Appeal No. UKEAT/0307/17/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 September 2018

Before

HER HONOUR JUDGE KATHERINE TUCKER

(SITTING ALONE)

MR J MANSFIELD — APPELLANT

TARAN MICROSYSTEMS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RHYS JOHNS (of Counsel) Instructed by: DLG Legal Services PO Box 1195 Churchill court Westmoreland Road Bromley Kent BR1 9YG
For the Respondent	MS NAOMI CUNNINGHAM (of Counsel) Instructed by: Messrs Phillips Solicitors Town Gate 38 London Street Basingstoke Hampshire RG21 7NY

SUMMARY

CONTRACT OF EMPLOYMENT - Damages for breach of contract

UNFAIR DISMISSAL - Constructive dismissal

UNFAIR DISMISSAL - Compensation

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Polkey deduction

The Appellant contended that the Employment Judge made a perverse finding regarding the Appellant's conduct prior to dismissal (but which the Respondent only discovered after dismissal). The Appellant also argued that the Tribunal erred in reaching a conclusion that because of that conduct, no compensatory award and no basic award should be paid to him.

The appeal in respect of perversity was dismissed: the Judge made a legitimate finding of fact on the basis of the evidence presented to him and, read as a whole, set out the reasons for that findings within the Reasons.

However, the Judge failed to then go on to properly identify the issues relating to compensation which arose in respect of the basic award and the compensatory award. In consequence, he did not set out in the Reasons how and why, having regard to sections 122 and 123 of the **Employment Rights Act 1996**, he had reduced the basic award and compensatory award to nil. By agreement, the case was remitted to the same Employment Judge.

HER HONOUR JUDGE KATHERINE TUCKER

1. This is my decision on an appeal against the Decision of an Employment Tribunal, Employment Judge Reed sitting alone at Southampton Employment Tribunal. The Decision appealed against was a Decision at a Remedy Hearing that, although the Appellant (Claimant below, as I will refer to him) had been unfairly dismissed by the Respondent organisation, no compensation should be awarded to him.

The proceedings before the Tribunal

The Liability Judgment

2. The relevant facts are set out in the Liability Judgment, which was sent to the parties on 1 June 2017, and in the Remedy Judgment which was sent to the parties on 16 August 2017. Those facts were as follows. The Claimant worked for the Respondent organisation from approximately 2000 onwards. The Respondent organisation is involved in managing IT services. It appeared from the Reasons that its work was focused in the management of IT services for hotels. The Respondent organisation introduced a bonus scheme in 2010. Problems arose in connection with that bonus scheme. The Employment Judge made two significant findings about it and how it impacted upon the Claimant:

a. First, the Employment Judge found that the employer committed a fundamental breach of contract when it withheld payment of bonus due to the Claimant. The Respondent failed to pay the Claimant his bonus in August and September 2016 (paragraph 19 of the Liability Judgment).
b. Secondly, that the reason that the Claimant subsequently resigned from the Respondent business was because he felt that he had been badly let down by the

company as a result of that underpayment (paragraphs 22 to 23 of the Liability Decision).

On that second issue, the Judge accepted the evidence of the Claimant. That finding, as to the reason why the Claimant had resigned, was reiterated in paragraph 5 of the Remedy Judgment: "*Mr Mansfield resigned from his employment with the company on 1 November 2016 as a consequence of the company's actions, and, in particular, the withholding of an element of his wages.*"

3. In my judgment, the Liability Decision also contained other significant (because they were relevant to remedy) findings of fact:

a. That from early September 2016 onwards, the Claimant had been canvassing the possibility of setting up a business on his own account, but together with a colleague, Mr Pain.

b. That the fact he was doing so was hardly surprising given that, even then, he considered that the behaviour of the company was such that he could not stay. The Judge found that it was unremarkable that he was 'testing the water' and seeing what his options were.

c. That the Claimant did not resign until 1 November 2016 because he was trying to sort the issue out about his pay. The Judge accepted the Claimant's evidence that, if the company had come up with a "*fantastic offer*", he would have stayed. (That is set out in paragraph 25 of the Liability Decision).

4. At this stage, this case appeared to be a relatively straightforward case of constructive unfair dismissal. However, by the time of the Remedy Hearing, the Respondent had unearthed

information which suggested that all had not been as it seemed in September to October 2016. At the Remedy Hearing, the Respondent contended, amongst other matters, that it had discovered that the Claimant had been guilty of serious misconduct. It contended that, as a result, any reward of compensation which might otherwise have been made should be reduced to nil.

The Remedy Hearing and the Remedy Judgment

5. At the Remedy Hearing, the Tribunal determined that the Claimant had been guilty of gross misconduct and declined to award any compensatory award or any basic award to the Claimant. In the Remedy Decision, the Employment Judge made additional findings of fact:

(i) The Tribunal made findings about the steps which the Claimant and his colleague, Mr Pain (whom I note was junior to the Claimant and who reported to the Claimant in the Respondent organisation), took in order to set up a business in competition with the Respondent. The Tribunal found that these included registering domain names and setting up a Twitter account on behalf of their new company, Hotality IT Solutions Ltd ("Hotality").

(ii) That on 5 October Mr Pain sent an email to the Claimant in which he set out technical information about what he had been doing, for example, usernames that he had set up for the company and software that he had installed or set up. Mr Pain also stated that, he was "*going to upload*" onto the Hotality server the following:

(a) the Taran Sharepoint,

(b) an export of Vault; and

(c) a list of all the LabTech TeamViewer IDs and passwords that LabTech auto-creates.

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The Claimant replied to Mr Pain a moment after Mr Pain had sent the email. His reply was "*Wow you have been a busy boy*", and it concluded "*Thanks for sending all this through, will take a look after eating*".

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6. There was a dispute between the parties about precisely what the information referred to in that email actually was and what had happened to it. During the hearing, the Employment Judge raised the possibility of the parties instructing an expert regarding those matters. Both parties stated that they did not wish to do so. The Judge then, in those circumstances, and at their request, made decisions about those factual technical matters and then the legal consequences which flowed from those findings regarding remedy. Criticisms of the Judge's fact finding about what those items consisted of must be considered against that background.

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7. In evidence before the Tribunal, the Claimant asserted various things about the three different items which I have referred to as (a), (b) and (c) in paragraph 5(ii) above. Regarding items (a) and (b) (the Taran Sharepoint and an export of Vault respectively), the Claimant asserted that the 'Sharepoint' and 'Vault' consisted merely of templates which he and Mr Pain had developed in their own time, that neither was confidential data belonging to the Respondent and, furthermore, that there was no reason why he and Mr Pain could not use it. Regarding (c), (a list of all the LabTech TeamViewer IDs and passwords) the Claimant contended that the TeamViewer IDs were codes needed to obtain remote access on a control software on a client's site but that Hotality would be given their own passwords if they were ever subsequently awarded a contract with one of the Respondent's then clients, and would not, therefore, need Taran's (the Respondent's) passwords. However, the Claimant asserted that, in any event, those codes were not taken.

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8. The Claimant's evidence is recorded by the Employment Judge at paragraphs 10, 11 and 12 of the Remedy Reasons, in my judgment, substantially in the following terms. The Tribunal recorded that the Claimant asserted that on 5 October 2016 he had not definitely decided to leave the Respondent. Furthermore, he asserted that he spoke to Mr Pain after receiving the email of 5 October and told him that Hotality would have no need for the codes. Submissions made on appeal and elsewhere in the documents suggest that that communication also contained an instruction to Mr Pain not to take confidential information. I do not accept the submission made that this involves any 'gloss' being placed upon his evidence.

9. The Claimant's account was disputed by the Respondent. The Respondent's witness (Mr Miles, the Respondent's Managing Director) gave evidence that what was referred to in Mr Pain's email consisted of confidential information. At paragraph 13 of the Reasons, the Judge recorded the Respondent witness' evidence as follows:

> **"13. … The reference to "Vault" indicated that there would be commercially sensitive information uploaded. It would not be simply templates that would be obtained. As far as the LabTech IDs were concerned, there was no question but that this was confidential information …"**

10. The Judge proceeded to make findings about these matters. He determined as follows. That, as far as Sharepoint was concerned, he preferred the evidence of Mr Miles to the effect that the wording of the email indicated that confidential information belonging to the company would be placed on the server of Hotality. The "*theft*" (and the Judge placed the word "theft" in inverted commas) of such information, of itself, would amount to gross misconduct (paragraph 32 of the Reasons).

11. The Judge concluded that the position was even more stark in relation to the LabTech TeamViewer IDs and passwords which, he found, as the Claimant accepted, contained

confidential information. The Judge considered that it would have been immediately apparent to him (that is the Claimant) that what Mr Pain had done was completely improper. He considered that an obvious response by the Claimant to the receipt of the email would have been to immediately remonstrate with Mr Pain and make it clear what a serious act of misconduct he (Mr Pain) had committed and take steps to rectify it. The Judge concluded that the Claimant's actual response in his email was "*very surprising*" as, if anything, it indicated approval of what Mr Pain had done. The Judge expressly rejected the Claimant's evidence that he had had a subsequent conversation to rectify the situation with Mr Pain. Importantly in my judgment, it followed that, as a matter of factual determination, the Judge found that the Claimant did not tell Mr Pain that Hotality would have no need for the codes or not to take confidential information as alleged by the Claimant.

12. One other matter which is relevant to the Decision of the Employment Judge on remedy was that Mr Pain reported to the Claimant within the Respondent organisation, as I have already mentioned. Mr Pain gave notice of his intended resignation on or around 11 October 2018 (this being the date that the Claimant told the Respondent's Managing Director of Mr Pain's imminent departure). The Respondent's Managing Director (Mr Miles) asked the Claimant if Mr Pain should be required to work his notice. The Claimant suggested that he should not and, consequently, Mr Pain was released from an obligation to do so. At the Remedy Hearing, the Respondent asserted that there was work that Mr Pain could have done during his notice period which would have made savings for the Respondent and that the Claimant misled the Respondent about Mr Pain's circumstances.

13. In reaching his decision, the Judge identified that his first task was to determine precisely whether, and if so what, behaviour of the Claimant could sensibly be regarded as

misconduct of any sort. It was at this stage that he observed that that required him to take a view on highly technical issues, but that the parties wished him to decide the issues without the assistance of an expert.

The Claimant's misconduct

14. On a fair reading of the Judgment as a whole, I consider that the Employment Judge concluded that the Claimant was guilty of the following misconduct:

(i) First, that although he did not provide overtly false information relating to Mr Pain and his departure, there was certainly more that he could have told the Respondent. In releasing Mr Pain from his notice, the Respondent unnecessarily expended money in circumstances where the Claimant knew that there was work that Mr Pain could have done which would have saved the Respondent money. The Judge concluded that this misconduct on the Claimant's part would have warranted a reduction in any award of compensation but would have not extinguished it altogether.

(ii) Secondly, the Judge rejected the Respondent's allegation that the Claimant had improperly installed remote access software on two of its hotel client's servers (that of Chewton Glen and Exclusive Hotels) on the basis that there was no real - from which I understand to mean probative - evidence to support the allegation.

(iii) Thirdly, the Judge found that the Claimant did not owe a fiduciary duty to the Respondent. I note that there were no express findings about the duty of good faith or of fidelity.

(iv) Fourthly, that the Claimant had no regard to his obligations to the company and was a party to the theft of confidential information from his then current employer (paragraphs 33 to 34). The Judge stated:

> **"35. Mr Mansfield [the Claimant] was a senior employee of the Company and what he had done amounted to a betrayal. He was effectively an accomplice to an act of stealing from the Company and on any interpretation that had to amount to an act of gross misconduct. In those circumstances, it seemed to me that I was left with little option but to conclude that Mr Mansfield's conduct was such that he should not receive any award of compensation."**

15. The Judge's record of the relevant applicable law is set out at paragraphs 23 and 24 of the Reasons.

The Appeal

16. The arguments on appeal have been clarified as a result of a Preliminary Hearing whereby only two grounds of appeal were allowed to proceed to a full appeal. The two points were, first, an argument that the Judge erred in the application of the statutory test for the award of compensation because he did not apply, or did not give sufficient reasons to show that he had applied, a just and equitable test, as he was required to by section 123(1) of the **Employment Rights Act 1996** ("ERA"). The second is a short perversity point, essentially whether it was open to the Judge to make a finding of theft in the absence of any evidence that confidential information or documents or templates were actually taken from the Respondent.

Ground 1: The parties' submissions regarding the approach to reduction of the compensatory and basic awards

17. The first ground of appeal was that the Tribunal erred in its approach to the reduction of the award of compensation. It was contended that the Tribunal had applied the test in section 123(6) rather the test in section 123(1), when section 123(6) was of no application in this case. Further, it was submitted that the Judge failed to carry out an appropriate balancing exercise of the conduct of the Respondent in unfairly dismissing the Claimant and the Claimant's misconduct, which was one important matter which should have been considered when considering whether or not it was just and equitable to award compensation. In any event, it

was submitted that even if the Tribunal did apply section 123(1) **ERA** 1996, it erred in that it did not have regard to all the circumstances, including, importantly, (a) the loss sustained by the Claimant in consequence of dismissal, and, (b) it did not consider whether the Claimant would have been dismissed in any event, the Claimant's submissions being that the evidence did not support such a conclusion. The Claimant submitted that the Judge improperly directed himself that an 'all-or-nothing' approach applied in this case, the Claimant referring to paragraph 35 of the Reasons where the Judge records that, in his view, he had "little option" but to award no compensation. Alternatively, it was submitted that the Judge failed to give adequate Reasons. Finally, in submissions the Claimant drew attention to the fact that the copy of the email of 5 October was obtained unlawfully and that that was not referred to in the Judgment.

18. In response, the Respondent contended as follows: that it is beyond argument that, pursuant to section 123(1) **ERA** and **W Devis & Sons Ltd v Atkins** [1977] AC 931, a Tribunal may reduce compensation to nil in some circumstances where misconduct on the part of the Claimant is discovered after dismissal. The question in such circumstances is whether an employee who has been guilty of gross misconduct has suffered any injustice by being so dismissed. My attention was drawn to the extract in the **Atkins** case where Viscount Dilhorne observed that a reduction to zero may arise if it is not just and equitable that a sum should be awarded in compensation when, in fact, an employee has suffered no injustice by being dismissed; ergo, the question is whether or not the Claimant has suffered an injustice by being dismissed. Secondly, it was submitted on behalf of the Respondent that there was no absolute requirement for a Tribunal to give express consideration to the fact that both parties have behaved badly, noting in particular that in all cases where a Tribunal is considering the award of compensation for unfair dismissal, there will, by definition, have been an unfair dismissal and, therefore, poor, or reprehensible behaviour on behalf of the Respondent. It was submitted

that the Judge simply did not apply an all-or-nothing approach, as revealed by his observation at paragraph 28 of the Reasons that, in his view, the action of the Claimant in respect of Mr Pain's notice period would not have attracted a reduction in compensation of 100%, but would have led to a reduction in compensation.

Ground 2: the parties' submissions on perversity

19. The Claimant contended that the finding of the Tribunal that the Claimant had been an accomplice to theft was perverse because there was simply no evidence upon which the Judge could properly have so concluded. The Claimant contended that there was no evidence at all before the Tribunal that Mr Pain was going to act as alleged or that he did; that the information, in any event, was not confidential; that there was no evidence that confidential information had actually been taken by the Claimant or Mr Pain; that improper conduct by Mr Pain should not have been equated with improper conduct by the Claimant; and, that the evidential burden of proving misconduct on the balance of probabilities, lay on the Respondent. In the Claimant's submission, Respondent had simply failed to discharge that burden.

20. The Respondent's case on the perversity point was simple: it was that the Reasons correctly and sufficiently recorded the factual evidence before the Tribunal and, in light of that evidence, the Judge was fully entitled to infer that information had been taken and that the Claimant was complicit in that. Significantly, the Respondent drew my attention to the reality of the evidence: Mr Pain said, clearly, in an email that he was going to do something, and the Claimant's evidence was not that Mr Pain did not act as he said he would, but it was, insofar as Sharepoint and Vault was concerned, that there was nothing wrong with what he was going to do and, in relation to the TeamViewer IDs and passwords, that Hotality did not need them, that

A he had told Mr Pain so and they were not taken. The Respondent submitted that, on both points, the Judge simply preferred the Respondent's evidence to that of the Claimant's.

B *The Law*

21. Section 118 of the Employment Rights Act 1996 ("ERA") provides that:

> **"(1) [….] where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of-**
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> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and**
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> C **(b) a compensatory award (calculated in accordance with sections 123, 124, [124A and 126]), (2), (3), [(4)] …."**

Section 122 of the ERA sets out the circumstances in which a basic award may be reduced. Of particular relevance in this case is section122(2) which provides that:

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> **"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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 the amount accordingly."**

E Section 123(1), (2) and (6) ERA provide as follows:

> **"(1) Subject to the provisions of this section and sections 124[, 124A and 126], 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.**
>
> F **(2) The loss referred to in subsection (1) shall be taken to include-**
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> **(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and**
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> **(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.**
>
> G **…**
>
> **(6) Where the tribunal finds that the dismissal was to any extent 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."**

H 22. In my judgment, one of the difficulties in this case is that there was not, within the Remedy Judgment, a clearly articulated identification of the issues to be determined by express

reference to the relevant law and statutes. I consider that the provisions of sections 122 and 123 of the **ERA** provide Tribunals with a broad discretion to award an appropriate level of compensation on the particular facts of a case. The legislation is worded in such a way that Tribunals can, usually, through the careful application of its terms reach a fair and balanced conclusion, and take account of the diverse and varied facts and factual context that come before them in employment litigation. However, in order to achieve a just result, proper regard must be had to the carefully worded provisions of the individual, relevant, sections of the statute.

Conclusions

Perversity

23. I turn, then, to my conclusion. I deal with the perversity point first. I dismiss that ground of appeal. In my judgment, the Judge in this case was asked to make factual determinations on the basis of the evidence that was placed before him. It is clear from the Reasons that he considered both sides' evidence carefully in respect of each aspect of the alleged misconduct, and he made specific findings. For example, he found for the Claimant in respect of the alleged installation of 'spy software'. That was because he was not satisfied, in my judgment, that there was sufficiently probative evidence to support the allegation that had been made by the Respondent, evidencing that he was live to the evidential burden on the Respondent. It was also, in my judgment, important to note what the Claimant said in evidence about the three items referred to by Mr Pain in his email (and that I have referred to at paragraph 5 (a), (b) and (c) above). The Claimant's case was not simply that Sharepoint and Vault were not put on the Hotality server. It was, instead, that there was nothing wrong in doing what was described in the 5 October email. At paragraph 10 of the Reasons the Judge recorded the Claimant's testimony to him as follows: "*as far as SharePoint and Vault was*

concerned, all that was being uploaded onto the server of Hotality ..." (my emphasis). That language, in my judgment, clearly suggested that the relevant information was or was being uploaded. There has been no suggestion during the appeal that that recitation of the evidence was wrong, inaccurate or inconsistent with that which was said in Tribunal. Had there been, no doubt I would have seen the notes of evidence, either from the parties and/or a request in respect of the Employment Judge's evidence. Furthermore, the specific finding made by the Judge was not that the Claimant stole the information; the finding was that the Claimant did not act immediately to correct what was being proposed or had been done by Mr Pain and that the Claimant, as Mr Pain's more senior employer and line manager, was 'complicit' in Mr Pain's actions. To the extent that any error in categorisation of the information as confidential is made, I find that that was not perverse because it was a conclusion reached on the facts by the Employment Judge without the assistance of technical expert evidence at the joint request of the parties.

24. In my judgment, both parties took a litigation risk or gamble. The Respondent tried to prove its case on the basis of that which it had, namely, the email of 5 October, and their assertions as to what conclusions should be drawn from that. The Claimant, for his part, invited the Judge to determine the matter on the basis of his evidence and what he said had occurred. The Respondent bore the burden of proving the misconduct on the balance of probabilities. Further, the Respondent had obtained information through questionable means, but it was not contended before me that I should address any issue as to admissibility as a result in this appeal. Ultimately, the Respondent's litigation gamble paid off, and the Claimant's did not; the Claimant lost on the facts. The Judge decided, that the information was confidential and, secondly, that the Claimant had not intervened to stop Mr Pain and was, therefore, complicit in Mr Pain's actions.

25. I agree that the use of the word "*theft*" to describe what happened may be open to criticism. However, at least one point, it is set out in inverted commas. In my judgment, a fair reading of the Judgment is that the words "*theft*" and "*steal*" were used to describe the event through which information belonging to the Respondent was taken without the Respondent's knowledge and without the Respondent's consent. I was not satisfied that, on the basis of the evidence before the Tribunal, the criticism about the finding that was made, met the high test of perversity. I considered that it was open to the Employment Judge to reach the conclusions that he did.

Reduction of compensation

26. In my judgment, the appeal in respect of ground 2 has more substance. I have observed already that the Judge did not clearly identify the issues at the beginning of the Remedy Hearing. Furthermore, his exposition of the law is not as clear as it could be. When he refers to section 123 ERA in paragraph 23, he recites, in full, the provisions of section 123(6) which was not relevant in this case. Shortly thereafter, in the next paragraph, the Judge expressly acknowledged that the determination of what is just and equitable does not exclusively require Tribunals to concentrate on whether or not an employee contributed to their dismissal.

27. In my judgment, the failure to clearly identify the issues in respect of remedy resulted in a situation where the Employment Judge apparently jumped from finding the facts in respect of the Claimant's misconduct to making a nil award of compensation, without, in my judgment, adequately explaining the steps that he took to reach that conclusion. Whilst I do not say for one moment that that conclusion was not one that was open to the Employment Judge, there was, in my judgment, a requirement for him to set out how he had reached that conclusion by

application of the relevant statutory provisions to the particular facts of the case. Had the Employment Judge set out what the issues were, he might have identified them as follows:(1) What, if any, remedy should the Tribunal order? He could have recorded that the Claimant did not seek the primary remedies of reinstatement or re-engagement. The issue was, therefore, what, if any, compensation should be awarded. (2) Should a reduction to the basic award be made on the grounds that the Claimant's conduct before dismissal was such that it would be just and equitable to reduce the award, having regards to the provisions of section 122(2) **ERA**? Within that issue, the Judge would have had to consider the following issues.

(a) What the Claimant's conduct was;

(b) Whether it be just and equitable to reduce the award in the light of that conduct and, if so, by how much?

The Judge needed to explain whether he considered that a reduction should be made, why that was and the reason for the level of any reduction made to the basic award.

28. The issues in respect of whether a reduction should be made to the compensatory award, should, in my judgment, be addressed separately: the relevant statutory provision is a separate statutory provision, and contains different wording and may, in some cases, require analysis of different matters. In respect of the compensatory award, the Judge might have identified the following issues: (1) What, if any, was the loss sustained by the Claimant in consequence of the dismissal? The Judge, at the beginning of his or her analysis, may not be able to give a complete answer to that question, but they must have in mind that that is one of the matters that when addressing the question of compensation, they must directly address this issue: what was the loss sustained by the Claimant in consequence of the dismissal? (2) Was that loss attributable to the action taken by the employer? (3) In all the circumstances, what amount of

compensation should be awarded? Section 123(1) expressly requires the Tribunal to consider the two issues set out at (1) and (2) above and also *all the circumstances.* At this juncture a Tribunal should identify and consider the particular circumstances of the case. In this case, that could have included the fact that the Claimant was constructively unfairly dismissed, (albeit that an unfair dismissal is a fact which will apply in all unfair dismissal cases); that the Claimant had begun to consider alternative employment in about September 2016 because of the Respondent's actions and response regarding his (well founded) contention that the Respondent had withheld pay; that on 5 October 2016 the Claimant's evidence was that he had not decided, at that point, to leave and he was still an employee of the Respondent company; the fact and detail of the Claimant's misconduct. The conduct which the Tribunal could take into account could have included his part in Mr Pain's early release from his notice period; his lack of regard for his obligations towards the company, his complicit conduct regarding steps taken by Mr Pain through which confidential information was, on the findings made by the judge, taken from the Respondent. The judge might also have had regard to the fact that the information relied upon by the Respondent to evidence the Claimant's misconduct was obtained illegally.

29. Further, in a case of unfair dismissal, a Tribunal will often be required to consider whether there was a chance, often measured in percentage terms, that the Claimant might have been dismissed in any event. This can involve Tribunals engaging in difficult and sometimes speculative analysis as to what might have happened in a world that never was. The analysis at this stage is not a precise art, but an analysis of what might have happened had the Claimant not been dismissed: for example, had the Respondent known about what the Claimant and Mr Pain had started on 5 October, what would they have done? Indeed, would they ever have known or

found out about this, given that the information was said to have been obtained illegally and after dismissal?

30. On balance, although I consider that some of the criticisms made of the Judgment are not entirely well made, (for example, I am satisfied that the Tribunal Judge did acknowledge within the Judgment that he was not bound to make a reduction of 100%, paragraph 21) I am satisfied that the Tribunal erred in failing to adequately explain how he reached the conclusion that he did. The failure to provide that explanation leads one to question whether or not the Judge sufficiently analysed all of the relevant circumstances as he was required to by statute. The Judge did not clearly identify the issues which he had to address in order to properly reach a conclusion about remedy. He did not then set out his conclusion on those important issues. In failing to do so, I consider that he erred in law.

31. Therefore, I allow the appeal in respect of the second ground of appeal and will now hear submissions in relation to what order I should make by way of disposal.