Appeal No. UKEAT/0041/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 11 September 2019

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

JAGEX LIMITED — APPELLANT

MR JOHN McCAMBRIDGE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL DYAL (of Counsel) Instructed by: Mills & Reeve LLP Botanic House 100 Hills Road Cambridge CB2 1PH
For the Respondent	MR JONATHAN COOK (of Counsel) Pro bono Cambridge Employment Law LLP Stratford House Ousden, Newmarket Suffolk CB8 8TN

SUMMARY

UNFAIR DISMISSAL – Contributory fault

UNFAIR DISMISSAL – Polkey deduction

CONTRACT OF EMPLOYMENT – Wrongful dismissal

The Claimant was summarily dismissed after finding a document that had been left on the communal printer which contained the salary of a senior employee and telling a few colleagues about it. Although the Claimant was not responsible for any wider dissemination of the information, it was embarrassing for the Respondent when the level of the executive's pay became more generally known in the office.

The Claimant succeeded in his claims of unfair and wrongful dismissal. No deduction for either contributory fault or a **Polkey** reduction was made and the matter was adjourned for a remedy hearing. The Respondent appealed the wrongful dismissal finding and the Tribunal's refusal to make a reduction in respect of both **Polkey** and contributory fault.

Held: There was no error in the Tribunal's approach to the construction of the contract and its finding that the Claimant's behaviour did not constitute gross misconduct. There was no express term of the contract that salary information was confidential, and nor could it be implied into the contract. In any event, even if it had been, the Tribunal was entitled to find that the Claimant had not breached clause 14 concerning confidential information.

Nor had the Tribunal either misdirected itself or failed to follow its direction on the correct approach to **Polkey**. The Tribunal found the decision to be substantively, as well as procedurally, unfair. The tenor of the Reasons when read overall is that no reasonable employer would, or could fairly, have dismissed the Claimant for what he did. In a case such as this there is no need for a Tribunal to embark on a detailed discussion of **Software 2000** or the line of authorities such as **King v Eaton (No.2)** [1996] IRLR 199 and **Scope v Thornett** [2007] IRLR 155. This was

not a redundancy selection exercise, but a substantively flawed decision where the Tribunal found that the Respondent had wrongly sought to make an example of the Claimant to cover their own discomfiture and had been exceptionally heavy handed. It is inherent in its decision that fair procedures would not have made the dismissal fair and the Tribunal has sufficiently answered the questions posed in the approach recommended in paragraph 54 of **Software 2000**.

However the Tribunal had erred in considering a contributory fault reduction could only be made if the Claimant had committed an act of gross misconduct, which was too high a threshold. The correct test is to consider if the conduct was culpable, blameworthy, foolish or similar which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract **Nelson v British Broadcasting Corporation** (No. 2) [1980] ICR 110.

The issue of contributory fault is remitted back to the same Tribunal (applying the factors in **Sinclair Roche & Temperley & Others v Heard & Anor** [2004] IRLR 763, to be determined at the forthcoming remedy hearing.

HER HONOUR JUDGE STACEY

1. There are three issues in this appeal: firstly, having found that the Claimant was unfairly dismissed, whether the Tribunal erred in its approach to the application of **Polkey** by not making a percentage reduction to the compensatory award (which is yet to be determined); secondly, whether the Tribunal erred in deciding not to make a reduction for contributory fault in relation to both the basic and compensatory awards; and thirdly, the Tribunal's approach to the construction of the Claimant's contract of employment and whether, based on a proper construction, there had been any breaches of it by the Claimant. The latter point therefore sought to challenge the Tribunal's finding that the Claimant was wrongfully dismissed and its decision to award him notice pay, which potentially impacted on both the contributory fault and **Polkey** findings, since if the Tribunal had erred in its approach to the Claimant's contractual obligations, it could inform a consideration of blameworthiness, and whether he could have been dismissed by a reasonable employer had a fair procedure been followed.

2. In a Reserved Judgment of the Employment Tribunal sitting at Bury St. Edmunds before Employment Judge S King on 14 March 2018 sent to the parties on 17th May 2018, the Tribunal found that the Claimant had been both unfairly and wrongfully dismissed and adjourned the matter for a Remedy Hearing. It decided that no reduction should be made in respect of either contributory fault or **Polkey**.

3. I shall continue to refer to the Appellant as the Respondent and the Respondent to the appeal as the Claimant, as they were before the Tribunal.

Relevant background and employment tribunal decision

ET Findings of fact

4. The Claimant was employed as a lead concept artist for the Respondent company, which develops and publishes on-line browser-based computer games. The Respondent has some 320 employees and considerable administrative resources with its own HR department including senior members of the HR team. The Claimant had six years unblemished service with the Respondent prior to his summary dismissal purportedly on grounds of gross misconduct. He led a team of four others and had been promoted to the role of lead concept artist in 2016.

5. At 7am on the morning of the 24 August 2017 the Claimant found a visa application that had been left uncollected on the communal printer for the mother-in-law of Mr Hamza Muddasir, Senior Vice President and Head of Corporate Strategy. It included details of Mr Muddasir's salary. Within the company there was a level of disquiet about the pay levels for developers, as compared to the salary of the executives. There were no contractual provisions preventing discussions on pay, but executive salaries were not common knowledge within the company.

6. Assuming Mr Muddasir would collect the document later, the Claimant left the document where uncollected documents were usually placed and returned to his desk and carried on working. Another employee, more senior to the Claimant, Matt Heath, Events Executive, also saw the visa application by the printer that morning and left it there, just as the Claimant had done.

7. It was still there later that morning when the Claimant pointed it out to a colleague, Stuart Murray, as they were passing. He was the only person the Claimant told that day.

8. Unsurprisingly word quickly got round and by lunchtime that day a group of nine employees at an offsite work event in a restaurant were playing what the Tribunal called a bidding game - Guess the Pay of the Executive you might call it – where people would shout out a guess and be told if the salary was higher or lower than the guess, until someone gave an accurate bid. The game had been initiated by Joe Redstall, a more senior employee than the Claimant, who was the senior lead at the off-site event, after he had received a text with Mr Muddasir's pay details from someone in the office called Alan. Matt Heath was also present at the lunch and took part in the game. The Claimant had not told either Alan or Joe Redstall about the visa application or the information about Mr Muddasir's salary which was contained in it. The Tribunal judgment does not make a finding about how Alan knew about it and it is not apparent if the Respondent knew how he came by the information. The Claimant, who was not part of the lunch, was in the office completely unaware of what was happening at the off-site work event.

9. After the lunch and back at the office, Joe Redstall raised the issue of Mr Muddasir's pay with the lead designer, David Osborne, as he was concerned about its effect on staff morale. He did not mention his role in the bidding game. Matt Heath also raised the issue with a more senior manager than himself, John Wilcox.

10. Meanwhile the document remained uncollected by the printer. When the Claimant noticed that it was still there the next day, he put it in a confidential waste bin. He also mentioned it to a couple of colleagues, one of whom was a direct report.

11. At 10am that day, 25th August, the Claimant was asked to speak to David Osborne in the presence of HR. He was told it was an investigation into a potential disciplinary matter. Mr Osborne considered the Claimant to be somewhat bemused during the meeting and could not see

what all the fuss was about. There was a dispute between the Claimant and the Respondent about what the Claimant said during the investigatory meeting. The Tribunal found the Claimant to be a more reliable witness than the Respondent's witnesses on the point and found as a fact that he had not accepted that the document was confidential during the meeting. They also found that he had been open about the three people he had mentioned it to, and that he had mentioned it in the context of the pay disparity between their salaries and the executive management salaries.

12. The Claimant was then summonsed to a disciplinary hearing also to be heard by David Osborne (who had also been the investigating officer) on a charge of gross misconduct described as "unauthorised disclosure or misuse of confidential information".

13. The Tribunal found as follows:

> **"27. At this point, the claimant was unaware that others beyond the three people he had spoken to had any knowledge of the matter. The claimant did not request copies of the documents. The claimant was not told what documents existed. The claimant was not provided with a copy of the disciplinary policy or his contract of employment. The claimant was not provided with a copy of the investigatory notes to agree as to their accuracy. The claimant was not provided with copies of the investigatory notes of others following the investigations conducted. At no point was the claimant suspended and he continued to attend work as normal during this period"**

The Claimant duly attended the disciplinary hearing on 7th September accompanied by a colleague. He made the point that it was a shared printer, the document was not marked private and confidential and that under the company procedures it was the person who had printed it who had responsibility to ensure it remained confidential. The Claimant stated he assumed that as Mr Muddasir was an executive his pay would be in a company published annual report in any event (although that was not the case). The Claimant apologised but said he did not feel that what he had done was that important but said he regretted revealing it to a couple of people.

14. The day after the meeting the Claimant was summarily dismissed for gross misconduct. The dismissal letter stated that the Claimant's view that the information was

> **"office banter and not something that was that bad to share" gave Mr Osborne concern. He said "It demonstrated to me that you did not understand the severity of the incident. You also did not adequately show remorse for your actions or consideration for the injured party, instead suggesting the blame is that of the party for leaving the information on the printer. This leaves doubt as to whether you would do it again."**

The letter went on to say:

> **"We did consider your 6 years employment and clear disciplinary record however it was felt that there was a significant breach of trust and confidence between yourself and Jagex as your employer. You purposely shared the information without the consent of the individual that it was regarding and it is felt that this is a significant breach."**

15. Unbeknownst to the Claimant Mr Redstall also attended a disciplinary hearing on the 7th of September with Mr Osborne and received a first written warning for six months for the same gross misconduct offence. Matt Heath was not disciplined.

16. The Claimant appealed against his dismissal but was unsuccessful.

Contractual terms

17. The Claimant's contract of employment contained a number of clauses concerning confidentiality and company property. The Tribunal set out the relevant clauses, helpfully underlining the parts relied on by the Respondent as follows:

> **"14.1 You must not during your employment (other than in the proper performance of your duties) or at any time thereafter use for your own purposes or disclose to any third party any Confidential Material and you must use your best endeavours to prevent such disclosure by third parties.**
>
> **14.2: All Confidential Material and all other documents, papers and property on whatever media and wherever located which may have been made or prepared by you, or at your request or have come into your possession or under your control in the course of your employment or which relate in any way to our business (including prospective business) or our affairs or those of any customer, supplier, agent, distributor or subcontractor of ours are, as between us deemed to be our property….**
>
> **14.3 You must immediately inform us if you become aware of the possession, use or knowledge of any of the Confidential Material by any person not authorised to possess, use or have knowledge of the Confidential Material, whether during your employment or thereafter and**

you must at our request provide such reasonable assistance as is required to deal with such event.

14.4. The provisions or this Clause do not apply to any Confidential Material which:

(a) is in or enters the public domain other than by breach of this Contract; or

(b) is obtained from a third party who is lawfully authorised to disclose such information; or

(c) is authorised for release by the prior written consent of the board of directors; or

(d) is a protected disclosure as defined by and made in accordance with Part IVA Employment Rights Act 1996.

14.5 Nothing in this Clause will prevent you from disclosing Confidential Material where it is required to be disclosed by judicial, administrative, governmental or regulatory process in connection with any action, suit, proceeding or claim or otherwise by applicable law.

14.6 Failure by you to comply with this Clause shall represent gross misconduct entitling us to terminate your employment with immediate effect.

…

14.9 defined Confidential Information as follows:

Confidential Information" means:

(a) any trade secret, customer information, trading detail or other information relating to the Company's business; goodwill, secrets or personnel, Intellectual Property Rights of the Company or any Group Company, which is not publicly available, including but not limited to business methods, corporate plans, management systems, finances, new business opportunities, research and development projects, marketing or sales of any past, present or future product or services, secret formulae, processes, tools and library development, inventions, designs, know-how discoveries technical specifications and other technical information relating to the creation, production or supply of any past, present or future product or service of the Company or Group Company and lists or details of clients, potential clients or suppliers of the Company or any Group Company;

(b) any version of any code, algorithm, program or similar item capable of being recorded, copied or transmitted, which has been originated, developed all modified by the Company or any Group Company;

(c) any information specifically designated by the Company, any other Group Company, or any customer as confidential;

(d) Any information supplied by the Company or any Group Company by a third party in relation to which a duty of confidentiality is owed or arises;

(e) Any information required to be treated as confidential by any legislation or professional or regulatory rule or requirement;

(f) Any information or item, which should otherwise be regarded as possessing a quality of confidence;

(g) Any information having commercial value or use in relation to the business activities of the Company or any Group Company, including any such information introduced by you into any computer or other electronic system or storage method owned or operated by the Company or any other Group Company; and

(h) Any information or item obtained, derived or compiled from any of the above."

18. The Tribunal noted that there appeared to be an error and that the definition of Confidential Information was probably intended to apply to the term Confidential Material in the

contract but observed that it was "nevertheless relevant as the clauses are comprehensive with regard to the typical expectations of confidential information they are aimed to protect, in this case the Company's intellectual property from which it derives its business in particular." (Paragraph 29).

19. Under the Respondent's employee handbook it was stated that gross misconduct included but was not limited to "unauthorised disclosure or misuse of confidential information".

20. The Respondent also had in place a detailed information security book that required any paper documents, electronic files or electronic media within the company to be suitably marked with a classification order that protection would be provided for their storage and processing. Internal documents labelled "personal" or "addressee only" consisted of information that could cause embarrassment to the Respondent or a member of staff if disclosed, such as payslips, salary communication, benefits or disciplinary action. The visa application found on the printer was not marked in accordance with the information security system.

21. The handbook also set out provisions concerning clear desk and clear screen procedures whereby employees were responsible for not leaving anything lying around which could be mislaid or read by somebody else not authorised to see it. The policy had been updated in October 2017 (after the Claimant's dismissal) and it defined third parties as contractors or consultants.

ET's discussion and conclusions

22. In the unfair dismissal claim the Tribunal concluded that the Respondent had established a conduct reason for dismissal in the sense that it was the Claimant's actions or conduct which had led to the dismissal. As to whether the employer held a genuine belief in the conduct as

misconduct, and in particular whether the Claimant's behaviour amounted to misconduct as defined in the contract of employment, the Tribunal was somewhat sceptical, but on balance accepted that the belief was genuinely held by Mr Osborne and his HR advisers, even though no-one else at the time had considered it serious.

23. The Tribunal went on to conclude however that it was not a reasonably held belief for a number of reasons: the decision taker had approached the matter with a closed mind; he had not considered if the behaviour amounted to a breach of the express contractual terms; and because of the catalogue of procedural failings. The Tribunal concluded that the decision fell outside the range of reasonable responses available to an employer.

24. The Tribunal subjected the Respondent to some fairly trenchant criticism and found that the Respondent

> **"wanted to make an example of the Claimant and reacted in an extraordinarily heavy-handed manner……No reasonable employer would class discussion of a colleague's salary internally as gross misconduct. The Claimant did not breach any policies in obtaining that information and whilst it was an error of judgement to share information left lying around no reasonable employer would say that this type of disclosure would be gross misconduct."**

25. The label attached to the conduct was more akin to misconduct, the Tribunal found.

26. The Tribunal sensibly avoided being distracted by a disparity of treatment argument as between Mr Redstall and the Claimant. It reminded itself

> **"what is really the issue here is whether the employer in this particular case dismissed the Claimant as a reasonable response to the misconduct proved and I have already dealt with this point."**

In finding the dismissal was substantively unfair, the Tribunal did not therefore rely on the fact that Mr Redstall only received a first written warning for his conduct.

27. As well as finding the dismissal substantively unfair, the Tribunal went on to find (paragraph 66) that it was also procedurally unfair noting that:

> **"…the Respondent has conducted this case with some fundamental errors as to the principles of both law and equity and the claimant's right to a fair hearing. It has failed to follow its own policy and procedure and the ACAS code of practice 1."**

Contributory fault

28. The Tribunal identified the issue in the following terms at the beginning of the hearing:

> **"3.5 If the dismissal was unfair, did the claimant contribute by culpable conduct which requires the respondent to prove that the claimant committed an act of gross misconduct alleged?"**

The issue had been formulated by the Tribunal itself, it was not working from an agreed list of issues prepared by the parties. The conclusions the Tribunal reached were as follows:

> **"74. This requires the respondent to prove the claimant committed an act of gross misconduct as alleged. Given my findings and conclusions above, I do not find that the claimant committed an act of gross misconduct. Whilst his conduct contributed the disciplinary action against him it did not cause or contribute to the dismissal as this was outside the range of reasonable responses. There was thus no culpable conduct by the claimant.**

Polkey

29. The Tribunal articulated the **Polkey** issue as follows:

> **"3.6 Does the respondent show that if there had been a fair procedure then he would have been dismissed in any event, and if so, what was the percentage chance or when?"**

30. In its discussion and conclusions the Tribunal cites the extent of the procedural shortcomings: that the investigating officer and disciplining officer were the same; that he had prejudged the matter; that he had not considered the contractual terms properly; that the Claimant had not been given the documents he was entitled to; the breaches of the ACAS code of practice; that the Claimant had had not been given the full picture; and that the appeal hearing did not remedy the defects; and, when looked at overall the procedure had been unfair. It does not repeat its earlier findings that the dismissal was substantively, as well as procedurally unfair, but concludes its observations with the following:

> **"80. Given the above I cannot say with any certainty that the claimant would have been dismissed fairly in any event as a percentage likelihood or after a passage of time. The breaches in the procedure are numerous and unusual for a respondent of this size with those administrative resources."**

It therefore made no **Polkey** reduction.

Wrongful dismissal

31. The Tribunal found that there was no breach of any of the express contractual terms and nor did the Claimant's actions amount to gross misconduct in common law. They found the Claimant was therefore wrongfully, as well as unfairly, dismissed and the matter was adjourned off for a remedy hearing. The remedy hearing has not yet taken place.

The grounds of appeal

32. The nine grounds of appeal were initially rejected on the sift under rule 3(7) by HHJ Barklem, but three grounds were permitted to proceed at a full hearing by HHJ Auerbach at a rule 3 (10) hearing.

Contributory conduct

The law

33. S.122 **Employment Rights Act 1996** (ERA 1996) sets out the statutory provisions concerning the calculation of the basic award and subsection 122(2) provides as follows:

> **"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 that amount accordingly."**

S.123 sets out the statutory provisions in relation to compensatory awards and subsection (6) provides as follows:

> **"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."**

A It is common ground that there is no requirement for the conduct or action of the complainant in question to amount to gross misconduct, for it to be relevant conduct or action for the purposes of either subsection. All that is required is for the conduct to be culpable, blameworthy, foolish or similar and this includes conduct that falls short of gross misconduct, and need not necessarily B amount to a breach of contract. The lead case of **Nelson v British Broadcasting Corporation** (No. 2) [1980] ICR 110 states as follows:

> **"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any** C **conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or, if I may use the colloquialism, bloody-minded. It may also include action which though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved." (per Brandon LJ).**

D

Respondent's submission

34. The Respondent's submission is that the Tribunal has applied too high a test by considering that gross misconduct only will trigger the possibility of a contributory fault E deduction and, having applied too high a threshold, have failed to consider the issues of justice and equity and the matter can only be dealt with by a remission back to either the same, or a differently constituted, Tribunal.

F

Claimant's submission

35. The Claimant conceded that the Tribunal had, on the face of it, misdirected itself on the G test of what constitutes conduct for the purposes of S122(2) and S123(6) in paragraphs 3.5 and 74, however it is implicit from their reasoning when the judgment is read as a whole, that they have decided that it would be neither just nor equitable for any deduction to be made and the Tribunal's error, such as it is, makes no difference to the outcome of the case in this regard. H Whilst it considered the behaviour to be an error of judgement, it is clear that the Tribunal did not consider it to be unreasonable or blameworthy in the circumstances of the case, and it is

apparent that the minor misdirection made no difference to the outcome of the case. It was entirely inappropriate for a contributory fault deduction to be made. Mr Cook for the Claimant relied on **Glenrose (Fish Merchants) Ltd v Chapman & Others** UKEAT/0467/91 Hutchison J. where the EAT upheld a finding by the Industrial Tribunal (as it was then called) that there was no conduct on the claimants' part that was capable of amounting to culpable or blameworthy conduct.

36. In that case, a group of fish filleters were dismissed for refusing to do one hour's overtime in what had been concerted action. They were required to work overtime "as and when fish becomes available" in their contracts of employment. The staff handbook provided that "Because the fish industry is a perishable goods industry and fish supplies are uncertain and must be purchased when available, this will necessitate overtime working for all employees, therefore all employees will work a reasonable amount of overtime at management discretion." The Tribunal found that the claimants' conduct had been a sufficient reason to dismiss, but the respondent had not acted reasonably in deciding to dismiss. As to contributory fault it merely stated: "We reject any notion of contribution to dismissal." On appeal, with a Mr B Langstaff (as he then was) for the claimants, the appeal was briskly dismissed. The EAT found that

> **"It is certainly not the law that in every case where the dismissal is based on conscious breach of contract by the employee there must be a finding of contribution. It was open to the tribunal to conclude, in all the circumstances as they found them to be, that it was not just and equitable to reduce the awards…….As to paucity of reasons… this is not in our judgment a case which calls for the intervention of this court on that score, since we are persuaded that Mr Langstaff is correct in inviting us to infer what the tribunal were doing in uttering that brief sentence, was in effect to say that in all the circumstances and in the light of the facts found by them, they had concluded that the present was not a case in which it was appropriate to make any deduction for contributory fault."**

Polkey reduction

The law

37. I have set out above the direction the Tribunal gave itself at 3.6 and it's finding at paragraph 80. There is no criticism by Mr Dyal for the Respondent of the self-direction at paragraph 3.6, but he does challenge the conclusion at paragraph 80.

38. Both sides helpfully reminded the Tribunal of the landmark case of **Software 2000 Ltd v Andrews** [2007] IRLR 568 and the seven points made by Elias P (as he then was) in paragraph 54.

> **"54. The following principles emerge from these cases:**
>
> **(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).**
>
> **(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.**
>
> **(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.**
>
> **(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.**
>
> **(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.**
>
> **(7). Having considered the evidence, the Tribunal may determine**
>
> > **(a) That if fair procedures had been complied with, the employer has satisfied it — the onus being firmly on the employer — that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2) .**
> >
> > **(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.**

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

39. Mr Dyal asserts that the Tribunal ducked the task of speculating and applied the wrong test when considering the matter as set out in paragraph 80 above. A predictive exercise was entirely possible and, in his submission, had it been undertaken, given the seriousness of the Claimant's conduct (when judged objectively), the Tribunal should have a concluded that even with a fair procedure, it could have led to a fair dismissal.

40. Mr Cook for the Claimant submitted that Mr Dyal has misread paragraph 80 of the Tribunal's Judgment which is to be interpreted as meaning that even if fair procedures had been followed, no reasonable employer could have dismissed the Claimant fairly, since the Tribunal had found the Claimant's dismissal to be both substantively, as well as procedurally, flawed.

Wrongful dismissal

41. In the context of its discussion of unfair dismissal the Tribunal notes that the Respondent did not consider in any real detail whether the information disclosed was confidential as defined in the written contractual terms. They found that it was "merely taken as read" (paragraph 48) and that there was "no real examination as to whether the information is truly covered by the clause but an assumption it did." It did not accept the dismissing officer's evidence that he had scrutinised the clause, instead finding that he had "made assumptions as to its contents." (paragraph 55).

42. Of course the Tribunal's focus in the unfair dismissal complaint is the reasonableness of the employer's actions, since it is considering the statutory tort, with pure contract law to be considered in the wrongful dismissal claim. The Tribunal held that it was not reasonable for the Respondent to conclude that the Claimant had breached his contractual terms describing the matter as follows:

> **"60. The respondent's interpretation and application of the contractual clauses was not reasonable in the circumstances. There was no disclosure outside the respondent. This was an internal disclosure of information on a personal document left lying around which was not classified as confidential."**
>
> **61 …. The claimant did not breach any policies in obtaining that information and whilst it was an error of judgement to share information left lying around no reasonable employer would say that this type of disclosure would be gross misconduct."**

43. The Tribunal analysed the contractual provisions in detail in paragraphs 81–85 under the heading of wrongful dismissal. The Tribunal notes that nowhere in the lengthy contractual clauses does the Respondent state that salaries are confidential material. It repeats its earlier observation that there has been inconsistent use of terms switching between "confidential material" and "confidential information", but seems to conclude it is a drafting error, demonstrative of sloppy drafting, but the terms are intended to be co-terminous.

44. It concluded that the salary information was not confidential since it was not sufficiently defined or particularised in any of the lengthy clauses. The focus of the Respondent's concern over confidentiality in the written contract was to protect its trade secrets, products, marketing opportunities, inventions etc and was detailed and specific in the type of items sought to be protected by confidentiality in its definition of Confidential Information at clause 14.9(a). The Tribunal was unimpressed by the Respondent's argument that the definition of confidential information stretched to include salary details.

45. It also found that the salary information had entered the public domain because it had been left on the printer by Mr Muddasir, so in any event it had lost any quality of confidence that it might have had. It also considered the alternative scenario that even if the salary information was confidential material, and it had not lost its confidentiality by being left lying around and by Mr Muddasir not complying with the confidentiality coding and classification system, the Claimant had not done anything with it that put him in breach of his contract. Finally it concluded that it was wrong about all of that, the matter was not serious and could not be categorised as gross misconduct under the contractual terms.

Respondent's submissions

46. Mr Dyal submitted that the Tribunal had erred in finding that salary details fell outside the scope of the confidential information/material definition. The clause is broadly drafted and as a matter of construction salary information relates to the company's business and/or personnel and/or finances pursuant to clause14.9(a), but if he is wrong about that salary information falls within clause 14.9(f) as it is information that should reasonably be regarded as possessing a quality of confidence. The three colleagues the Claimant had spoken to about it or shown the document to, were third parties and he had revealed the information for his "own purpose" which was to gossip.

47. Mr Dyal also challenged the Tribunal's construction of "public domain" as lacking reality; and its conclusion that colleagues were not third parties, and therefore there had been no disclosure. Mr Dyal needs to succeed on all three points to succeed.

48. Mr Dyal maintained that properly construed the Claimant was in repudiatory breach of contract entitling the Respondent to dismiss him summarily, since clause 14.6, set out above,

made provision for that. But even if it was not a repudiatory breach, it was nonetheless a breach of contract of some sort and should therefore have been taken into account in the Tribunal's contributory fault discussion, even if it did not entitle the Respondent to dismiss him without notice. The Tribunal had misconstrued the contract and the case must be remitted to a fresh Tribunal to consider the matter with the guidance of this Tribunal to assist in the exercise of construction, Mr Dyal submitted.

The Claimant's submissions

49. Mr Cook for the Claimant accepted Mr Dyal's submission that the drafting error and mismatch between confidential information and confidential material was a modest drafting slip, an obvious mistake, and the definition of "Confidential Information" in clause 14.9(a) was intended to apply to "Confidential Material". Indeed the Tribunal accepted as much in its decision, which I read more as an observation on poor draughtsmanship.

50. Mr Cook set out three uncontroversial propositions as to the correct interpretation of employment contracts, which Mr Dyal endorsed.

51. Firstly as per McCombe J in **Harlow v Artemus International Corporation Limited** [2008] IRLR 629 paragraph 28:

> **" …. The fact of the matter is that employment contracts today, such as Mr Harlow's in this case, consist of all sorts of material put together by human resources offices, rather than lawyers, and are designed to be read in an informal and common sense manner in the context of a relationship affecting ordinary people in their everyday lives. Close arguments arising out of nuance of language, possibly of moment in more formal contracts, seem to me to be singularly inappropriate in such a context, unless it is made clear in the document that an important point of distinction is being made."**

52. Secondly, where a contract is badly drafted and its literal interpretation would lead to a result that was never intended by the parties, the contract should be interpreted in light of the

context and commercial background behind it (**Chartbrook Ltd v Persimmon Homes Ltd and Others** [2009] 1 AC 1101, HL).

53. Thirdly, a contract of employment ought not to be interpreted in a vacuum and when resolving ambiguity in the express terms, it is proper to have regard to the factual setting in which the contract was made. Mr Cook relied on **Adams and ors v British Airways plc** [1996] IRLR 574 per Lord Bingham MR at paragraph 21:

> **"The starting point is that the parties meant what they said and said what they meant. But an agreement is not made in a vacuum and should not be construed as if it had been. Just as the true meaning and effect of a mediaeval charter may be heavily dependent on understanding the historical, geographical, social and legal background known to the parties at the time, so must a more modern instrument be construed in its factual setting as known to the parties at the time. Where the meaning of an agreement is clear beyond argument, the factual setting will have little or no bearing on construction; but to construe an agreement in its factual setting is a proper, because a common sense, approach to construction, and it is not necessary to find an agreement ambiguous before following it."**

54. The Claimant was a litigant in person before the Tribunal and it did not therefore have the benefit of Mr Cook's helpful analysis of contract law. However, he submitted that it clearly had in mind these principles when it concluded firstly that the contract was "quite clearly designed for data breaches outside the organisation" (at paragraph 77) and that even if it could be said that salaries fell within the scope of the confidential information to be protected (even though it was not particularised or specifically dealt with) colleagues were not parties which a common sense interpretation would suggest referred to those outside the company.

55. Mr Cook also submitted that the Tribunal was perfectly entitled to conclude that the visa application was in the public domain as it had been seen by several known people and unknown others (paragraph 83) and therefore had lost any protection of confidentiality. Furthermore, the Tribunal was entitled to rely upon the policy documents as an aid to construction which place responsibility for maintaining confidence in confidential documents with the author or those handling them – in this case Mr Muddasir - who had left the document lying around and failed to

comply with the security and confidential document classification procedure. The whole thrust of the clauses, Mr Cook submitted, was to protect against disclosures by employees to competitors or external third parties of highly sensitive commercial or trade secret type information.

Discussion and conclusions

56. As a general observation the Tribunal's decision is, as HHJ Barklem noted in the sift, carefully structured and the reasons for the conclusions clearly set out. It covered a substantial amount of ground and made detailed findings and was a reserved decision which enabled the Tribunal to take stock after the hearing and fully consider the material, but was produced within a reasonable time after the hearing when events would have still been fresh in the tribunal's mind.

Wrongful dismissal (ground 1)

57. I shall start with wrongful dismissal since it may be relevant and feeds into the two other grounds.

58. As Mr Cook observed, issues of construction and interpretation of a contract and its breach are separate – the latter being for the first instance tribunal, and only the former being a point of law. In practice, it is not always easy to distinguish precisely between a point of law and fact – the two can truly become mixed and this Tribunal must be mindful not to interfere with the Tribunal's fact finding role.

59. In order for the Claimant to be in breach of clause 14, it was necessary for the Respondent to prove that he had (1) either used for his own purposes, or disclosed to a third party (2)

confidential material/information (as defined), unless (3) the confidential material had entered the public domain other than by breach of the contract.

60. Salary is not listed amongst the many specific examples of what is considered confidential. Is salary confidential? There is no universal answer – company law requires disclosure of directors' pay; many public sector salaries are in the public domain – e.g. the judiciary; where there is collective bargaining pay rates are generally known and published, as indeed they are in many private sector employers where formal pay structures exist, and starting salaries are often advertised in recruitment literature. But some employers are less transparent and open about pay and do not publish pay rates. Some have specific contractual provisions identifying pay and salary as a confidential matter. It cannot be implied into the contract that salary details are confidential and falls far short of the business efficacy, officious bystander or necessity test.

61. Where, as here, the contract did not specifically identify salary as a confidential matter in the long list of other examples, and given the importance of construing a contract in its factual setting as per Lord Bingham in **Adams,** I do not propose to interfere with the Tribunal's conclusion. The Tribunal's understanding was no doubt influenced by the fact that apart from Mr Osborne and the HR department, none of the others involved understood it to be information that they should keep confidential. Alan considered he was safe to send a text to a senior manager with the pay details in it. The employees Mr Redstall and Mr Heath who were more senior than the Claimant clearly did not consider it confidential or they would not have initiated the Executive Salary guessing game at the off-site event which resulted in 7 other members of staff learning of Mr Muddasir's pay when someone accurately guessed the figure. When Mr Redstall reported it

back to more senior managers, it was not in the context of there having been a breach of confidentiality, but its effect on staff morale.

62. If I am wrong about that however, and if as a matter of construction it was confidential information under either clause 14.9(a) or (f), the Tribunal's conclusion that the information had entered the public domain is a finding of fact that they were entitled to make. The document had been left on or by the printer for over 24 hours, and we know that others saw it, such as Mr Heath. It is not known how Alan knew, beyond knowing it was not the Claimant who told him. By lunchtime on 24 August at the latest it was known by a considerable number of people within the organisation. The Tribunal were entitled to conclude that by leaving the document on the printer Mr Muddasir had put it in the public domain of the workplace. A strange feature of the case that neither Mr Muddasir or any of the managers removed the document from where it was open for anyone to see alongside the printer that day.

63. If, however, I am wrong about that too, is Mr Dyal right to say that the Claimant was using the information for his own purposes, namely gossip, or were his work colleagues third parties within the meaning of clause 14.1?

64. Use for one's own purposes would, in an ordinary common sense interpretation of the words, require something more than gossip – some ulterior, self-interest or profit motive. Mr Dyal's interpretation stretched the words of the clause beyond breaking point and the Tribunal were right to discount that argument. His second, and stronger argument, was that "third parties" includes colleagues. The term is undefined in the contract and I do not find it helpful to draw on documents drawn up for other purposes which came into existence after the Claimant's dismissal. Mr Dyal's argument is that a third party is anyone who is not a party to the employment contract

between the Claimant and the Respondent. Mr Cook submits that in the factual context of this contract and this organisation it is clearly intended to refer to third parties to the Respondent – i.e. non-employees and Mr Dyal applies too literal an interpretation that belies the reality of the situation.

65. Again, I am hesitant to interfere with the Tribunal's conclusion as I have not heard the evidence, and crucially, the reaction of others which was that they were not third parties to each other. Once more the fact that Mr Redstall and Mr Heath felt it appropriate to introduce the guessing or bidding game at the off-site event is telling. Had they thought they had received confidential information that they were prohibited from revealing to anyone with risk of being summarily dismissed for gross misconduct, surely they would not have suggested playing a game that would involve everyone at the lunch being told? In this case, where the meaning of the agreement is not clear about who is intended to be a third party, the factual setting and understanding of the others can be a valuable aid to construction. Common sense would also suggest it is intended to refer to those outside the company.

66. So for all those reasons, I do not consider the Tribunal to have erred in its interpretation of the contract of employment. But again, if I am wrong about all of that, the Tribunal was certainly entitled to conclude, as it did in the alternative to its primary findings, that if there had been a breach it was not serious. Clause 14.6 is not sufficiently clearly drafted to deem each and any breach of the clause, no matter how minor, to amount to gross misconduct. The Tribunal was entitled to conclude that what the Claimant did was not gross misconduct as defined.

67. If we step back a little from the detailed analysis of individual words in the contract, what has happened here is that an employee of the Respondent, Mr Muddasir, has inadvertently left

details of his own salary on the office printer, which was embarrassing for the Respondent when the details became known about in the office.

68. The Tribunal was entitled to conclude that the Claimant had not breached his contract when he saw the document on the printer and mentioned it to a few of his colleagues. The ground of appeal fails.

Polkey reduction (ground 9)

69. This ground of appeal turns on the meaning of paragraph 80 of the Tribunal's Reasons read in the context of the Judgment as a whole, as it would be understood by the parties, who were not strangers in the litigation. It is accepted that the Tribunal correctly directed itself in paragraph 3.6, Mr Dyal's argument was that it had not followed its own direction.

70. The starting point is that the Tribunal found the dismissal to be both substantively, as well as procedurally, unfair and paragraph 80 must be read in the context of the finding of substantive unfairness. The facts were largely not in dispute and the Respondent had no grounds for fairly dismissing the Claimant in the Tribunal's judgment. It is against that background that paragraph 80 is to be read. I agree with Mr Cook's analysis that what the Tribunal is in effect saying is that a prediction could not be made with any degree of certainty. It could have been more clearly expressed but I do not read the paragraph as suggesting that the Tribunal considered a high level of certainty was required in order for a **Polkey** reduction to be made. The tenor of the Reasons when read overall is that no reasonable employer would, or could fairly, have dismissed the Claimant for what he did. In a case such as this there is no need for a Tribunal to embark on a detailed discussion of **Software 2000** or the line of authorities such as **King v Eaton (No.2)** [1996] IRLR 199 and **Scope v Thornett** [2007] IRLR 155. This was not a redundancy selection

exercise, but a substantively flawed decision where the Tribunal found that the Respondent had wrongly sought to make an example of the Claimant to cover their own discomfiture and had been exceptionally heavy handed. It is inherent in its decision that fair procedures would not have made the dismissal fair and the Tribunal has sufficiently answered the questions posed in the approach recommended in paragraph 54 of **Software 2000**.

71. Mr Dyal's challenge is a classic example of focussing too much on a particular passage or turn of phrase, taking it out of context to the neglect of the decision read in the round, as deprecated by Mummery LJ in **London Borough of Brent v Fuller** [2011] ICR 806. No error in the Tribunal's approach is made out.

Contributory fault reduction (ground 8)

72. Here the position is a little different. By misdirecting itself that only gross misconduct would open the door to a contributory fault percentage reduction, having decided that there had been no gross misconduct, the Tribunal failed to consider the matter further. It should have gone on to consider if the Claimant's conduct was blameworthy or culpable, and if so, followed the statutory wording of s. 122(2) and s.123(6) to determine whether any reduction should be made to either, or both, of the basic and compensatory awards.

73. Mr Cook submitted that despite their misdirection, the Tribunal's findings that the Claimant's behaviour was merely an "error of judgment" and "at best…an act of misconduct", enables the decision to stand. **Glenrose (Fish Merchants)** is a good example of the wide margin of appreciation available to a Tribunal. This Tribunal should not interfere with paragraph 74 and the conclusion that the Claimant did not cause or contribute to his dismissal, he said.

74. I agree that the Tribunal was entitled to conclude that the behaviour, namely the disclosure of the information contained in Mr Muddasir's mother in law's visa application that the Claimant found on the general office printer, was not serious and it certainly did not constitute gross misconduct, but they have erred in not considering whether the error of judgment, as they described it, amounted to blameworthy or culpable behaviour. That is a task for the first instance Tribunal and this appellate Tribunal cannot second guess the answer. Mr Cook may well be right that the Tribunal will see it as behaviour falling short of blameworthy, but so too could Mr Dyal be right in thinking that they might not. It will be for the Tribunal to consider and to decide. If it decides that it does fall within the definition of culpable conduct, there will be further questions to be considered in order for the Tribunal to make an assessment of whether there should be any reduction to either the basic or compensatory awards, and if so by how much or by what percentage. If it concludes that the behaviour does not amount to culpable conduct it will be an end to the matter.

75. By reference to the statutory wording in s.123(6) and the compensatory award, did it cause or contribute to the Claimant's dismissal? If not, the enquiry may well end there. In relation to both the basic and compensatory award, if the Claimant's conduct was blameworthy, the Tribunal will need to consider if it would it be just and equitable to reduce the basic and/or compensatory awards? If so, the Tribunal will have to decide to what extent any reduction ought properly to be made to either, or both aspects, of the financial award. I have assumed, since the parties have not suggested otherwise, that re-instatement or re-engagement was not sought by the Claimant.

76. There will need to be a remedy hearing at the Tribunal in any event and the consideration of whether to make a contributory fault reduction can conveniently be dealt with at the same time to avoid any further delay. I am conscious that it is now 18 months since the Claimant obtained

A the judgment of the Tribunal that he had been unfairly and wrongfully dismissed and he has not yet received any remedy for it. It is just over two years since his dismissal.

B 77. Counsel's agreed time estimate for the combined remitted hearing and remedy was 1 day.

C 78. Bearing in mind the factors in **Sinclair Roche & Temperley & Others v Heard & Anor** [2004] IRLR 763, where, as here, there is no question of the professionalism of the Tribunal, which has made one mis-step in an otherwise impeccable and thoughtful judgment, the same Tribunal can certainly approach the remitted aspect with an open mind having asked itself the correct question on the issues to be remitted.

D 79. I therefore reject grounds 1 and 9 of the grounds of appeal, but allow the appeal on ground 8, that the Tribunal applied the wrong test when considering contributory conduct. I remit the case back to the same Tribunal to consider the following questions when it considers the other outstanding issues yet to be decided on the remedy to be awarded to this Claimant who was both unfairly and wrongfully dismissed:

E

F (i) Was the Claimant's conduct blameworthy as defined in **British Broadcasting Corporation v Nelson (No. 2)** [1980] ICR 110 at para F p121?

(ii) In relation to the compensatory award, did it cause or contribute to the Claimant's dismissal?

(iii) If the Claimant's conduct was blameworthy, would it be just and equitable to reduce the basic and/or compensatory awards?

G (iv) If so, to what extent or by how much?

80. Finally, it remains only for me to thank both advocates for their clear, succinct and cogent submissions, both orally and on paper, and for all their help at this hearing.

H