision. Permission was refused on the sift by Her Honour Judge Eady QC. However, at a Rule 3(10) Hearing before Her Honour Judge Katherine Tucker, permission was granted to proceed on two grounds of appeal set out in an amended Notice. These were that:

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a) The Tribunal erred in that it conflated matters that were relevant to a **Polkey** reduction with matters that were relevant to substantive unfairness. In the alternative, it was said that the finding that the dismissal was not unfair was perverse.

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b) The Tribunal erred when it stated at paragraph 44 of the Reasons that there was nothing in the evidence to indicate that if the Claimant had been warned that he would be dismissed if he insisted on the exercise in the US, he would have changed his mind. Reliance is placed upon the transcript of the notes of the meeting on 5 August as showing that the Claimant did indicate that he may have changed his mind had there been a meeting and the position had been made clear to him in advance.

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Legal Framework

18. Section 98 of the **ERA**, so far as relevant, provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
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> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
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> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
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> **(2) A reason falls within this subsection if it -**
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> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
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> **(b) relates to the conduct of the employee,**
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> **(c) is that the employee was redundant, or**
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> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
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> **…**
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> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
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> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
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> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

19. Lord Bridge's seminal analysis of this provision, or, more accurately, an earlier version

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of it in previous legislation, in **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344, remains as important today as when it was first decided 30 years ago:

> **"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by section 57(2)(a), (b) and (c) of the Employment Protection (Consolidation) Act 1978. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural," which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate**

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> **procedural steps in any particular case, the one question the industrial tribunal is *not* permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied.**
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> **My Lords, I think these conclusions are fully justified by the cogent reasoning of Browne-Wilkinson J in *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91 to which my noble and learned friend the Lord Chancellor has already drawn attention." (Page 364B-H)**

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Ground 1

Conflation of **Polkey** reduction with the test of unfairness under section 98(4)

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20. The Claimant's argument, developed with some skill on his behalf by Mr Rad Kohanzad of counsel, is that the Tribunal's analysis in paragraph 44 of the Judgment suggests that it had asked itself the impermissible question as to whether the taking of the requisite procedural steps, in this case prior notice of the meeting at which the Claimant may be dismissed and the holding of such a meeting prior to the final decision to dismiss, would have made any difference to the outcome. Particular reliance is placed upon the following passages in paragraph 44 of the Judgment:

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a) "*It is difficult to see what a meeting before the decision to dismiss was made would have achieved*";

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b) "*Holding a meeting before the decision to dismiss was made would not have made any difference to the outcome*";

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c) "*Equally, had the Claimant been given more notice of the meeting on 5 August or the purpose of the meeting, it is difficult to see what difference it would have made*".

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21. At a superficial level, and taking these sentences in isolation, one can see the basis for Mr Kohanzad's concerns. The language used in these sentences does appear to indicate that the Tribunal was asking itself the one question Lord Bridge in **Polkey** had said it should not.

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However, it would be unfair to read sentences such as these in isolation without regard to what is said in the whole of the paragraph and indeed all of the Judgment. When the sentences are read in that context, it is, in my judgment, quite clear that the Tribunal not only had the correct test in mind but also applied that test correctly.

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22. Thus, we see that, having set out statutory provisions at paragraph 4 of the Reasons, the Tribunal identifies the correct question at the beginning of paragraph 43: "*Having concluded that there was a potentially fair reason for the dismissal, I considered whether the Respondent acted reasonably in all the circumstances of the case as treating it as a sufficient reason for dismissing the Claimant*". That was undoubtedly a correct statement of the relevant test under section 98(4) of the **ERA**.

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23. Then at paragraph 44, the Tribunal began by stating, "*I considered whether the failure to hold a meeting before the decision to dismiss was made or to give the Claimant notice of the meeting on 5 August made the dismissal unfair*". This makes it clear, in my judgment, that far from considering the hypothetical question of whether there would have been any difference to the outcome if a meeting had been held, the Tribunal was focusing on whether the failure to hold a meeting before the decision rendered the dismissal unfair. That was clearly something which the Tribunal had to consider. The Claimant's case was put on the basis that the failure to hold a meeting in advance of 5 August was unfair. It would have been wholly artificial for the Tribunal to seek to determine the question of whether the dismissal was fair or unfair without considering what effect that failure had on the fairness of the dismissal.

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24. The Tribunal then proceeded to reiterate the finding of fact, which it had already made earlier in the Decision, that by the time of the decision to dismiss the Claimant had already

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decided that he was going to undertake the exercise and had committed himself to it. In other words, there was nothing that was going to result in a change in the Claimant's position that he would be taking seven weeks off to attend the exercise. In that context, the Tribunal was

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entitled to conclude, it seems to me, that the failure to hold a meeting in advance was not unfair because, on the facts of this case, it would not have changed anything. It is for that reason that the Tribunal also states in the same paragraph that, "*The parties had come to an impasse*" and, "*A parting of the ways was inevitable*."

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25. This is not, for example, a misconduct case where it would usually be considered necessary to hold a meeting in order to consider the employee's explanations for the impugned

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conduct. This was a dismissal for some other substantial reason, that reason being that the Respondent could not sustainably permit the Claimant to take seven weeks' leave. In that context, it was open to the Tribunal to make a finding of fact that an earlier meeting would not

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have changed the position because of the Claimant's firm commitment to the exercise.

26. The Tribunal was not, in my judgment, considering a hypothetical scenario on what might have happened had there been an earlier meeting but was making conclusive findings of

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fact based on the certainty, in its view, that the Claimant would be taking seven weeks' leave. Mr Bacon submitted that the evidence was such that once the ADC form had been signed, it was impossible for the Claimant to change his mind and that he could not do so. Mr Kohanzad

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is perhaps correct to say that there was no finding as such by the Tribunal that it was *impossible* for the Claimant to change his mind. However, the Tribunal did say that nothing would make him change his mind (see paragraph 43). Having regard to the evidence that was before the

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Tribunal, including the terms of the ADC form, the Claimant's own evidence that by signing the form he was now under military law and subject to the Service Discipline Act, and that he

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had to be present for duty on the dates set out in the ADC, that was clearly a finding open to the Tribunal to make.

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27. Mr Kohanzad said that looking at the ADC documents there was 'wriggle room' in terms of the commitment. He took me to a passage in the ADC form, which provided as follows: "*In exceptional circumstances, should I wish to terminate my period of ADC service before the expiry of this commitment, I will be required to submit the request, in writing, to NPT*

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Reserves through my Commanding Officer". However, a proper reading of that passage is not that it provides any 'wriggle room' to get out of the exercise altogether but that in exceptional circumstances, it may be possible to terminate it early once it has commenced. It does not

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undermine in any way the Tribunal's conclusion that there was nothing that would make the Claimant change his mind about the exercise in this case.

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28. The Tribunal did expressly undertake the **<u>Polkey</u>** analysis of whether taking the procedural steps would have made any difference. It did so in paragraph 46 of the Judgment where it considered the alternative case in the event that the dismissal was unfair. The Tribunal concluded that no compensation would have been awarded on the basis that "*rectifying that*

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flaw would not have had any impact on the outcome". The fact that the Tribunal undertook a separate **<u>Polkey</u>** analysis in this paragraph supports, in my judgment, the conclusion that the analysis in paragraph 44, notwithstanding any superficial similarity to the **<u>Polkey</u>** assessment,

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was not impermissible. That deals with ground 1, which, for the reasons set out above, is dismissed.

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Ground 2

29. I turn now to consider ground 2. Here the Claimant takes issue with the Tribunal's conclusion that, "*There was nothing in the evidence to indicate that if the Claimant had been warned that he would be dismissed if he insisted on going to the exercise in the US, he would have changed his mind*". The short point made by Mr Kohanzad here is that there was evidence contained in the transcript of the 5 August meeting indicating that the Claimant may have been prepared not to go on the exercise if given an ultimatum that going on it would result in his dismissal.

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30. There are two extracts in the transcript of relevance. The first extract provides as follows:

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> **"ASR: Yeah and the reality is we would never approve that type of leave for that length of time anyway.**
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> **AH: Okay, but [overspeaking] and it was requested and what wasn't done was this meeting to discuss it in a way and manner in which to you or to Joseph to express any hesitation on it and had that been done, it would've been quite easy for me to have had a discussion with my CO and the TO and the other members of the [unclear] that were involved in me going on this training, to do another training in another, you know, period."**

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31. The second extract provides as follows:

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> **"AH: I'm not being facetious, I'm just saying it's, you know, if you thought about it from every angle, I would've thought the most normal course of action would be to have a meeting with me, sit down with someone and have a conversation and actually discuss whatever the issues are, and had the Marines been such an issue, and had our - I'm not saying I would've done, but had you raised it as such a concern that you couldn't have me at the business, then I may have been able to find another way. I may not, so I may have said, "Actually, I have to do this, this is something that I want to do and it's part of the amount of training that I have to do and there's no other way for me to make up the time" or I may have said, "Well, actually, okay, I'll put that aside and I'll have to make up that training next year, early next year."**

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32. In light of these passages, submits Mr Kohanzad, there was no proper basis for the Tribunal's conclusion that there was no evidence to indicate that the Claimant would, if warned that dismissal was a consequence of going on the exercise, change his mind. As that finding was central to both the conclusion on unfairness and the **Polkey** reduction, those conclusions must be considered unsafe.

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33. There might have been something in this argument if in fact the Tribunal's conclusion was wholly unsupported by other evidence. The difficulty for the Claimant, in my judgment, is that there was substantial evidence to support the Tribunal's conclusion that the Claimant was committed to the exercise and was not going to change his position. Thus, at paragraph 21, the Tribunal referred to the fact that by signing the additional duties commitment form, the Claimant would commit himself to undertaking the exercise.

34. At paragraph 26 the Tribunal found that on 22 July the Claimant signed the additional duties commitment form. At paragraph 29 the Tribunal referred to the Claimant's email on 2 August 2016, in which he said, "*As such, I am therefore obligated to undertake this training (and if not this then another)*". In the same paragraph, the Tribunal made a finding of fact that, regardless of any concerns on the part of the Respondent, the Claimant was going to undertake the seven weeks' training. At paragraph 43, the Tribunal found as a fact that "*It was clear that nothing was going to make him change his mind about* [being absent from work from 26 August to 16 October that year]" because he had returned his additional duties commitment form and had thereby committed himself to the exercise.

35. In view of the numerous findings of fact supported by unambiguous evidence, there does not seem to me to be any real basis for suggesting the Tribunal erred in law in coming to the conclusion that it did. An error of law may arise where a finding of fact is wholly unsupported by the evidence or is contrary to all of the evidence. However, it is trite law that where there is evidence going both ways, it is a matter for the Tribunal to weigh up that evidence and reach a conclusion on it. That is precisely what the Tribunal did here.

36. The Claimant's argument amounts to little more than a challenge to a finding of fact, which the Tribunal was entitled to make. That would be reason enough on its own to dismiss this ground of appeal. However, even if there had not been considerable evidence going the other way, the Tribunal would still have been correct to say that there was nothing in the evidence to indicate that the Claimant would have changed his mind. The extracts from the transcript set out above, and I note that a further extract is relied upon from the Claimant's witness statement, would not support a finding that the Claimant would have changed his mind.

37. The extracts are equivocal at best. The first extract said little more than the Claimant could have had a discussion with his CO and TO without giving any clear indication of what the outcome of any such discussion might be. In the second extract the Claimant says in terms that he was not saying that he would have changed his mind but that he may or may not have been able to find another way. None of that provides any definitive basis for saying the Tribunal erred in reaching its conclusion that there was no evidence that the Claimant would in fact change his mind. That finding, it seems to me, is entirely consistent with what is said in paragraph 43, as to be clear that nothing was going to make him change his mind about the exercise.

38. The Claimant also takes a point that the Respondent having opened the discussion on 5 August on the basis that the Claimant was to be made redundant, it was unsurprising that the Claimant did not thereafter explicitly say that if given an ultimatum, he would have chosen his job over the exercise. Putting aside the fact that that seems somewhat inconsistent with the suggestion that there was evidence that the Claimant would have or may have changed his mind if the ultimatum had been given, the question here was whether there was evidence which supported the Tribunal's conclusion that he would not have done so.

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39. For the reasons already set out above, it is quite clear to me that there was such evidence and the fact that the meeting was opened in that particular way does not change that conclusion. I note that the reference to redundancy really only occurred at the outset of the meeting, the remainder of the meeting apparently being given over to discussion about the commitment to the exercise.

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40. The final point made by the Claimant in support of this ground is that the Tribunal ought to have referred to its industrial experience and taken account of the fact that most employees would not want to give up their job or a six-figure salary to attend the exercise, if given an ultimatum that doing so would result in their dismissal. It is not clear to me what, if any, point of law this point raises. The suggestion appears to be that it would have been very unlikely for the Claimant if faced with dismissal to have attended the training exercise.

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41. However, that seems to me to ignore the express findings of fact made by the Tribunal that the Claimant was already committed to attending the exercise and would have done so regardless of the employer's concerns. In those circumstances, it was unnecessary for the Tribunal to make reference to what is described as its industrial experience. The Tribunal simply made a finding of fact based on the evidence before it that nothing was going to change the Claimant's mind and that was a finding that the Tribunal was entitled to reach.

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Conclusion

42. For those reasons, and notwithstanding Mr Kohanzad's careful submissions, this appeal fails and is dismissed.

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