Appeal No. UKEAT/0205/19/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 January 2020

Before

HIS HONOUR JUDGE MARTYN BARKLEM

MR M SMITH OBE DL

MR T STANWORTH

APPELLANT

MR N A CHOWDHURY

MARSH FARM FUTURES

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS EMILY GORDON WALKER (of Counsel) Instructed By: Pattinson and Brewer Solicitors 2 Mermaid House 2 Puddle Dock EC4V 3DB
For the Respondent	MS SARAH CLARKE (of Counsel) Instructed By: DAS Law North quay Temple Back Bristol BS1 6FL

SUMMARY

UNFAIR DISMISSAL

An Employment Tribunal ("ET") did not err in law in permitting a hearing to proceed notwithstanding clear indications of illness on the part of a Claimant, who was adamant that the hearing should proceed. However, the ET erred in law in treating the procedural shortcomings which it identified as redeemed by the substantial merits of the case. A finding of unfair dismissal was substituted for the ET's finding that the dismissal was fair, and the case was remitted for a hearing on remedy, to include contribution and **Polkey** issues.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against the decision of an Employment Tribunal ("the Tribunal") sitting at Watford, (Employment Judge Lewis sitting with members Mr Bury and Mr White) which rejected claims made by the Claimant who now appeals. I shall refer to the parties as they were below.

2. The Claimant represented himself before the Tribunal, both at the Hearing as well as another earlier hearing which had proved abortive. He is represented today by Miss Gordon Walker. The Respondent is represented by Ms Clarke who also appeared before the Employment Tribunal. Each has produced a helpful skeleton argument which has been augmented by oral submissions today.

3. At the sift stage Her Honour Judge Stacey engaged the **Burns v Barke** procedure and comments were obtained from the Tribunal panel. Following that the matter was rejected on the sift by Her Honour Judge Eady QC, as she then was. At a Rule 3(10) Hearing at which the Claimant was represented by Mr Matovu of counsel who appeared under the ELAAS scheme, I allowed the appeal to proceed on four grounds, one of which was a new ground advanced at that hearing.

4. The first ground of appeal asserts, and I am paraphrasing, that the Tribunal erred in failing to adjourn or make reasonable adjustments in light of the Claimant's health which resulted in an unfair Hearing at which the Claimant could not participate fully.

5. The second ground asserts, again with my paraphrasing, that the Hearing was unfair because the Tribunal failed to understand why the Claimant was not fully and properly prepared for the Hearing, was not given time to prepare and was criticised for not being fully prepared.

6. The third ground complained that the Claimant's claim for unlawful deduction of wages was not considered by the Tribunal.

7. Finally, ground four asserts that the Tribunal erred in law in treating the procedural shortcomings which identified as redeemed by the substantial merits.

8. At the Rule 3(10) Hearing I was told that the Respondent had failed to produce some or all of the documents until the last minute, resulting in the Claimant having insufficient time to prepare. In allowing the case to go forward I commented that it was reasonably arguable that, taken as a whole, the Employment Tribunal's decision to plough on in this situation was an error of law. I had regard both to the medical situation as well as what was said to be the failure to produce documents. Ground three, I commented, probably stood or fell with the other grounds and as to the fourth ground I commented that it was arguable that the Tribunal impermissibly allowed the substantive merits, as it found them to be, to override the procedural flaws.

9. These were, of course, comments based on a brief Hearing with limited reading of the papers and having heard just one side of the story. It goes without saying that by allowing the case to progress to a Full Hearing I was, in no sense, pre-judging the outcome of the present Hearing.

10. I felt this was a case in which the assistance of lay members with considerable experience in industry would be invaluable in assessing what is, at its heart, a question of the fairness of a Hearing. That has proved to be correct.

11. We turn first to the first two grounds of appeal, which both counsel accepted stood together. The Tribunal made the following comments as to the Claimant's health at paragraphs 29 to 31 of the reasons under the heading "The Claimant's Health":

> **"29. Before the hearing began, the tribunal was sent a Med 3 form dated 8 February, stating that the claimant was unfit for work for four weeks due to depression and anxiety. After the first week, we were sent a copy of a prescription dated 7 February for Sertraline for 28 days, and a later prescription for Diazepam. We were informed that the hospital attendance on the night of Thursday 15 February had been the result of chest pain, but other than that information, the discharge note had been redacted, and the tribunal (and respondent) made no further inquiry about the point.**
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> **30. The claimant's health was a concern throughout this hearing. On the first morning, when asking the claimant if he were well enough to do justice to himself and to his case (a form of words used on a number of occasions and on several days) the judge clarified to the claimant that the next available slot in the tribunal's timetable to start a case of this length would be just before Christmas: and therefore, effectively in January 2019. The claimant appeared visibly distressed by the risk of a year's delay. He expressed a concern that the tribunal might form its own view of his health: we assured him that we had no skill or ability to do so. He said that he wanted to proceed.**
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> **31. The judge explained to the claimant at a number of points that the question of whether he was well enough was an open question, in the sense that the answer might change or develop, and the claimant should tell the tribunal what the situation was. Although the claimant made many references to feeling unwell, asked for a number of breaks and at times appeared to us (as medical lay people) unwell, he did not ask for any adjournment or postponement, and was plainly concerned that the case should be brought to its conclusion."**

Other comments which seem to us to be relevant to the difficulties posed by this case appeared variously under the headings, "Time allocation," "Disclosure bundles" and the "Case management challenge":

> **"32. It was fortunate that the tribunal was available (as was Ms Clarke) to add to the allocated days. Oral evidence took five days rather than the 3.5 allocated by Judge Heal.**
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> **33. Before, and throughout the evidence, the judge reminded the claimant of the allocation of time, and of the time left available at each step. At the end of two days' questioning of Mr Rafi, the claimant, who was proceeding sequentially through Mr Rafi, witness statement, had reached paragraph 11 out of 56 paragraphs. He asked for more time to be allocated. At the end of one day of Mr Davis' evidence, the claimant asked for another day. Before beginning cross-examination, Ms Clarke recorded that she considered that she had not been allocated sufficient time, but then concluded a professional cross-examination within the allocated time.**
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> **34. We noted our powers under rule 45 of the tribunal's rules of procedure to set limits on the time available for evidence, and to impose a time limit even where the evidence had not finished. We did not agree to allow additional time for the claimant's cross examination for reasons which are more fully explained below. His lack of preparation and focus, and his**

inability or failure to follow the repeated guidance of the tribunal, led to a poor use of time. We had no confidence in his ability to complete cross-examination within any further reasonable time allocation. We did not consider it proportionate or fair to allow the claimant simply to continue undisciplined cross-examination until he thought he was finished.

35. We were also concerned that the parties would suffer injustice if this hearing were to go part heard, because having seen the claimant's case presentation, we could not envisage how he could do justice to himself in the event of a gap in the hearing of weeks or even longer. It was, on the contrary, all too easy to envisage that if the case resumed part-heard after a gap of weeks or months, there would be uncertainty and dispute about what had been said at this stage.

Disclosure and bundles

36. At the hearing in July 2017, the bundles before Judge Heal ran up to page 1375. We had a third bundle, pages 1376-1810, consisting of additional documents which we understood to be provided to us at the request of the claimant.

37. A further issue arose about the bundles which had been before the tribunal in July. They appeared in identical format as pages 1-1375. Judge Heal's note confirmed that she had said that they would be destroyed. That meant, in the conventional understanding, that the tribunal's copies would be destroyed, no doubt because they had been marked by the tribunal members during the July hearing. She therefore alerted the respondent to the need to produce fresh copies. No direction about this was given to the parties. The claimant told us on the first day that he had discarded the bundles, understanding them to be destroyed and replaced, but they had not been replaced. It turned out that he had not discarded them but still had them. The position was therefore that the claimant had at all times had the full bundles. If he had thought that the July bundles were to be replaced, he had misunderstood a remark made by Judge Heal. He had not asked the tribunal for clarification. In the run up to this hearing he had not asked the respondent to provide fresh bundles, or the tribunal to direct them to be provided. On his own account, he had come to the tribunal unprepared, and (presumably) thinking that he would on the first morning be handed a fresh set of some 2,000 pages to work from.

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42. There were in addition items on the claimant's laptop, from which he worked, which plainly were disclosable in principle, but which the claimant appeared hot to have disclosed, and to which he referred during the hearing. The tribunal and Ms Clarke were flexible in looking at this material to see if it were of assistance.

43. The bundles presented three major, general problems. The first was their presentation. The bundles were disproportionate in volume, and unwieldy in arrangement. The contents were often repetitive, disorganised and burdened with email trails in reverse chronology.

44. The second problem was that despite their volume, the claimant was convinced that the bundles were incomplete, in the sense that they lacked items which he thought were relevant. In a revealing question he asked Mr Davis whether before the disciplinary he (the claimant) had had enough time to go through the '25,000 to 30,000 emails' of his employment in preparation of his defence. We thought that revealing, because it captured the claimant's inability to focus and select the relevant, and his belief that litigation depends on every conceivable item being available.

45. In reply to the claimant's general complaint about omissions from the bundle, the tribunal told the claimant that it could not deal with a generalised assertion that there had been incomplete disclosure; if at any point he asked about a specific identifiable item, the tribunal would try to deal with the point; in the event, this did not happen.

46. The tribunal also told the claimant if in the course of evidence it was referred to a copy of an item which was relevant but was not in the bundle, it would cross the bridge of that item when it came to it. The claimant in the course of the hearing showed the tribunal a modest number of items from his laptop, which were of limited relevance or assistance, save for material relating to Mr Salim's presence in the office, on which Mr Rafi was recalled.

47. The third problem, arising from the previous two, was that the claimant repeatedly cross-examined about documents which he could not refer to the tribunal, either because they could not be found, or due to the shortcomings in his own preparation. Ms Clarke was able to be of

some assistance in these respects, but not invariably: no criticism of her is to be read in those words. It was a frustrating use of the tribunal's time when six people (the tribunal, the claimant, the witness and Ms Clarke) thumbed through the bundle to find an item which the claimant (or occasionally a witness) were sure was there, but which was not identified in a witness statement, and could not be found.

48. In that context, the tribunal declined to print, copy or consider the additional documents which the claimant throughout the hearing emailed to the tribunal overnight.

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The case management challenge

54. The tribunal is familiar with the difficulties faced by members of the public who represent themselves, particularly where the opposing party is legally represented. We do not expect a lay member of the public to have professional understanding of the law and procedures of the tribunal, but we do expect parties to come to a hearing reasonably well prepared. We endeavour to make every allowance which we fairly can, in accordance with the overriding objective, for the ignorance or inexperience of a party in person. In this case, we were also called upon to make allowance for the claimant's ill health. The claimant showed the tribunal occasional signs of stress, but generally conducted himself with courtesy and addressed the tribunal appropriately. Although the claimant referred once or twice to language difficulties, his spoken and written English were, we were confident, not a barrier to his participation in the life of the workplace or the work of the tribunal.

55. That said, the claimant's preparation and presentation of the case fell far short of enabling him to do justice to the case which he wished to put.

56. The claimant lacked insight into the requirements of reasonable case preparation, and into the impact on the tribunal and the respondent of his defaults. The extreme example was his submission to the tribunal of the 205 page witness statement a matter of hours before the start of the hearing. He had not appreciated that if the statement were to be used, a number of plain logical consequences followed. The tribunal would need at least four hard copies, which it was his responsibility to provide. The respondent needed at least one hard copy, and sufficient time to read it, and prepare its defence in reply. The tribunal timetable would be severely eaten into by the time needed to read a document of that length.

57. The claimant's difficulties with using time effectively were conspicuous and recurrent. Repeatedly the tribunal advised and counselled him about the use of time, and about timetabling. We endeavoured to give him every opportunity to use time more effectively, without interfering with our judicial impartiality.

58. Repeatedly, the claimant squandered the finite time available to him to cross examine by lengthy and repetitive cross-examination on irrelevant points. It was repeatedly necessary to remind him that the legal issues were only those identified by Judge Heal, and that the factual issues for which he was dismissed, set out in the pre-disciplinary letter and in the dismissal letter, were the focus of the tribunal's work. It was repeatedly necessary to remind the claimant that his strength of feeling about an issue did not render that issue relevant, and that there might be many issues which the tribunal would not hear about, and had no power to resolve.

59. The claimant for example asked Mr Rafi about who had supervised the respondent's building works in 2011 (long before he took up his post); he asked Mr Davis about arrangements by which Luton Borough Council nominated Councillors to the respondent's board; he clearly wanted to cross- examine Mrs Pedersen about his personal disputes with Luton Borough Council, which, we were told, related to premises within the ward for which Mrs Pedersen is a Lib Dem councillor. He sought to introduce satellite attacks on the integrity of Board members who had little involvement, if any, in the events before us. These are no more than examples. In his closing submission, the claimant advanced a case based on a far-reaching conspiracy of managers and Board members, working together for corrupt motives: there was no evidence to support that case, which was in any event not before the tribunal.

60. While we understand the difficulty faced by a party in facing the discipline of cross-examination, the claimant appeared to us to have prepared little if at all. He seemed at this hearing to be reading through the respondent's witness statements sequentially for the first time, and asking any questions which came to mind. When, as was almost inevitable, the

claimant was given an answer which was not what he wanted, he repeatedly (despite guidance) answered the answer with a lengthy exposition of his views on the point.

61. Repeatedly throughout cross-examination he referred to documents which were either not available at all, or to which he could not refer the tribunal. He plainly had not prepared to address this point."

12. On behalf of the Claimant, many of the criticisms referred to in the Reasons are cited and it is argued that the EAT must independently consider whether a fair procedure was followed. We were referred to the Decision of this Tribunal, in **Shui v Manchester University** [2018] ICR 77. In that case it was said that the appellate body must objectively view that which took place below and decide for itself whether a fair process was followed. The merits of the underlying claim had no place in that determination.

13. We were also taken to **Teinaz v Wandsworth London Borough Council** [2002] EWCA Civ 1040, the case in which the Court of Appeal upheld this Tribunal's finding that an Employment Tribunal had erred in refusing an application to adjourn supported by medical evidence. Of course, in the present case, although a "fit note" had been produced, not only was there no application by the Claimant to adjourn, but he was, as we are reminded on behalf of the Respondent, evidently anxious to proceed. See paragraph 30 of the Reasons above and the reference to the Claimant being visibly distressed at the prospect of a year's delay.

14. As far as the bundles are concerned we note the Tribunal's comments at paragraph 37, namely that although the Claimant had said that he had discarded his bundles and was awaiting fresh ones, it turned out that he had in fact retained them and had not specifically asked the Respondent for replacement bundles. As is clear from paragraph 39 of the Reasons, Ms Clarke had prepared a table demonstrating that all relevant documents had been produced.

15. The only documentation which seems not to have been provided prior to the hearing was the Claimant's own disclosure but Ms Clarke was able to do that which those instructing her had seemingly been unable to do and produced a further bundle. As these were the Claimant's documents they cannot have prejudiced him.

16. In the supplementary bundle we have seen an email copied to the Claimant from the solicitors acting for the Defendant in the Tribunal stating that a fresh bundle had been sent to the Claimant on 28 November 2017. Reference was made to difficulties opening documents which the Claimant had sent by email and asking that he send them by post. There was no reply to this.

17. We reject the submission that the Claimant was in a position in which he was swamped by documentation at the last minute, resulting in his being in no position to prepare for the case. It seems to us from the Reasons, as though he chose to conduct the Hearing on the fly with limited preparation.

18. It is stressed by Ms Clarke in her submissions that we have a limited role in interfering with a case management decision see **O'Cathail v Transport for London** [2013] IRLR 310. That was a case in which an adjournment was refused despite the Claimant having medical evidence. The Court of Appeal upheld the principle that the appellate courts could interfere only where there was an error of legal principle in the approach taken by the Tribunal or perversity in its outcome.

19. Ms Gordon Walker in her submissions suggested that **O'Cathail** should be regarded as having been overturned by the Supreme Court's decision of **R (Osborn) v Parole Board)**

[2014] UKSC 61 which stressed that whether a fair hearing took place was not a question to which the test of **Wednesbury** unreasonableness should apply. Rather, the appellate court must decide for itself whether the procedure is fair, as subsequently held in **Shui**.

20. In our judgment the cases deal with different points and **O'Cathail** remains good law in relation to individual case management decisions. The principles in **Shui** relate to the wider question of the fairness of the hearing taken as a whole. In any event, the Claimant at no point sought an adjournment, quite the reverse. In an email sent on 13 February at about 11pm the Claimant stated that he wished to continue the hearing the following day, "as long as my health allows me." It is clear from the rest of that email that the Claimant was fully aware that it was open to him to seek an adjournment.

21. We do not consider that it was inappropriate for the Tribunal to have made reference to the practical effect of adjourning - a long delay – neither was it appropriate to consider expediting any further hearing in the absence of an application. It seems to us that there was no question of the Claimant lacking capacity to make an informed decision. The Tribunal plainly revisited the question of his health on numerous occasions and there was nothing before them to suggest that he lacked the ability to continue.

22. To have insisted on the provision of further medical information would, in our judgment, have been inappropriate. The doctor's note stating that he is unfit to work lacked any detail beyond "depression and anxiety symptoms." There was a box on the form marked "Comments including functional effects of your condition." It was left blank. The discharge note from the hospital was redacted by the Claimant leaving a bare statement that he had, "attended the accident and emergency department with the complaint Chest Pain."

23. Ms Clarke relied on **Andreou v Lord Chancellor's Department** [2002] IRLR 728 for the principle that a person certified unfit for work is not to be taken automatically as being unfit to attend a Tribunal hearing. Moreover although the Claimant had been admitted to hospital in the course of the proceedings, the discharge note did not state that he was unfit to engage in continuing proceedings. Had the Claimant wanted to, she submits, he could easily have asked for such a statement be included.

24. Ms Gordon Walker referred us to the **Bench Book** and to adjustment which, she says, ought to be made for a litigant in person, particularly one with mental health problems. She referred to passages in the Judgment which are critical of the Claimant, specifically paragraphs 34, 47, 55 to 56, 60 to 61 and 67, and says that the approach that the Tribunal ought to have taken would have been to assist him to formulate questions. She acknowledged that the Claimant was given breaks, a day off after he had been admitted to hospital the previous evening and a further two days off, but she says that the limiting of his cross-examination in particular was unfair. We note that cross-examination took over three days.

25. We have looked very carefully at the material which has been put before us. We can see no unfairness in the way that the Tribunal conducted this difficult case. We are satisfied that the Claimant was given every reasonable assistance by the Tribunal which was clearly frustrated at times by his apparent refusal to act on the guidance given. We do not accept that because criticism is made in a judgment it follows that similar criticism was made in the course of the hearing, a point made by the lay members of the Tribunal in the statements given prior to the sift stage. For these reasons we dismiss grounds one and two of the appeal.

26. Turning to ground three the Tribunal said this at paragraphs nine and 21 of the Reasons:

> **"9. Although in some paperwork there had been reference to a claim for arrears of time off in lieu, that claim was not identified in the definitive list of issues or pursued before us, and in the absence of evidence or submission, it has failed.**
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> **…**
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> **21. Although Judge Heal definitively set out the list of issues, and did not include a claim in respect of TOIL, she referred under remedy to a question of arrears. We declined to interpret that word as encompassing a claim for TOIL. There was before us no coherent formulated claim for TOIL, beyond the claimant's generalised assertion, and grievances throughout his employment, of needing more hours work than he was paid for."**

We accept Ms Gordon Walker's submission that even a definitive list of issues should not preclude a Tribunal from dealing with the material placed before it. We have seen the lengthy list of issues prepared Employment Judge Heal which does not include this specific issue.

27. However, the wording of paragraph 9 of the Reasons under appeal seems to us to indicate clearly that notwithstanding the absence of the points in that list, there was neither evidence nor submissions on the point but had there been, the Tribunal would have entertained them.

28. We learned in the course of today's Hearing that there had been sequential written submissions put in following the Tribunal Hearing. Ms Gordon Walker was not able to say whether those submissions contradicted the Tribunal's clear statement at paragraph nine as to the absence of evidence and submissions.

29. To the extent that the point is wrapped up in the issue of fairness, we reject it. It is not for the Tribunal to supplement an already lengthy list of issues when the point was simply not raised before it. In any event, the Tribunal made a finding which was open to it on the evidence - or rather the absence of evidence - and no error of law is evident.

30. The final ground concerns the Tribunal's findings of the procedures which was followed resulting in the dismissal. We set out the Tribunal's findings below.

> **Procedural Concerns**
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> **"217. We accept, subject to what is stated above, that the respondent put to the claimant a framework of allegation against him, such that he understood the nature of the case he had to meet; and afford him sufficient time to prepare. He had the right of accompaniment, and was provided with notes of the meetings, and with written outcomes. Subject to what is stated below, he had a right of appeal against dismissal.**
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> **218. The tribunal nevertheless had serious reservations about the disciplinary process overall. In so saying, we rely on the following. The disciplinary procedure was silent on the process to be followed. It is a remarkable omission. Mr Davis had been the person to whom Mr Rafi reported and shared working concerns, and had to a limited extent given a sympathetic ear to the claimant. Mr Davis had had some form of management role during Mr Rafi's sick leave in late 2015. He was a shrewd and experienced person, with a long established relationship of respect with Mr Rafi. The suggestion of drawing together the strands about the claimant's performance originated with him; and we find that the he was responsible, with Mr Rafi, for commissioning the respondents legal advice about the claimant's position. He accepted the advice, which was to conduct a grievance hearing (which he chaired) about the claimant's pay and then closed that issue off. In hearing that matter, Mr Davis knew, but the claimant did not, that disciplinary letter had been prepared and was ready to be given to the claimant if his complaint failed. Mr Davis then chaired the disciplinary panel and dismissed the claimant.**
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> **219. Ms Pedersen's evidence was that her appeal remit was limited to deciding whether the four acts of gross misconduct for which the claimant had been dismissed had each been properly designated as gross misconduct. When asked by the tribunal what would have happened if she had reached that conclusion, she seemed surprised by the question, and answered that her course would have been to remit the decision to Mr Davis to make again, in light of the outcome of appeal. That would be an exceptional and uncomfortable model for management. A full written disciplinary procedure, had it existed, would have told Ms Pedersen what her powers were.**
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> **220. The tribunal asked Mr Davis why so much of this procedure focused on him individually, given the number of Board Members available, and he answered that not all Board Members were willing to give the commitment which this matter required. We understood that to refer both to the commitment of time involved in the disciplinary process, but also the commitment of energy and resource involved in managing this claimant. That was also an uncomfortable answer, because it suggested that responsibilities fell on the most willing; and while we understand that this is inherent in the voluntary sector, the issue for us is one of fairness at work.**
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> **221. We must keep well in mind the respondent's limited size and administrative resources, and the reality that in the voluntary sector activity, responsibilities fall on those volunteer for them. We must have also have the regard to the substantial merits, which were that the claimant was dismissed for four actions, all four of which he admitted having done, and then sought to justify. Our reservation in these respects, although serious, do not in the event lead us to the conclusion that the claimant's dismissal was on balance unfair.**
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> **Contribution and Polkey**
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> **222. The issue of contribution and Polkey were not before us. We have nevertheless heard evidence which would plainly be relevant to both. It seems to us right to set out our provisional views on the findings which we might have made, if we had found the claimant's dismissal to be unfair. On the basis of the above we would have found that the four actions for which the claimant was dismissed, and which he admitted at the time and us, each and cumulatively constituted culpable contributory conduct such as to give rise to a significant reduction of both the basic and compensatory awards. If we had found the dismissal to be procedurally unfair we would have given serious consideration to a substantial Polkey reduction, or extinction, on the basis that a fair procedure would most probably have led to the same outcome. We make that observation for this reason: by the time of the claimant's dismissal, he had ceased to accept or respect the discipline of any form of line management from the respondent. He regarded by relationship of trust and confidence with his employer as broken. He had made clear that he rejected the authority of the CEO and Chair of the**

Board. Given that mindset, it is in our view unlikely in the extreme that if not dismissed the claimant would have accepted the line management of the respondent such as to enable him to return to work.

….."

31. Ms Gordon Walker argues that the finding of the Tribunal pointed unequivocally to procedural unfairness and that the Tribunal then fell into error in having regard to the substantial merits of the case. She relied on **Polkey v AE Dayton Services Limited** [1987] UKHL 8.

32. Ms Clarke pointed to the fact that there were admissions of wrongdoing and thus there was limited scope for the investigative process. However, in the course of argument she agreed with the proposition that if there had been a failure to adopt a fair procedure, the merits would make no difference. That was a sensible concession. Although we have looked at the relevant paragraphs with care, we see no scope saying that this was simply a clumsy way of putting findings which were permissible. Although the resources of the Respondent were limited, the criticisms made by the Tribunal were deeper rooted than a mere lack of resource would have entailed. We find that the Tribunal erred in conflating the lack of merits with the procedural failings.

33. The Tribunal expressed its provisional views as to the effect of **Polkey** and gave what it said would be a "probable outcome," namely a substantial **Polkey** reduction or extinction. Based on the unappealable findings of fact that seems to us to be almost inevitable. However, it is not for us to make findings of our own to complete that process.

34. Therefore, we allow the appeal in relation to ground four. We substitute for the finding at paragraph 221, namely that the dismissal was fair, a finding that the dismissal was unfair, this being the only possible outcome based on our decision.

35. We remit the case to the same Tribunal to determine remedy and to consider issues of contribution and **Polkey**. We consider it likely that such determination would not require further evidence or submissions but leave that for the Tribunal to determine in the light of submissions from the parties.

36. We warn the Claimant that given the provisional findings, his success before us on this point could well prove Pyrrhic.