Appeal No. UKEAT/0180/18/BA
UKEAT/0181/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 & 7 December 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR D DEE — APPELLANT

SUFFOLK COUNTY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHANGEZ KHAN (of Counsel) Instructed by: Quantrills Solicitors The Peninsula Business Centre Wherstead Street Wherstead Ipswich IP9 2BB
For the Respondent	MISS JUDE SHEPHERD Suffolk County Council Legal Services Endevour House 8 Russell Road Ipswich Suffolk IP1 2BX

SUMMARY

UNFAIR DISMISSAL – Contributory fault

UNFAIR DISMISSAL – Polkey deduction

Following a finding that the Claimant had been unfairly dismissed, an Employment Tribunal erred at the Remedy stage in failing to give adequate reasons for the sequential reductions to a compensatory award it made (i) under **Polkey** and (ii) by way of contributory fault. It also erred in failing to explain why no similar reduction was applied to the basic award, and why no uplift was applied for breaches of the **ACAS code** identified in the Liability Judgment.

HIS HONOUR JUDGE MARTYN BARKLEM

Introduction

1. These are an appeal and cross-appeal against the decision of Employment Judge Postle, sitting alone, in the Employment Tribunal at Bury St Edmunds. I shall refer to the parties as they were at the Tribunal.

2. Each is represented by Counsel who appeared below, Mr Khan for the Claimant and Miss Shepherd for the Respondent, adopting, as I shall, the terms applied to the parties below. I am grateful to both for their helpful skeleton arguments and oral submissions at the hearing. In the interests of delivering this Judgment ex-tempore, I will not set out the arguments extensively. I have had regard to them all in reaching my decision.

3. On 2nd May 2017, the Tribunal sent written Reasons for its finding that the Claimant had been unfairly dismissed and that the Respondent had acted in breach of contract. A Remedy Hearing followed and written Reasons were sent to the parties on 14th March 2018. It is against the Remedy Decision alone that these appeals are brought.

Background

4. I can set out the facts very briefly. The Claimant had been employed by Suffolk County Council as a Teacher since 2003. At the date of the events underlying these proceedings he was Head Teacher of Cedar Parks Primary School.

5. On the 3rd April 2014 the Claimant was asked to speak to a nine year old girl ("Child A") who had recently been transferred to the School, and who was the subject of a behaviour plan designed to cope with her special educational needs, namely her emotional and behavioural problems. The Claimant had previously agreed to act as a nominated "authority figure" in relation to Child A, which involved him speaking to her occasionally and reinforcing school rules. However, he had not read the behaviour plan which set out the relevant warning signs and gave guidance as to handle the child. He had also not undertaken training on de-escalation and restraint techniques.

6. Prior to the Claimant's involvement on 3rd April, another child had told a teacher that Child A had hit her on the hand. The Claimant was eventually called, in his "authority figure" role, and after she refused his initial request that she go with him, he picked her up bodily, effectively tucked under his arm, and carried her out of the classroom. This, and his allegedly dropping the child at the end of the "carry" was the subject of complaint from fellow members of staff. The Claimant was suspended, a police investigation ensued, and the Claimant was charged, but acquitted, of criminal charges, the bench finding that "reasonable force" had been used.

7. Notwithstanding the acquittal, the Respondent thereafter commenced an internal enquiry and the Claimant was ultimately dismissed for gross misconduct. His appeal was unsuccessful. As stated above, his claim for unfair dismissal was successful, and has not been appealed. It follows that the factual findings of the Tribunal made at that stage cannot be disturbed or challenged on this appeal. There are, however, challenges as to whether those findings have been accurately carried across into the Remedy Judgment.

8. The Tribunal correctly addressed itself as to the elements of the **Burchell** test (see paragraph 78). At paragraph 81 it concluded that the governors had reasonable grounds upon which to form their conclusions, and (at paragraph 86) that dismissal was within the range of reasonable responses. However, it expressed serious reservations as to the investigative process leading to the dismissal. It also raised concerns that the disciplinary panel may not have reached their conclusions independently. Two matters influenced that view. First, what was described as a "slanted" report from the investigator, Mrs Jones, who had expressed her view as to the outcome in forthright terms. Second, "undue influence" (to coin a phrase – the Tribunal did not use that term) from Mr Davis, Manager of the Respondent's HR department, whose role in the deliberations of the governors following the meeting was the subject of criticism. I shall relate the relevant findings in relation to those issues in due course.

9. A Remedy Hearing then took place, and written reasons duly given. The Tribunal held, so far as is relevant for these appeals, (1) that the compensatory award should be reduced by 50% to take account of a **Polkey** reduction, and (2) that the Claimant contributed to his dismissal and a 50% reduction should be made to the compensatory award.

10. The parties sought reconsideration, it being unclear as to how the reductions should be applied. In a Reconsideration Judgment (which, rather oddly, refused the application for reconsideration, but then went on to make fresh findings) the Tribunal explained that the **Polkey** deduction should first be made, and the contributory fault reduction applied to the balance resulting in an overall 75% reduction. The reduction was said to be in relation to the compensatory award only.

11. The Tribunal acknowledged in the Reconsideration Judgment that it had not dealt with the uplift sought by the Claimant for breaches of the ACAS Code (which had been the subject of written submission) but found that no uplift should be applied. As that is a ground of appeal I will need to recite the precise terms of that finding in due course. Reconsideration had also been sought of the decision that the deductions should apply only to the compensatory award. The Tribunal did not address this point – again a ground of appeal.

12. The Tribunal left it to the parties to carry out the assessment of the compensatory award, no doubt intending that it would become involved if this resulted in deadlock.

13. Following rulings at the Rule 3(7) and Rule 3(10) stages by Mrs Justice Simler DBE and Mr Justice Soole, the Claimant has been permitted to advance his appeal on two grounds (grounds 1 and 3 of the original Notice of Appeal) and the Respondent on eight grounds.

The Claimant's Grounds of Appeal

14. In relation to the Grounds of Appeal of both parties, I am summarising them in my own words.

15. The Claimant's first ground of appeal is that the Tribunal erred in making two successive reductions: a 50% reduction on **Polkey** grounds and a further 50% reduction for contributory fault *in relation to the same factor,* namely conduct, so that the overall award of compensation is unjust.

16. The second ground (originally Ground 3) is that the Tribunal's finding, in the Reconsideration Judgment, that there were no unreasonable failures to follow the **ACAS code** is

irreconcilable with its findings in the Liability Judgment, and that no, or no adequate reasons are given for this.

17. Ground 3 was amended following the Reconsideration Judgment – it having earlier been based on the Tribunal's failure to deal with the point. To the extent necessary (and with no objection from Miss Shepherd) I grant leave to purse the amended Ground.

The Respondent's grounds of Appeal

18. Ground 1 asserts that the Tribunal applied the incorrect test in assessing the appropriate **Polkey** reduction and inappropriately concluded that the **Polkey** reduction should be 50% rather than 100%. The essence of the argument is that the Tribunal erred, notwithstanding its correct self-direction, in looking not at what the Respondent would have done, had it acted fairly, but at what a hypothetical employer would have done. On the factual findings at the liability stage, it is said, a finding that dismissal was bound to have resulted – that is, a 100% reduction was the only possible outcome.

19. Ground 2 asserts that the finding that there should be only a 50% reduction to the compensatory award in respect of the Claimant's contributory conduct was perverse in light of the findings made as to the Claimant's conduct in the Liability Judgment. Further, that the Tribunal failed to set out any adequate reasons for this finding and failed to set out any reasons for making the assessment of 50% following the finding of a 50% **Polkey** reduction.

20. Ground 3 asserts that the Tribunal failed to express in its findings that the reduction for contributory fault should also be applied to the basic award, or to provide any reasons in that regard.

21. Ground 4 asserts, in relation to the Tribunal's decision not to make an uplift for the breaches of the **ACAS Code** that the Tribunal failed to set out its reasons for that finding. This is a mirror to the Claimant's ground 3.

22. Ground 5 asserts perversity in respect of findings at paragraph 27 of the Remedy Judgment, being contrary to findings at the liability stage and/or the subject of no evidence.

23. Ground 6 asserts that that Tribunal erred in placing weight (when assessing the **Polkey** reduction attributable to procedural unfairness) on matters which formed part of a child safeguarding process and not the disciplinary action.

24. Ground 7 asserts that the Tribunal erred in law in posing a question at paragraph 29 of the Remedy Judgment as to whether Mrs Chevin (the Chair of the disciplinary panel) had already made up her mind as to what the panel's decision would be without making any finding of fact in that regard. The Ground argues that there was no evidence before the Tribunal to allow it to conclude that this was the case, nor any evidential basis for concluding that there was little or no regard for mitigating factors, or that she had not looked at the matter objectively.

25. Ground 8 asserts that the Tribunal erred in drawing conclusions contrary to the findings of fact at paragraph 81 of the Liability Judgment in which it had held.

"It is therefore easy to conclude that the governors plainly had reasonable grounds upon which to form their conclusions. The Claimant accepts that he failed to read the child's behaviour plan and therefore was unaware of the individual needs of child A."

26. It is necessary for the conclusions set out at the Liability Hearing to be set out, to put the grounds of appeal into a proper context (see paragraphs 62,63,77 to 100 of the Liability Judgment).

"62. The school's Disciplinary Procedure provides that a disciplinary hearing is heard before a panel of governors and the procedure is set out in a model disciplinary procedure found at 631. That is the investigating officer, Mrs Jones presents the case, calls witnesses. The Claimant and his Trade Union representative then have an opportunity to question those witnesses. The Claimant and his representatives then present his case. They can call witnesses but none were called.

64. The hearing lasted for three days. The hearing concluded on the third day around 11am and the governors then spent the rest of the day deliberating and reaching their decision although there are surprisingly no notes of their deliberations and one gets the feeling from Mr Davis's evidence that he had a greater input into the decision making process than he'd have the Tribunal believe. Mr Davis function should be merely to advise on procedure and policies. The Tribunal believes he went beyond this, giving his opinions on outcomes.

….

77. It is patently clear that the reasons for the Claimants dismissal was a reason related to his conduct. That conduct being that the Claimant used unnecessary and excessive force when removing a pupil from classroom on 3rd April breaching safeguarding procedures and had breached the Teacher's Standards (Part 2; Personal and Professional Conduct). Particularly that the Claimant had not treated the pupil in question with dignity and had not observed proper boundaries appropriate to the Claimants position as Head Master.

78. In those circumstances clearly the three fold Burchell test applies. Did the respondent believe that the Claimant was guilty of the misconduct. Did it have in mind reasonable grounds upon which to sustain that belief. At the stage at which the belief was formed on those grounds had the respondents carried out as much investigation into the matter as was reasonable in the circumstances. I must therefore confine my consideration of the facts to those found by the respondent at the time they took the decision to dismiss.

79. It is true that the Claimant accepted under cross examination that the disciplinary panel consisting of three governors were entitled to reach conclusions that they did reach, whether reached by them or with the assistance of Mr Davis the tribunal will never know. However, that was the decision that apparently the panel of governors reached and they set it out in their decision letter on the basis of the evidence before them.

80. It has never been suggested that Mrs Chevin or Mrs Norris respective Chairs of the disciplinary hearing and appeal hearing did not believe that the Claimant was guilty of the misconduct that they subsequently found against him. Their belief followed a three day hearing at which the Governors themselves heard live evidence, not only from the Claimant but also witnesses to the incident on 3rd April and further arguments at a one day appeal hearing.

81. It is therefore easy to conclude that the governors plainly had reasonable grounds upon which to form their conclusions. The Claimant accepts that he failed to read the child's behaviour plan and therefore was unaware of the individual needs of Child A.

82. It is true that Department of Education advice document on the use of reasonable force does expressly state that force can only be used on a child with special needs, but the judgement on whether to use force should not only depend on the circumstances of the case, but also on the information and understanding of the needs of that pupil (792). On the Claimants own evidence

his judgement was plainly not based upon the specific needs of Child A because he was unaware of Child A's specific need having failed to acquaint himself with the behaviour plan, albeit that behaviour plan was somewhat out of date.

83. It is also true that the Claimant accepted under cross examination that the method he used to restrain the child was not a recognised restraint technique taught by School Safe. He accepted that it was important for any staff to have training before they attempt to restrain children. The evidence before the Governors was, there was no evidence of the Claimant having completed the appropriate training (albeit the time period was somewhat confusing). When the Claimant was asked to explain to the Governors his knowledge of safe restraint techniques he was unable to respond.

84. The Claimant further accepted before the disciplinary hearing that had he had training he would have been aware that in establishing whether force was necessary you must consider whether all other options have been explored and exhausted before. (796) The Claimant further accepted during the disciplinary process that there were other things he could have done other than restraining the child. Clearly the Claimant had not explored or exhausted other options. The Claimant accepted that force should be used as a last resort. Given the above and what the Claimant said at the disciplinary the Governors had reasonable grounds upon which to conclude that the restraint of this child was unnecessary and excessive.

85. The panel of Governors at the disciplinary hearing were also informed that Child A's incident was witnessed in whole or in part by other members of staff – four teachers and one teaching assistant, and possibly a student teacher. Whilst it is accepted that their accounts are not entirely consistent the theme of what happened is a constant theme running through those statements. Those members of staff believed what they had seen was inappropriate. The panel of Governors at the disciplinary hearing had the opportunity to hear live evidence from those witnesses, and those witnesses were questioned by the Claimant and his Trade Union representative. The panel of Governors were therefore able to assess the credibility of all witnesses. The conclusion reached by the panel of Governors from the witnesses was that it was not necessary or appropriate to remove the child in the way that the Claimant did on the 3rd April. Witnesses had described that they couldn't believe what they were seeing (Mrs Snow), they had been shocked that it happened so quickly with no time given to calm down (Miss Becker), Mrs Swallow commented that "in all her teaching career I've never seen any teacher physically carry a chi[l]d in the way Mr Dee did. I have in the past undertaken handling training and have never been taught a technique that resemble that" that was a common theme amongst the teachers who witnessed the incident that it was something surprising, shocking or unnecessary.

86. The disciplinary panel concluding that the Claimants conduct justified dismissal is clearly within the range of reasonable responses for the governors to decide to dismiss the Claimant on the basis of their findings. It is true that such conduct goes to the heart of the Head Teacher's responsibilities in safeguarding the children in his care. It is accepted that the Claimant expressed regret and reflected that he would have done things different with hindsight however, that is not the point. The point is what he did on the day in question.

87. The appeal panel hearing the case for a whole day. They did not accept the Claimants explanation that his decision to lift the child and carry Child A out of the classroom was the best way to minimise the risk to the child, to other pupils or to the Claimant. Nor did they accept that the Claimants approach was an appropriate was to deal with the disruption. They concluded that the act removing the child in the manner in which the Claimant did was dangerous and irresponsible and far from minimising the risk created a significant risk of harm to the child and others.

88. A lot has been made during the course of this hearing about the fact that the Claimant was found not guilty of assault in the Magistrate's Court in September. It is of course entirely true that criminal proceeding are an entirely separate process looking at a different question of law and an entirely different burden of proof.

89. As to whether or not there was a reasonable investigation, and whether process leading up to the disciplinary and delay was a reasonable process the tribunal was troubled by this. Firstly, whether the suspension was lawfully carried out and whether it was in breach of the respondents own policies. The fact of the matter was the suspension was for a period of fourteen months that may well have impacted (the length of delay) on the Governors when reaching their conclusions. Was it likely after such a period of absence from the school that they were not to

find the Claimant guilty of misconduct and therefore dismiss or whether in reality he was ever likely to be returned as Head Master. There was the question of whether the suspension was carried out in accordance with the rules of the Governing Body. The respondents say that technically if an urgent decision is required the decision to suspend could be made at the level it was. However, the suspension matrix guidance suggests that as it is an important decision it should be done by a Committee of the Governors, and in this case it was not and was carried out seemingly by representatives of the respondents who were not Governors, Mr Knights a Governor joining the meeting some twenty minutes later to effectively endorse the suspension decision.

90. We then have a LADO meeting before the Claimant was even asked to give his account of what happened. Mrs Jones at that meeting did not share the Claimants account in the incident log. Furthermore the suspension appears never to have been reviewed by the Committee of a Governing Body throughout the fourteen months. It would have also been only natural for people to gossip about the absence of the Head Master for such a long period of time and there must have been exchanges between Governors concerning the continued suspension of the Head.

91. Had Mrs Chevin the Chair of the panel of Governors at the disciplinary hearing over the period of time of suspension consciously or otherwise had her thinking towards the Claimant being shaped.

92. The Tribunal also had concern over the transparency of the charges that were put to the Claimant at the suspension meeting, effectively he was not told and left guessing for months and although it has been said that the Claimant should have put two and two together there is no reason why the Claimant could not have been given more detail at that meeting given the allegations were being put at the LADO meeting.

93. Furthermore, there is no evidence that the Police prevented the respondents from commencing their internal investigation at the same time as the Police investigation was being undertaken. The Tribunal did get the underlying feeling that the respondents hoped that the Claimant would be found guilty at the Magistrate's Court and then that would be sufficient for the respondents to proceed to a dismissal fairly quickly or for the Claimant to resign at that stage.

94. The Tribunal also had concerns whether the investigator Mrs Jones was entirely impartial. It would appear that she had a closed mind that the Claimant had behaved improperly in removing the child she indeed went on to express that view without qualification in the LADO meeting on the 10th April. Tribunal repeats for reasons best known to Mrs Jones she withheld the Claimants account in the behaviour log from the LADO meeting. In effect she allowed a one sided view to be reached at that meeting and was happy to accelerate the decision to suspend the Claimant.

95. At the Magistrate's Court hearing there was some concern as to whether Mrs Jones was sufficiently distanced from the prosecution. She clearly liaised with the Police before and during the Magistrate's trial, and she appeared to express a one-sided sympathy with the child's family at the hearing and also with the prosecution witnesses.

96. Mrs Jones final report appears to offer a slanted summary of the evidence and is not a neutral presentation. It is to be noted that the Claimants Trade Union representative who objected to her appointment as investigator and despite this Mr Davis/Mr Knights refused to remove her notwithstanding the fact there would have been other alternatives to investigate the matter.

97. There is also some concern that during the course of the investigation there was no attempt made to interview the student teacher who had been in the classroom throughout the incident with Child A. The respondent's reasoning for this was rather weakly we couldn't find him. It frankly beggars belief to suggest that a Local Authority had lost contact or were unable to trace a student teacher who had been training/teaching in one of their schools.

98. What is of concern is that the investigator in concluding her report went far beyond collating evidence or fact finding. Indeed she suggested and advocated particular conclusions on the charge (603)

> **"The Investigating Office concludes that, on the balance of probabilities and taking into account the frameworks within which staff in schools are expected to conduct themselves, Mr Dee has used unnecessary and excessive force in removing a pupil from a classroom on 3rd April 2014 and that this amounts to serious professional misconduct."**
>
> **When questioned on this Mrs Jones felt that she was entitled as an investigator to reach this conclusion. It does then question whether in the light of that report a panel of Governors with no prior experience of disciplinary processes or trained would come to a different conclusion.**
>
> **99. The tribunal also repeats that it does have some concern as to whether the disciplinary panel reached their conclusions on their own, there is no notes of their deliberation or whether they simply followed the conclusion of the investigator with the help of Mr Davis from HR who was at the disciplinary hearing and quite clearly played a greater part than he'd wish us to believe.**
>
> **100. Taking all these matters into account the dismissal was procedurally unfair."**

27. Before dealing with the grounds of appeal in detail, I should express this view, in relation to a matter which underpins a good deal of Ms Shepherd's argument. Although at paragraph 81 the Tribunal seems to recount the governors' findings at the disciplinary meeting as though they had been validly made, this was in the context of the Tribunal's analysis of the three-part "**Burchell**" test. It seems to me that, when considered alongside the comments as to Mrs Jones, and the effect of her "slanted' report on governors with no prior experience (see paragraph 98) and the impact and role of Mr Davis at the disciplinary hearing, and governors (see paragraphs 63, 79 and 99) this was far from a conclusion that the findings made by the governors were untainted.

28. Likewise, although the question rhetorically posed in relation to Mrs Chevin (see paragraph 91) was unanswered, in my judgment it reinforces my clear impression that serious concerns were being voiced by the Tribunal as to the validity of the conclusions reached by the governors, including Mrs Chevin. The proposition that paragraph 81 must be read as compelling the Tribunal, at the remedy stage, to make a finding that, stripped of the findings of procedural unfairness, the panel was bound to have reached the same conclusion is one which I reject.

29. At the outset of the Remedies Hearing the Tribunal identified the issues that were before it as being, first, whether there should be a **Polkey** reduction, second whether there should be a reduction in any compensation on the grounds of the Claimant's blameworthy or culpable conduct and third, whether there should be an ACAS uplift on the awards. Having set out the relevant legal principles, and a summary of the parties' submissions, the Tribunal set out its conclusions as follows (paragraphs 25 to 34of the Remedy Judgment):

> **"25. The tribunal reminds itself when considering whether or not to make a "Polkey" reduction it must construct from the evidence, and not from speculation, a framework which is a working hypothesis about what would have occurred had the respondents behaved differently and fairly. That inevitably does involve a prediction and thus some speculative element. It is never an easy task.**
>
> **26. The tribunal reminds itself of its findings in the Reserved Liability Judgment, particularly the reason for dismissal, conduct and the disciplinary panel findings in relation to that conduct (paragraphs 77-88).**
>
> **27. However, the tribunal also reminds itself of a number of procedural failings made by the respondents in the process leading up to dismissal and including the lack of any reasoning (produced by the chair of the panel) other than that completely prepared by Mr Davis of HR. There was the length of suspension, a period of some fourteen months, should it have been concluded as soon as reasonably practicable (which it could have been) after the proceedings in the Magistrates Court in September had found the claimant not guilty of assault. It seems more likely had that happened there was more chance, a very good chance a fair-minded set of governors might not have dismissed, given also a shorter period of suspension, April to September. Given also the findings of the Magistrate Bench on the creditability of the respondent's witnesses. The fact that if the respondent's/governors have a clear policy or who/how to suspend. It should be followed (paragraph 89) suspension, further was never reviewed by the governors.**
>
> **28. The failure of Mrs Jones at the LADO meeting to put forward the claimant's account of what happened.**
>
> **29. Given the length of suspension, some 15 months, did Mrs Chevin the chair of the panel of governors conducting the disciplinary consciously or otherwise already made up her mind as to what the panel's decision would be regarding any mitigating factors, or perhaps looking at the matter more objectively herself?**
>
> **30. Why could the internal investigation not be convened much earlier, there was no evidence the police prevented this. Again, did the respondents hope/believe the claimant would be found guilty of the criminal charges and that would then solve the problem/need to have a disciplinary at all.**
>
> **31. Did Mrs Jones throughout the process have a closed mind, expressing her view without any qualification at the LADO meeting, and wishing to accelerate the claimant's suspension? Furthermore, Mrs Jones' final report as investigating officer is bias, there is no balanced presentation of facts concluding:**
>
> > **"The Investigating Officer concludes that on the balance of probabilities and taking into account the frameworks within which staff in schools are expected to conduct themselves. Mr Dee has used unnecessary and excessive force in removing a pupil from a classroom on 3 April 2014, and that this amounts to serious professional misconduct."**
>
> **32. It is difficult to see in light of Mrs Jones' decision going far beyond the remit of an investigator, how a panel of school governors with no prior experience of disciplinary processes**

or training would or could come to a different conclusion. Mrs Jones should only have presented the facts and not pushed the governors into a corner.

33. The tribunal therefore concludes on predicting, could the employer have fairly dismissed, and if so, what were the chances that this employer would have done so are 50% in assessing the chances of what another panel of governors would have done, had the procedural unfairness been removed?

34. On the question of contribution. Clearly removing the child in the manner in which it occurred as the claimant acknowledges with hindsight was not the best way forward. It was in the heat of the moment and potentially an escalating situation with a volatile child. The claimant must accept some blame and contribution towards his dismissal which the tribunal also assess at 50%."

30. Finally, I set out the brief Reconsideration Judgment, which deals with the ACAS uplift point (see paragraph 3 of the Judgment):

"3. Employment Judge Postle does accept he omitted to deal with the question of whether there should be an ACAS uplift on the awards in the judgment.

The ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 gave Tribunals the power to increase up to 25% on awards of compensation if the Tribunal feels that a respondent has unreasonably failed to follow the guidance set out in the code.

In *Kuehne & Nagel Limited v Cosgrove* EAT/0165/13 it was said that an employment tribunal may only consider adjusting the compensatory award once it has made express finding that a failure to follow the code was unreasonable and adjustment does not automatically follow from a breach of the code.

Furthermore, an employer's failure to follow its own internal procedures will not necessarily lead to a finding of a breach of the ACAS Code.

Employment Judge Postle accepting the procedure leading to dismissal was flawed did not conclude that there were unreasonable failures to follow the code. In exercising the Tribunal's discretion, Employment Judge Postle concluded this was not a case when an uplift was warranted."

31. I shall deal first with the **Polkey** point. Mr Khan, for the Claimant, suggests that, taken in isolation from the further reduction for contribution, it is a fair "middle ground", the parties having argued, respectively, for a zero reduction and a 100% reduction. That said, he points to what the Tribunal described, at paragraph 27, to "…more chance, a very good chance…" that a fair-minded panel of governors would not have dismissed. A reduction of 50% is not reflective of that "good chance", he argues, which must, by definition be in excess of 50%.

32. Miss Shepherd makes three points. First, that, notwithstanding a correct self-direction (at paragraph 7 of the Remedies Judgment) the Tribunal made reference, at paragraph 27, to "a fair-minded set of governors" and at paragraph 33 to "assessing what another panel of governors would have done", which was an error of law. Second, that a number of the factors said by the Tribunal to have been relevant to the decision on **Polkey** could have had no possible bearing on the findings which the disciplinary panel had to make and/or were not accurate summaries of the findings at the liability stage: see paragraphs 27 to 29. This includes not answering the rhetorical question posed in relation to Mrs Chevin.

33. There is force in each of these arguments. The main difficulty I have with the conclusions in the Remedy Judgment is that there is no explanation by the Tribunal as to how it weighed the competing factors in arriving at a 50% figure, nor as to the relevance of each the various factors identified by it to the task it was obliged to undertake. I struggle to see the relevance of the length of the suspension to the fact-finding issue, nor the relevance of Mrs Jones' behaviour at a meeting which was part of a safeguarding process, and which formed no part of the disciplinary hearing. The length of suspension and the delay in the investigation *could* have had a bearing on the outcome of the hearing – memories could have dimmed, perhaps – but if that was what the Tribunal had in mind I would have expected some form of explanation. The disciplinary hearing was entirely separate from the Magistrates Court hearing, as the Tribunal had pointed out. It may be that the Tribunal was using the acquittal by way of analogy to support the premise that it was not a foregone conclusion that the *same* disciplinary panel, untainted by improper input from Mrs Jones and Mr Davis, *would* have reached a similar conclusion to that of the Magistrates, either that the Claimant was not guilty of gross misconduct, or that a lesser sanction would have been imposed. However, that is guesswork on my part.

34. As to the reference to what "another panel of governors" might have done, that does, again, indicate that the Tribunal was straying from the process – inevitably speculative in part – of assessing what might have happened had the relevant unfair elements been missing on the same panel. I agree with Miss Shepherd that, although the point seems not to be the subject of authority, to carry out the exercise with a different set of hypothetical decision makers from the same employer cannot be right as a matter of law.

35. Miss Chevin had given evidence at the liability stage, and the Tribunal was thus in a position to answer its own questions about her, and to make some assessment as to how she may have reacted in the absence of the factors rendering the dismissal unfair. Contrary to Mr Khan's submission, I do not think the Respondent can be criticised for not calling the decision makers at the remedy stage. It would be an unusual witness who would be fairly able to put him or herself in the hypothetical situation of not possessing certain knowledge and/or not being influenced by certain matters which have in fact occurred.

36. Miss Shepherd cited **Whitehead v Robertson Partnership** EAT 0331/01 in which the EAT stressed the importance of Employment Tribunals adequately explaining their reasons for making a **Polkey** reduction. At paragraphs 22 to 23 of the Judgment, HHJ Peter Clark said this:

> **"22. The relevant paragraphs of the Employment Tribunal's reasons are paragraphs 11-13. In answering what we have earlier described as the explicit question it is, we think, incumbent upon the Employment Tribunal to demonstrate their analysis of the hypothetical question by explaining their conclusions on the following sub-questions:**
>
> > **(a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?**
> >
> > **(b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct even although the Employment Tribunal found as a fact that misconduct was not made out for the purposes of the contribution argument; alternatively, if for some other substantial reason, was that a sufficient reason for dismissal: similarly, capability.**

> **(c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?".**
>
> **23. We think that the Employment Tribunal's failure, in their reasons, to deal with the fairness of the potential dismissal following a proper investigation causes these reasons to fall short of the degree of reasoning required by the guidance given by the Court of Appeal in *Meek v City of Birmingham District Council* [1987] IRLR 250.**

37. I agree with Miss Shepherd that the reasoning in the present case similarly falls short of the **Meek** guidance.

38. So far as the reduction of 50% by way of contributory fault is concerned, the rival submissions each have force. Mr Khan argues that the only reason for a 50% **Polkey** finding must be that there was a 50/50 chance that the Claimant was dismissed, and that dismissal can only have been on the basis of his conduct. Conversely, Miss Shepherd contends that the finding means that employer and employee were equally to blame in the case, when it has done nothing wrong, so far as the underlying event is concerned. Though not apparently canvassed below, I made the point in argument that it is conceivable that the Respondent may well have had a part to play in failing to ensure that an employee of many years standing was up to date in relevant restraint and safeguarding training. I say that not to set a hare running when the matter is remitted, as it must be, but to note that the issue is not as cut and dried as the Respondent contends.

39. The argument that the making of both deductions necessarily amounts to a double penalty was rejected in **Rao v Civil Aviation Authority** 1984 ICR 495 CA. However, the absence of any reasoning given by this Tribunal for arriving at that figure – beyond the barest of explanation at paragraph 34 - makes it impossible to assess on what basis the Tribunal arrived at its conclusions. That makes this element of the decision, too, one which is not **Meek** compliant.

40. In relation to the failure to explain why a different deduction applied to the basic and compensatory awards, Miss Shepherd referred me to **RSPCA v Cruden** 1986 ICR 205 in which the EAT held that, although a Tribunal is not necessarily bound to reduce the basic and compensatory awards in precisely the same proportions, it was likely to be only in exceptional circumstances that the deductions from the basic award and the compensation award would differ and, if a Tribunal does reduce the basic and compensatory awards by different proportions, it should give its reasons for doing so. Mr Khan does not resist with any force the proposition that the present position cannot be maintained, in this case, in the light of authority.

41. Finally, there is the issue of the uplift. Five "breaches" of the code were contended for in the Claimant's submissions. None of these was individually identified by the Tribunal in the exceptionally brief and unreasoned passage in the Reconsideration Judgment. It is difficult to square the critical comments in the first two Judgments, particularly as to the delay in dealing with the disciplinary hearing and the failure to review at any time the Claimant's suspension, with the bald conclusion that the failures to follow the code were not unreasonable. It is simply impossible to know how the Tribunal arrived at that conclusion, which, again makes it non- **Meek** compliant.

42. It follows from the above that the appeal and cross appeals are allowed. The Remedy Judgment is quashed in relation to the points raised above. So far as disposal is concerned, there is no reason to suppose that the Tribunal as previously constituted would not adopt an entirely professional approach to the task of revisiting the issue of remedy. Indeed, as the task will necessarily involve a careful consideration of the evidence given and findings made at the Liability Hearing, it would be an exceptionally difficult task for another Tribunal to undertake.

43. Broadly, and without wishing to be too proscriptive, the Tribunal should consider first, what decision the panel would have reached on the question whether the Claimant was guilty or not of gross misconduct and/or misconduct in respect of the charges he faced. If following that process, it determines that he would have been found guilty of gross misconduct or misconduct, it must then determine what sanction the panel would have imposed. Each factor which is relevant to the respective determination(s) by the Tribunal should be identified and the effect of it explained.

44. Naturally, the outcome cannot be expressed other than by reference to a percentage, but it is important that the basis for that is set out.

45. A similar exercise should be completed in relation to the deduction for contributory fault, and confirmation given that the Tribunal has "stood back" and looked at the matter as a whole, avoiding double counting and ensuring that the result is just and equitable.

46. If a different percentage is to apply to the compensatory and basic awards, the basis for this should be set out.

47. Finally, full reasons should be given in relation to each of what the Claimant contends to amount to breaches of the Code, and, should it be held that the breaches were not unreasonable (to use shorthand – the correct test must be applied) reasons for this should be given.