Appeal Nos. UKEAT/0285/18/DA (V)
UKEAT/0338/19/DA (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 and 2 June 2020
Judgment handed down on 26 August 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

UKEAT/0285/18/DA

PGA EUROPEAN TOUR — APPELLANT

MR SCOTT KELLY — RESPONDENT

UKEAT/0338/19/DA

MR SCOTT KELLY — APPELLANT

PGA EUROPEAN TOUR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant/Respondent (PGA European Tour)	Mr P Nicholls (one of Her Majesty's counsel) Instructed by: Fox Williams LLP 10 Finsbury Square London EC2A 1AF
For the Respondent/Appellant (Mr Scott Kelly)	Mr D Mitchell (of counsel) Instructed by: M Law LLP 3a Montagu Row London W1U 6DZ

SUMMARY

UNFAIR DISMISSAL - REMEDY

The Respondent in the Employment Tribunal conceded that the Claimant was unfairly dismissed. Following a contested hearing, in its 2016 Decision, the Employment Tribunal found that the dismissal was not an act of age discrimination.

At a subsequent Remedy Hearing the Tribunal, by a majority, ordered that the Claimant be re-engaged in the role of Commercial Director, China PGA European Tour. The Respondent's appeal against that Order succeeded. The majority had erred by not considering, and deciding, whether the Respondent had genuinely and rationally concluded that it lacked trust and confidence in the Claimant's capability, applying **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513. It had also, in any event, erred, by ordering re-engagement to a position in respect of which the Claimant did not meet an essential requirement.

The Claimant had sought a reconsideration of the remedy decision on the basis that there had been a failure to disclose vacancies for other positions that had arisen since his dismissal, but also been filled by the time of the Remedy Hearing. That was refused. The Claimant's appeal against that decision was dismissed, as these did not, in law, fall to be considered.

Although it had ordered re-engagement, the Tribunal had also considered *Polkey*. However, it had erred by failing, when doing so, to consider the potential implications of findings it had made in its 2016 Decision, and what light they may have cast on the *Polkey* issues. That issue would therefore be remitted to the Tribunal for fresh consideration, as part of the process of deciding the compensatory award.

HIS HONOUR JUDGE AUERBACH

Introduction

1. I will refer to the parties as they were in the Employment Tribunal ("the Tribunal"), as Claimant and Respondent.

2. The Claimant was employed by the Respondent from 1989. He was dismissed in October 2015. He complained of unfair dismissal and direct age discrimination, as well as claiming wrongful dismissal. In June 2016 the Respondent admitted that the dismissal was unfair because a fair procedure was not followed. In a reserved Decision promulgated in November 2016, following a hearing in October, the complaint of age discrimination was dismissed. I will call that the 2016 Decision. The Claimant appealed that Decision. Following a hearing, that appeal was dismissed by Choudhury J in a reserved Decision in February 2018.

3. In the meantime a Remedy Hearing was held in January 2018 before the same panel which had heard the age discrimination complaint: Employment Judge Gumbiti-Zimuto, Mrs A E Brown and Ms H T Edwards. Following deliberations in chambers, their reserved Decision was promulgated on 18 June 2018. The Tribunal unanimously declined to order reinstatement. By a majority, the Tribunal ordered that the Claimant be re-engaged in the role of Commercial Director, China PGA European Tour, within 56 days. That is the Remedy Decision.

4. The Respondent appealed the Remedy Decision. DHCJ John Cavanagh QC (as he then was) considered seven out of eight grounds to be arguable (the exception being ground 6) and directed a full Hearing of them. That is the first appeal – the Respondent's appeal.

5. By a letter of 20 December 2018 the Claimant's solicitors applied to the Tribunal for a reconsideration of the Remedy Decision (and sought an extension of time for that application). Two grounds were advanced. The first was that material breaches of disclosure on the part of the Respondent had recently come to light. The second sought a variation of the terms of the re-engagement Order. The Respondent put in a submission opposing that application.

6. By a decision sent on 27 August 2019 EJ Gumbiti-Zimuto refused the reconsideration application. That is the Reconsideration Decision. The Claimant appealed that Decision. At a Rule 3(10) Hearing I allowed one ground to proceed to a full Hearing. That is the second appeal – the Claimant's appeal.

The Statutory Framework

7. The effect of section 112 **Employment Rights Act 1996** ("the **1996 Act**") is that, where an unfairly dismissed employee asks the Tribunal to make an Order for reinstatement or an Order for re-engagement, the Tribunal must first consider whether to make such an Order. If it makes no such Order then it will, instead, make an award of compensation. Although it is not a term used by the **1996 Act** itself, I shall adopt the general practice of employment lawyers, of using the term "re-employment Order" to refer to these two types of Order compendiously.

8. Sections 113 to 117 of the **1996 Act** provide as follows:

> ***"Orders for reinstatement or re-engagement***
>
> **113 The orders.**
>
> **An order under this section may be—**
>
> **(a) an order for reinstatement (in accordance with section 114), or**
>
> **(b) an order for re-engagement (in accordance with section 115),**
>
> **as the tribunal may decide.**

114 Order for reinstatement.

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

115 Order for re-engagement.

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

116 Choice of order and its terms.

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Subsection (5) does not apply where the employer shows—

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that—

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

117 Enforcement of order and compensation.

(1) An employment tribunal shall make an award of compensation, to be paid by the employer to the employee, if—

(a) an order under section 113 is made and the complainant is reinstated or re-engaged, but

(b) the terms of the order are not fully complied with.

(2) Subject to section 124, the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.

(2A)There shall be deducted from any award under subsection (1) the amount of any award made under section 112(5) at the time of the order under section 113.

(3) Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make—

(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), and

(b) except where this paragraph does not apply, an additional award of compensation of an amount not less than twenty-six nor more than fifty-two weeks' pay,

to be paid by the employer to the employee.

(4) Subsection (3)(b) does not apply where—

(a) the employer satisfies the tribunal that it was not practicable to comply with the order,

… … …

(7) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining for the purposes of subsection (4)(a) whether it was practicable to comply with the order for reinstatement or re-engagement unless the employer shows that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement.

(8) Where in any case an employment tribunal finds that the complainant has unreasonably prevented an order under section 113 from being complied with, in making an award of compensation for unfair dismissal it shall take that conduct into account as a failure on the part of the complainant to mitigate his loss."

The Employment Tribunal's Decisions

9. In the 2016 Decision the Tribunal described how the Claimant started with the Respondent in 1989 as Marketing Director of the European Tour. By 2015 he was Group Marketing Director. In 2014 a new Chairman was appointed. He brought in consultants who conducted a strategic review. In August 2015 a new Chief Executive, Keith Pelley, took up his post. He had authority to "evaluate the senior team and make any necessary changes to ensure that he had the right team in place to deliver the commercial success of his strategic vision."

10. Within two months Mr Pelley had taken the decision to dismiss the Claimant. He and the HR Director then decided to have an "off the record" discussion with the Claimant to see if they could agree terms for his departure. There were meetings on 8 and 15 October, but no meeting of minds. There was a further meeting with the HR director, but proposals were not agreed. Mr Pelley then decided to terminate the Claimant's employment; and at a meeting on 27 October he was handed a letter dismissing him with effect on 30 October 2015.

11. In light of certain found facts the Tribunal concluded that the burden had passed to the Respondent to show that the dismissal was not because of age. At [47] it continued: "The explanation given by Mr Pelley for the claimant's dismissal is that Mr Pelley did not consider that the Claimant was capable of fulfilling the role he wished him to perform going forward."

12. At [53] – [55] the Tribunal said:

> **"53. The positive reason given by Mr Pelley is that the claimant was not suitable for the role of commercial director. The evidence before us exposed numerous references to the claimant's ability being an issue for Mr Pelley. The claimant asks us to conclude that this is an after the fact rationalisation because there was no fair reason for the dismissal. We do not accept that. Mr Pelley carried out his own due diligence before he joined the respondent and formed a view of concern about the respondent's commercial performance. On meeting the Claimant Mr Pelley was concerned about the claimant's attitude to sponsorship revenues which was 100% reactive. Mr Pelley received negative feedback on the claimant from the claimant's team. Mr Pelley formed his own unfavourable view**

> **of the claimant's performance. The claimant himself refers to incidents with Mr Pelley in which Mr Pelley makes critical observations to the claimant about matters related to his performance, which on at least one occasion was expressed in writing (p119).**
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> **54. Mr Pelley consider the claimant had not bought into his ideas and this was a matter he considered. The Respondent argues that an email exchange between the Claimant and Mr O'Grady supports that view. We do not accept that the email we were referred does make that position clear, however, we accept the evidence given by Mr Pelley, that the Claimant had not bought into his ideas, was a genuine expression of his view that the Claimant had been unable to embrace a change of CEO.**
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> **55. We have also considered the fact that the respondent has failed to carry out any fair procedure to deal with a capability dismissal. The fact that the respondent's conduct was unfair does not support a view that there was discrimination on the grounds of a protected characteristic. Mr Pelley had approval of the board to decide his team having formed his view of the claimant he decided to follow it through quickly. The failure to follow a reasonable procedure is not necessarily indicative of discrimination. It may indicate a closed mind but it does not assist in concluding why the decision to dismiss was taken."**

13. I turn to the Remedy Decision. The Tribunal's self-direction as to the law referred to sections 113 and 114 of the **1996 Act**, and then set out a number of propositions of law. These included reference to parts of the wording of the statute, and to a series of principles recognisably derived from the authorities, although only one was specifically cited. I need only set out one sentence from this section, as the remainder of the self-direction is not criticised on appeal. At [12] the Tribunal wrote:

> **"The employment tribunal has to reach its own conclusions as to trust and confidence rather than testing the employer's view to see whether it was genuine and founded on a rational basis."**

14. The Claimant sought reinstatement, or, if not, re-engagement. During the course of describing the Claimant's evidence, at [17] the Tribunal said:

> **"The claimant has stated from the outset that it was his wish to return to work at the Tour either in his old role of Group Marketing Director or in another role. The Claimant did not accept that relations between himself and the Tour have broken down. He stated that the deterioration in the relationship since his departure is nothing which sensible, level-headed adults with their focus on the good of the company cannot overcome. (The majority accept that this is so. The minority view is that this is a recognition of a break down in the relationship at the very least recognition of sufficient damage to the relationship for it to require some repair.)"**

15. A particular role to which the Claimant sought to return was Commercial Director China PGA European Tour, based in Beijing. At [28] the Tribunal said, of his evidence:

> **"He said that he would be willing to relocate to Beijing in order to perform this role. The Claimant said he does not speak Chinese; he indicated that culturally, he likes China and would be willing to learn Chinese. He said: "I have a modest navigation of Japanese" and his facility with languages might assist him in being able to pick up the Chinese language. In practical terms, he would have to work with an interpreter or translator whilst he was learning the language."**

16. In view of what is to come later, I should note that, in summarising the submissions, the Tribunal said this, at [51]:

> **"51. The respondent stated that where, as here, an employer was relying on a breakdown in trust and confidence as making a re-engagement impracticable, the employment tribunal had to be satisfied not only that the employer genuinely believed that trust and confidence had broken down but also that its belief in that respect was rationally held. The issue of trust and confidence had to be tested against other relevant factors to determine whether a re-engagement order was capable of being successfully carried into effect by the parties."**

17. The Tribunal unanimously concluded that it would not be practicable to reinstate the Claimant to his old job, for reasons that it gave at [52]. It then continued:

> **"53. In addition, the minority view is that the generally unfavourable view held by Mr Pelley of the claimant's ability, together with the fact that Mr Pelley has become aware of the covert recordings made of the meetings on 8 and 15 October, mean that it is not practicable to reinstate the claimant.**
>
> **54. Mr Pelley does not have confidence in the claimant to perform the role as he requires it. He does not trust the claimant's ability. While the claimant can correctly state that he was not put through a capability procedure which would have highlighted shortcomings and given him an opportunity to improve, the views held by Mr Pelley were genuine and formed as a result of his observation of the claimant's work.**
>
> **55. Further, the covert recordings of the meetings have resulted in a loss of trust in the claimant on the part of Mr Pelley.**
>
> **56. The absence of trust in the claimant's ability and integrity, in the view of the minority, means it is not reasonably practicable to reinstate the claimant. Reinstating the claimant would require him to work closely with Mr Pelley.**
>
> **57. The view of the majority is that issue of trust and confidence arising from doubts about the claimant's capability and his integrity arising from the covert recordings are not so significant as to make it impracticable for the claimant to be re-engaged. The majority consider that when tested those matters are not so serious as to prevent the claimant's reemployment in a suitable role.**

58. The view of the majority is that there is no reasonable basis for concluding that the claimant did not have the ability to perform the role required by the Tour in his old role (Group Marketing Director). Mr Pelley did not give the claimant the opportunity to prove himself capable or incapable of working in the new regime that Mr Pelley instituted. He formed a view that the claimant was not capable and dismissed without more.

59. The majority consider that concerns alleged about the claimant's ability are necessarily emphasised by the respondent due to the nature of this litigation. The majority do not consider that they necessarily reflect reality. The claimant had 26 years of successful service with the Tour and at the point of his dismissal was considered of sufficient competence to be offered a role as a consultant on the Morocco tournament, a prestigious and important event, for a period of three years. The majority do not consider that the Tour was likely to agree to this merely to effect an elegant exit for the claimant. While there may have been concerns about the claimant's style, the majority do not consider that it has been established that there was concern about the claimant's ability to do the job that withstands scrutiny.

60. The question of trust arising from the covert recordings and any other residual issues form the litigation could be overcome by all if reasonable professional behaviour is maintained. The covert recordings were merely a covert recording. There was no underhand attempt to exploit the fact that the recording was made. There was no attempt to unfairly exploit the circumstances. The majority echo the sentiments of Mr Schofield on this issue.

61. While there has undoubtedly been tension created by the dismissal and the employment tribunal process, and there may have been historic issues relating to the claimant's performance, but it is the view of the majority that it has not been established by the respondent that there has been such a fracturing of relationships that the claimant could not return to work with the respondent.

62. The Tribunal has gone on to consider if there are any roles in which the Claimant could be re-engaged. The Tribunal considers that the only role in respect of which there is a realistic possibility of successful re-engagement is the Comercial Director, China, role."

18. After holding that another particular role, Ryder Cup Account Manager, was not appropriate for re-engagement, the Tribunal continued:

"64. The China PGA role is a role which the Tribunal considers the claimant could fulfil. Considering the nature of the role and the claimant's personal attributes, the Tribunal is satisfied that it is a role that the claimant could potentially perform. The area of reservation in relation to this role arises from the fact that the role is based in China and it is expressed by the respondent as being a role for which a Chinese speaker is required.

65. In respect of this part of the case, the majority view is that the Claimant's expressed willingness to learn added to his proficiency in languages mean that is practicable for the claimant to be re-engaged in the role of China PGA role.

66. The view of the minority is that while in general terms, the claimant is the possessor of the skill set required for the role, he is deficient in one significant respect relating to the person specification. The job profile states that "bilingual essential (spoken, written, listening), Mandarin and English (Cantonese is preferred but not essential). The person profile makes clear that the person

> **filling this job has to have those language skills. The minority notes that the outgoing holder of the equivalent position was a Chinese speaker. The minority also takes into account the evidence which was given by Mr Pelley as to what the expectations were in relation to this role – "a person with cultural knowledge of China to be able to identify benefit to the Tour."**
>
> **67. The view of the minority is that whilst the claimant in broad terms has the skills required for this job, the absence of the language skills is such that in reality it would not be practicable for the claimant to be engaged in this role. For that reason, the minority view is that the claimant cannot be re-engaged in this role."**

19. The Tribunal observed that, as it had decided to order re-engagement, it did not need to consider making basic and compensatory awards. But it set out its conclusions in relation to mitigation and *Polkey* "had we been required" to reach them. In relation to *Polkey* it said this:

> **"74. The Tribunal has gone on to consider whether there are factors from which we could form a view that the claimant would have been dismissed in any event either at the same time or alternatively within a short further period after the date that he was in fact dismissed had a fair procedure been followed.**
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> **75. We accept the submission put forward by the claimant that the respondent in the way that it chose to deal with him deprived him of the opportunity of being able to demonstrate that he was capable of performing a role going forward in the way that Mr Pelley would have wished. We accept his position that he did not have the opportunity that Mr Hills and Mr Walters were given to prove themselves.**
>
> **76. We are unable to form conclusions that support of a *Polkey* reduction. The issues presented to us at the liability hearing turned principally on the question of whether the claimant was dismissed in a discriminatory manner. While the Tribunal made a number of findings in respect of the reasons for the claimant's dismissal. We were not considering whether those reasons would have resulted in a fair dismissal."**

20. Having so found, and then also rejected the contention that the Claimant had unreasonably failed to mitigate, and having considered the schedule of loss, the Tribunal indicated that, had it made a compensatory award, it would have been in the maximum amount.

21. I turn to the reconsideration application. The Claimant's appeal relates solely to the rejection of the first part of that application, which relied on the assertion that material breaches of the Respondent's disclosure obligations in relation to remedy had come to light.

22. The proposition of law on which that part of the application rested was that, in considering whether to make a re-engagement Order, it was relevant for the Tribunal to consider, not only what suitable vacancies existed at the date of the Remedy Hearing, but also any such vacancies that had arisen since the dismissal, even if they had, by the date of that Hearing, been filled. This argument drew, in particular, on the fact that section 116(5) refers not only to the question of whether it is practicable to comply with an Order for reinstatement, but also to that of whether it is practicable to comply with an Order of re-engagement. The application then asserted that a number of such positions had come to light, in respect of which the Respondent had failed to make proper disclosure prior to the Remedy Hearing. It would therefore be just to reopen the Remedy Decision, as the law required these to be considered.

23. In reply the Respondent analysed the history of the litigation in this respect, commenting on what information had been provided, and when, and the factual position regarding particular posts referred to by the Claimant. It maintained that, as a matter of law, whether there were suitable vacancies for the Claimant had to be determined as at the date of the Remedy Hearing; and that there had been no failure of disclosure. In the Reconsideration Decision the Judge simply stated: "For the reasons explained by the Respondent there does not appear to have been a failure to provide disclosure for the purposes of remedy."

The Respondent's Appeal

Grounds of Appeal and Respondent's submissions

24. I had the benefit of written skeleton arguments and two full days of oral argument from both counsel. I have considered it all. What I set out here is only a summary of what appear to me to have been the most significant arguments.

25. Grounds 1, 2 and 3 occupy the same general territory and overlap. So I will summarise them, and the principal arguments that Mr Nicholls QC advanced in support of them, together.

26. Ground 1 contends that, in considering whether re-engagement was practicable, the majority should have considered whether the Respondent had a genuine and rationally-held belief that its trust and confidence in the Claimant had been damaged. Instead, erroneously, they acted on their own view, that it was *not* damaged. They also wrongly took the approach that, for these purposes, there were grades of seriousness of loss of trust and confidence.

27. Ground 2 contends that the majority erred, at [58] and [59], in holding that the Respondent did not have a reasonable basis to conclude that the Claimant lacked the capability to carry out his old role. That contradicted positive findings made in the 2016 Decision, as to the reason for dismissal. Ground 3 contends that, in any event, the only relevant question regarding capability was whether the Respondent genuinely and rationally believed that the Claimant lacked capability, even if that belief was not reasonable. That was because, as the Tribunal correctly directed itself at [14], if the Respondent had genuinely lost confidence in the Claimant, then it would be bound to have concluded that re-engagement was not practicable.

28. Mr Nicholls accepted that the question of whether or not re-engagement was, in the given case, practicable, was one for the factual appreciation of the Tribunal. However, in this case, it had not applied the correct legal test to the facts. He cited **Wood Group v Crossan** [1998] IRLR 680 as authority for the proposition that, if the employer has a genuine, even if unreasonable, belief, that the employee has committed misconduct, then re-employment will rarely be applicable. The same approach should, he submitted, apply where the concern relates to capability. In either case, the question is whether the employer had a genuine belief, for which

A there was a rational basis. That is because the issue is the practicability of *this* employer re-employing – not some other employer and not the Tribunal. If this employer has genuinely and rationally lost trust and confidence, re-employment will not be practicable. See: **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513.

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29. In this case, at [12] of the Remedy Decision, the Tribunal plainly misstated the test. The majority then went on to apply that erroneous test: by stating its own view at [57] that "doubts about the Claimant's capability and his integrity arising from the covert recordings are not so significant as to make it impracticable for the claimant to be re-engaged"; and, at [60], that the question of trust arising from the covert recordings "could be overcome if all reasonable professional behaviour was maintained." It compounded this error, at [57], in observing that the Respondent's concerns "were not so serious" as to prevent re-employment, which suggested that it, erroneously, thought that there were degrees of loss of trust and confidence.

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30. Mr Pelley's evidence had been that there were two aspects that had contributed to his loss of trust and confidence in the Claimant. The first was the discovery that the Claimant had covertly recorded their meetings in which the proposed parting of the ways was discussed. The Tribunal had not said that it did not believe that what the Claimant had done had genuinely, in Mr Pelley's eyes, damaged trust. Nor had it said that such a view would not be rational. The majority seemed to accept that it *was* rational, given that they suggested a method by which the damage might be repaired, that is, by the parties "maintaining professional behaviour" – whatever they meant by that. But this was itself misguided, as, once destroyed, trust and confidence cannot be repaired; and it was plain that Mr Pelley's concerns were very serious.

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31. The second aspect was the view that Mr Pelley said he had formed of the Claimant's capability. Mr Nicholls submitted that it appeared that the majority were saying, in particular at [59] of the Remedy Decision, that this was not his genuine view. If so, it was not open to them to take that stance, when the Tribunal had, in the 2016 Decision, accepted Mr Pelley's evidence about the reason why he had dismissed the Claimant. It had referred, at [47] of that Decision, to his explanation that he did not consider the Claimant capable of fulfilling the role he wished him to perform going forward; at [53] to the reason advanced by Mr Pelley "that the Claimant was not suitable for the role of commercial director", to his view of the Claimant's performance, and to critical observations he had made to the Claimant about his performance. It had accepted, at [54], that he was genuinely of the view that the Claimant had been unable to embrace a change of CEO. At [56] it had said, in terms, that it accepted Mr Pelley's evidence.

32. Alternatively, said Mr Nicholls, if the majority, in these passages, were not casting doubt on the genuineness of Mr Pelley's evidence as to his own view of the Claimant's capability, but merely disagreeing with it, they still erred, by substituting their own view for his, rather than considering whether his genuine view was rationally held.

33. Grounds 4 and 5 challenge the specific decision to order re-engagement to the PGA China job. Ground 4 argues that the Order required the Respondent to create a job which did not exist, and to employ additional staff. Specifically, being bilingual in Mandarin and English was an essential requirement of this job. The Claimant did not meet that requirement, and the Order required the Respondent, instead, to create a job for a non-Mandarin speaker. Ground 5 contends, effectively in the alternative to ground 4, that it was perverse for the majority to hold that re-engagement in the PGA China role was practicable, when bilingualism was an essential

A requirement of the job, and the Claimant could only offer an unspecific indication that he expected to make good progress in acquiring Mandarin within one year.

B 34. It is well-established, said Mr Nicholls, that a Tribunal should not, by a re-engagement Order, require an employer to create a new job. See, for example, **Lincolnshire County Council v Lupton** [2016] IRLR 576, and **Port of London Authority v Payne** [1994] IRLR 9. In this case, there was no job for someone who did not speak Mandarin. To order the Claimant to be re-
C engaged to this role was therefore an error of law.

35. This point was demonstrated, submitted Mr Nicholls, by the fact that, in the second part
D of the reconsideration application, the Claimant had asked for the re-engagement Order to be amended to include a provision that he be provided with an interpreter and/or language lessons. That would have required the Respondent, in practice, to pay an additional salary. In any event,
E using an interpreter was simply not a substitute for speaking the language. Bilingualism was plainly an important requirement of the post. As to that, he referred to the features highlighted by the minority Tribunal member at [66] of the Remedy Decision.

F 36. Even if his primary argument, that the Tribunal had wrongly ordered re-engagement to a non-existent post, was wrong, it was perverse (per Ground 5) to hold that it was practicable to re-engage the Claimant in a post in relation to which he did not meet a mandatory requirement.

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37. Ground 7 contended that the Tribunal took the wrong approach to the *Polkey* question by failing to engage properly with it; and/or that its conclusion on this question conflicted with the
H 2016 Decision. Mr Nicholls submitted that the Tribunal had made findings in the 2016 Decision which were pertinent to this question: as to Mr Pelley's views on the Claimant's capability, which

were based on various sources, the Claimant's mindset, and unwillingness to embrace a change of CEO. The Tribunal should have considered, and come to a view on, the *Polkey* question, in light of those findings. It was not open to it to decline to do so. He relied upon the principles set out in **Software 2000 Limited v Andrews** [2007] IRLR 568. Mr Nicholls further submitted that it was plain from the Tribunal's findings in the 2016 Decision that Mr Pelley had lost all faith in the Claimant, in terms of capability, and that, even if a full and fair process had been followed, this would inevitably have led to his dismissal.

38. In the course of oral submissions Mr Nicholls indicated that a further contention, that the Tribunal should also have engaged with whether the Claimant's conduct in making the covert recordings would have led to his dismissal, was no longer pursued.

39. Ground 8 contended that there were two errors in calculation of the back-pay element of the re-engagement Order. First, the Tribunal had used the wrong figure for the Claimant's previous salary. Secondly, the Tribunal wrongly omitted to give credit for the sum of £160,000 which had been paid to the Claimant on termination, partly in cash and partly into his pension.

Claimant's Submissions

40. When considering practicability at the stage of deciding whether to make a re-employment Order, the Tribunal's decision is only provisional. See **McBride v Scottish Police Authority** [2016] ICR 788, citing earlier authority to that effect. Absent a clear and compelling case of perversity, the EAT will not interfere with a Tribunal's findings on practicability, an issue which is pre-eminently within its territory as industrial jury: **Clancy v Cannock Chase Technical College** [2001] IRLR 331.

41. As to Grounds 1, 2 and 3, this was not a conduct dismissal, nor was there any contributory conduct alleged or found. The covert recordings of meetings were not exploited by the Claimant in any way. An employer could not rely on a "trust and confidence" argument in relation to an issue of capability, as opposed to conduct. The structure of section 116 did not allow for it, whereas *conduct* could be taken into account through sections 116(1)(c) and (3)(c).

42. In any event, though the wording of the sentence appearing at [12] of the Remedy Decision was obviously an error, the Tribunal also set out the Respondent's submission, plainly based on **Farren**, at [51]. Further, in the concluding section the majority then, in fact, properly tested the Respondent's view, in line with **Farren**. It did not substitute its own view.

43. In the 2016 Decision, the Tribunal had accepted that Mr Pelley's stated concerns about the Claimant's capability were genuine; but this was not to be equated to a finding that dismissal was (as had been pleaded by the Respondent) by reason of capability or, alternatively for a substantial fair reason, for the purposes of section 98 of the **1996 Act**. Findings made solely for the purpose of deciding whether the dismissal was an act of age discrimination could not be relied upon to tie the Tribunal's hands when deciding at a separate hearing fourteen months later, the very different question of whether or not re-engagement was practicable.

44. Even if the **Farren** approach was potentially applicable to a case where the employer's stated concern related to a matter of capability, rather than conduct, it required the Tribunal to consider not only whether the stated concern was genuine but whether it was rationally held. This was an important test which should not be downgraded. Otherwise an employer would simply be able to rely upon its own assertion as self-fulfilling. It meant the same thing as asking whether

A the employer's view was reasonably held. See, for example, **Asda Stores Limited v Raymond**, UKEAT/268/17, at [59]. That was what the Tribunal had properly done.

B 45. The majority had accepted that Mr Pelley may have genuinely believed that, because of his concerns about the Claimant's capability, and/or the covert recordings, trust and confidence had broken down; but, for cogent reasons set out at [57] – [61], it properly concluded that such belief did not have a rational, or reasonable, basis. The majority did not substitute its own view.

C At [57], as envisaged by **Farren**, it "tested" the Respondent's reliance on these matters. At [58] it properly concluded that there was no "reasonable basis" for Mr Pelley's view of the Claimant's capability. At [59] it properly considered whether the stated concerns about capability "withstand

D scrutiny", echoing again language used in **Farren**. It also properly relied on the fact that, in the dismissal letter, the Respondent had offered the Claimant a consultancy in Morocco, which was inconsistent with the assertion that it had lost all trust in him. The majority properly concluded

E that the Respondent had not made good a rational basis for its claim to have lost trust and confidence in the Claimant.

F 46. It needed to be borne in mind that previous authorities, in which loss of trust and confidence was held to render re-employment impracticable, such as **Crossan**, and **Central & North West London NHS Foundation Trust v Abimbola**, UKEAT/0542/08, all concerned very serious conduct issues. In **Farren** itself, there were serious conduct issues, but even in that

G case the EAT still remitted the issue to the Tribunal. Given the contrasting nature of the capability issues raised in the case, it could not be said that the majority's view was perverse. On day two of oral argument Mr Mitchell hardened his position, contending that it was not open to an

H employer to run a trust and confidence argument to resist re-engagement in reliance on issues of capability, as opposed to conduct.

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47. As to Grounds 4 and 5, the Respondent disclosed a job profile, not a job description. The evidence that the Tribunal had was that the job had yet to be advertised, and the details would be confirmed as and when it went to market. Mr Pelley's witness statement asserted that the language requirement was mandatory; but he was unclear about this in oral evidence, saying that the position was unsuitable because it would bring the Claimant into contact with him. The language requirement in the profile was for the "ideal candidate". As the Tribunal recorded, the Claimant gave evidence that he had connections to Japan, was willing to move to Beijing, is a linguist, and would make good progress in Mandarin after a year. While, in oral submissions, Mr Mitchell accepted that the Tribunal *had* found that bilingualism was a mandatory requirement (and he did not argue that that was perverse), these features of the evidence provided relevant context when considering the impact of this on the issue of practicability.

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48. There was no error in the majority's conclusion on the practicability of re-engaging the Claimant in this post. The Tribunal was only required to make a provisional assessment on a prospective basis. It was sufficient if it reasonably thought that it was likely to be practicable – see **McBride** at [37] – [38]. The Tribunal was alive to the **Lupton** point – citing the authority at [6], and referring to the Respondent's submission on it at [49]. In the present case, unlike in **Lupton**, there was a specific identified vacancy, and the Order related to it. The Order did *not* require the Respondent to create a new job for the Claimant or to employ an interpreter or translator. In any event the Tribunal *could* properly have addressed the issue of language assistance in its Order. It was permissible to employ "sensible creativity" in writing the terms of a re-engagement Order: **Oasis Community Learning v Wolff** UKEAT/0364/12, at [39]. The Order that the Tribunal had in fact made could not be said to have been perverse.

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49. The Respondent would also have the opportunity to raise its issues in this regard at the second stage Remedy Hearing, pursuant to section 117(4), which was the proper place for them.

50. In relation to Ground 7, the Remedy Decision did address the *Polkey* question, at [74] – [76]. There was no conflict with the 2016 Decision, in which no finding that the dismissal was, in section 98 terms, for capability or SOSR, had been made. There had also been a complete absence of fair process, and no sufficient evidential material on which to base a reconstruction of what might have happened. The Tribunal found (at [58] and [59]) that Mr Pelley's views had no reasonable basis and did not necessarily reflect reality. This case was properly regarded, in **Andrews** terms, as one so riddled with uncertainty that no sensible prediction could be made.

51. As to the first limb of ground 8, the difference between the figures was that the Respondent had not, in its calculation, factored in the Claimant's annual bonus. Mr Nicholls indicated that, on the basis, not hitherto appreciated, that the figure identified by the Tribunal indeed took account of the bonus, this limb was not pursued. As to the second limb, Mr Mitchell accepted that the Tribunal erred in not giving credit for the termination payment.

The Claimant's Appeal

The Ground of Appeal and the Claimant's Argument

52. The essence of the Claimant's Appeal is that (a) as a matter of law the Tribunal was required to consider not just suitable vacancies existing at the date of the Remedy Hearing, but also those that had arisen, since the date of dismissal, but then been filled, and whether the Respondent could defend having filled them; and (b) that, applying that test, failures of disclosure of relevant vacancies had come to light, so that a reconsideration would be just.

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53. The legal hinge is the interpretation of section 116(5). Its application is not confined to Orders for reinstatement. It refers to subsection (3)(b), as well as (1)(b), and to "reinstatement or re-engagement". Section 115(1) provides that a re-engagement order applies to "employment comparable to that from which he was dismissed or other suitable employment." Section 116(5) has to be read in light of this, and therefore bites on any "comparable … or other suitable employment." This covered the situation, for example, of an employee unfairly dismissed in the course of a redundancy or restructure. The employer could not engage a permanent replacement for such an employee in their old job, which no longer existed; but this did not preclude the operation of section 116(5) in such a case.

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54. Mr Mitchell said that it was accepted that the reference to the "dismissed employee" in section 116(5) is a reference to the employee bringing the claim. However, reading it in light of section 115(1), section 116(5) extends to "a permanent replacement" for that employee in any "comparable … or other suitable employment." As that provision is retrospective, it requires the Tribunal to consider practicability in respect of all such roles which have become vacant in the period since the dismissal. That therefore requires information relating to all such roles to be disclosed by the employer. There is only a limited exception to this in section 116(6).

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55. Where, as in this case, the employer has not complied with a re-engagement Order, similar provisions apply, in section 117(7), for the purposes of the second Remedy Hearing.

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56. The Respondent's stance, that it was only required to disclose vacancies existing as at the date of the Remedy Hearing, confused the date at which the Tribunal was required to determine practicability, with the scope of the disclosure obligation, which extended to roles that had been filled in the period since dismissal. In this case, it had failed to disclose a structure chart from

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November 2016 which showed 17 vacant positions at that time. Had the Respondent given proper disclosure, the Claimant would have been able to contend that he should have been re-engaged to suitable vacant positions on that chart, even though they had since been filled, and section 116(6) would then have been in issue.

57. The onus was on the Respondent to disclose this information, as it was uniquely placed to provide it, and the Claimant was reliant upon it complying with its obligations. See **Dafiaghor-Olomu v Community Integrated Care** [2018] ICR 585 at [29].

58. This approach was also consistent with the costs provision in Rule 76(3) of the **Employment Tribunals Rules of Procedure 2013**, which provides:

> **"Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—**
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> **(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and**
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> **(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment."**

59. It had therefore been necessary for the Tribunal to grant the reconsideration application on this ground in the interests of justice, and it erred by instead dismissing it.

Respondent's Submissions

60. Mr Nicholls began by noting that, in its reply to the reconsideration application, the Respondent had addressed the position in relation to all the categories of documents raised in that application. This included identifying (correctly, said Mr Nicholls) that the information given for the purposes of the Remedy Hearing had not been confined to then current vacancies, but had

included (in a second witness statement of Mr Pelley) information about some vacancies that had by then been filled. In rejecting the reconsideration application the Judge had accepted that there had been no failure by the Respondent to give disclosure. It could not therefore be said that the Judge's decision had depended on the construction of section 116(5).

61. Secondly, Mr Pelley's statement had referred to the fact that a role of Head of Marketing had been created but had also been filled. If the real purpose of the Claimant's appeal, however, was to contend that the Tribunal should have considered whether he should have been re-engaged in *that* role, this was not a matter that could be re-opened. That was because, despite Mr Pelley referring to this position, the Claimant had not indicated to the Tribunal that he was seeking to be re-engaged in that role. It was too late to raise this now.

62. As to the construction of section 116(5), first, submitted Mr Nicholls, the reference to a "dismissed employee" is to the employee bringing the claim. As I have noted, Mr Mitchell did not dispute that, as such. But, said Mr Nicholls, it followed from this that it was only a defence based on the fact that the job formerly done *by the dismissed employee* had been filled that was regulated by section 116(5) and (6). It did not, and could not, apply to the filling of a job that had been done by some other employee. If that were right, the employer could not rely on the fact that it had replaced any employee since the complainant's dismissal, no matter what their job or connection with the complainant, which cannot have been intended by Parliament. The fact that section 116(5) could apply where re-engagement was sought, merely catered for the possibility that the filling of the complainant's old job could, potentially, be raised as a defence, if they were, for example, seeking re-engagement to a closely comparable position.

63. In any event, said Mr Nicholls, insofar as the real target of this challenge was the Head of Marketing role, to which a new appointment had been made prior to the Remedy Hearing, even on the Claimant's construction, section 116(5) could have no application. Even on that construction, it still could only apply to the replacement of *dismissed* employees. But in this case the previous holder of the Head of Marketing role had *resigned* and then been replaced.

Discussion and Conclusions

Respondent's Appeal – Re-engagement Order

64. I start with some points about the legal framework that emerge from the authorities.

65. The interpretation of "practicable", in the context of these provisions, as meaning not merely "possible", but "capable of being carried into effect with success", which can be traced to **Coleman v Magnet Joinery Limited** [1975] ICR 46 at 52B and C, has carried down through the authorities over the years since, and cannot be improved upon.

66. The word "provisional" to describe the assessment of practicability made under section 116(1)(b) or (3)(b) also permeates the jurisprudence, but it is important not to lose sight of what it does, and does not, mean. First, to the extent that the language in some of the earlier authorities may have created the impression that a Tribunal does not, at that first stage, have to determine whether it is practicable for the employer to comply with a re-employment Order, **Port of London Authority v Payne** [1994] IRLR 9 confirmed (at [42]) that it does. The statute plainly requires it. It is something that the Tribunal "shall" take into account, and it cannot take into account the question of whether it is practicable, without determining it.

67. This is not affected by the fact that, at the section 116 stage, practicability is not the only mandatory consideration. That is because Parliament has taken a view that, even if the Tribunal concludes that re-employment *is* practicable, it would not be right to impose it on an employee against their wishes, and also potentially unfair to impose it on an employer where there has been contributory conduct. But practicability still has to be determined at that stage; and, though the language of sub-sections 116(1) and (3) is not exhaustive, in cases where there is no issue of contributory conduct, it will usually be the determining consideration, either way.

68. The material difference between the two exercises flows from the point in the process at which each of them is undertaken. At the section 116 stage the Tribunal is considering, as at the date of the remedy hearing (or final submissions), whether it *will be* practicable to comply with the proposed Order, by the *future* final compliance date to be set in any such Order (in accordance with section 114(2)(c) or 115(2)(f)). Under section 117 the Tribunal returns to the matter only if and when that last date for compliance has passed, without the Order having been complied with. The employer may then seek to satisfy the Tribunal, under section 117(4), that, as things actually turned out, it *was not* practicable to comply with the Order by that date.

69. The statute expressly permits the employer to invite the Tribunal to revisit the question at the second Hearing. It is plainly possible that circumstances may have changed, and events unfolded, between the date when the Tribunal made its original Order and the last date which it set for compliance with it. The Tribunal is not estopped, by its earlier determination of practicability, from revisiting the question. Parliament has permitted, indeed required it, if the employer invokes section 117(4)(a) – to revisit the question, now with the benefit of hindsight, but with the onus on the employer to show that compliance was not practicable. It is in *that* sense

A that the Court in **Payne** (in the final two sentences at [42]) described the first determination as "provisional": meaning that it does not give rise to an estoppel.

B 70. That passage does go a little further, as the Court also held there that the first determination does not limit an employer "so that he can only rely on the facts which have occurred after" the original Order was made. Why that should be so is not entirely obvious. But it is perhaps, doctrinally, precisely because the Tribunal is making a determination at the second C stage, of a different question – not whether it *will be* practicable to comply in the future but whether it *was* practicable to comply in the past – rather than merely being asked to reconsider an earlier decision on an identical question, in which context **Ladd v Marshall** [1954] 1 WLR D 1489 principles would apply.

71. But the significance of this second strand of the reasoning in **Payne** should not, I think, be over-stated. Though it potentially means that, at stage two, new evidence, leading to E *additional* fact-finding, about events *before* the date when the first Order was made, *could* be permissible, it would not, it seems to me, be permissible to seek, at the second Remedy Hearing, to reopen "hard" factual findings that *had* been made in the first decision. Further, it seems to F me, in practice, in most cases, that the contention at stage two, that it was not practicable to comply, is likely to be founded on developments post-dating the first Order, in respect of which, in the nature of things, no facts will, on that earlier occasion, have been found.

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72. There is a third sense in which the word "provisional" is used. Because the first assessment is prospective, there is bound to be an element of uncertainty, at that point, as to how H things will in fact turn out. It is in that sense that many of the authorities refer to the decision at that stage as "provisional". The observation in **McBride** [2016] ICR 788 at [38], that it was

A sufficient if the Tribunal at stage one "thought that it was likely to be practicable", reflects this aspect, coming, as it does, at the end of two paragraphs which highlight the significance of the temporality point. It reflects the fact that, at stage one, the Tribunal of necessity cannot be entirely sure how matters will turn out.

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73. However, even at the second stage, when the Tribunal is considering whether it *was* practicable to reinstate, it should still be remembered that it is applying that test *as at* the same date, namely the last date on which the original Order required the employer to *start* the employee in the new job. The regime does not provide for the employee to be given a trial period. The Tribunal is not, at the second stage, reviewing how things have in fact gone in a job that the employee has in fact started, and been trying out.

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74. I turn to the question of trust and confidence. It is plainly well-established that a genuine loss of trust and confidence may lead to the conclusion that re-employment would not be practicable. How is the Tribunal to approach a case in which this is asserted? The answer, is explained in **Farren**, in particular at [39] – [42]. In that case, the EAT found, the Tribunal had come to its own view of whether the employee had been dishonest, and the Tribunal had also concluded that she could be trusted, if she was returned to working for the employer in a different working environment than before. However, the EAT continued:

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> **40. That, however, was not the correct question for the ET. As the case law makes clear (see Crossan at paragraph 10, cited above), it had to ask whether this employer genuinely believed that the Claimant had been dishonest, and - per the EAT at paragraph 14 of United Distillers v Brown, see above - whether that belief had a rational basis. It was, after all, *this* employer - not some other and certainly not the ET - that was to re-engage the Claimant. The issue of trust and confidence had to be tested as between the parties in order to determine, even on a provisional basis, whether an order for re-engagement was practicable, whether it was capable of being carried into effect with success, whether it could work. The Respondent might have reached a conclusion as to the Claimant's honesty by an impermissible route in its dismissal decision and might also have drawn the wrong inference at the re-hearing, but the ET still needed to ask, as at the date it was considering whether to order re-engagement, whether it was practicable or just to order *this* employer to re-engage the Claimant. It thus was**

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the Respondent's view of trust and confidence - appropriately tested by the ET as to whether it was genuine and founded on a rational basis - that mattered, not the ET's.

41. We make clear that we are not saying that we find that a re-engagement order was not a permissible remedy in this case. The answer did not have to be in the negative simply because the ET had found that a fundamental part of the substantive charge against the Claimant had been made good or because it had concluded that her compensation should be reduced by a third, given her contributory conduct, or because it had refused to order reinstatement. These were all relevant considerations but were not necessarily determinative and we would not have allowed the appeal simply on those bases. In particular, we observe that stating the bare facts of a case can seem to suggest a particular answer, but the assessment of practicability for the purpose of a re-engagement order requires a far more nuanced consideration of the position; something that an ET is very much best placed to undertake. In this case the assessment undoubtedly included the Claimant's long experience, her past good record and professional commitment; all matters that permissibly weighed with the ET. We equally do not say that the ET was wrong to have regard to evidence of references from other employees: we can see why an ET might not consider such evidence to be relevant, and we do not consider these were given great weight in the present case, but it is all a matter of assessment for the ET.

42. What we consider the ET did have to do was to consider, as at that point in time, whether the Respondent had made good that which it said made it impracticable or unjust to order re-engagement; that it could no longer have trust and confidence in the Claimant. Given the ET had found that the Claimant had committed the act of misconduct in question, that might not seem to have been an obviously irrational position, but, as Mr Bourne accepted in oral argument, it was not the only question. The ET also needed to consider whether the Respondent had made good its case that trust and confidence could not be repaired, whether its belief in her dishonesty was such that a re-engagement order was unlikely to be carried into effect with success. The ET was thus entitled to scrutinise whether the Respondent's stated belief was genuinely and rationally held, tested against the other factors the ET considered relevant. It was, however, still a question to be tested from the perspective of the Respondent, not that of another employer, still less that of the ET: was it practicable to order *this* employer to re-engage *this* Claimant? And, unfortunately, we do not feel able to conclude this was the approach adopted by the ET. We consider that paragraphs 48 and 49, in particular, set out the conclusions reached by the ET itself, standing in the shoes of the employer, testing the question of practicability from the ET's perspective rather than asking what was practicable as between these parties, the parties to the re-engagement order it was considering making. That being so, we consider we are bound to allow this appeal and set aside the Order.

75. Accordingly, the Tribunal must consider whether the employer genuinely and rationally believes that trust and confidence has been broken, so that re-employment is not practicable: that is, not capable of being carried into effect with success. An employer cannot merely *assert* that this is the case in a self-serving way, in order to successfully resist the Order sought. The Tribunal should test and evaluate against the *evidence* before it, whether the employer's stated belief *is*

A both genuinely and rationally held. But it must keep in mind that the ultimate question is about whether it is practicable for *this employer* to re-employ *this employee*.

B 76. The requirement for the asserted belief to be both genuinely held, and have a rational foundation, is not a reasonableness test, or to be equated with that which would be applied under section 98(4) of the **1996 Act**. A belief may have a rational foundation in evidence or information known to the person who forms it, though it has not been reasonably reached. This explains why, as authorities such as **Crossan** show, it is possible for an employer to rely upon a genuine and rational belief in misconduct as having a bearing on practicability, even though the dismissal for that same conduct was unfair. In **Raymond** the EAT specifically cited the **Farren** test. Further, while, at the start of [59] it referred to the question of whether it was unreasonable to refuse to reinstate, having referred to the evidence, it concluded in that same paragraph, that the Tribunal could not be satisfied that the Respondent "had any rational belief" that trust and confidence had broken down. I do not think this passage signifies that the "rational belief" test is to be equated to an ordinary reasonableness test. It is not.

F 77. I also do not agree with Mr Mitchell that trust and confidence can, in this context, only be invoked in cases where the dismissal was by reason of conduct. An employee can seek re-employment in any case where they have been unfairly dismissed, whatever the specific reason for dismissal; and in any such case, practicability will fall to be considered. In practice, in many cases to do with conduct, section 116(1)(c) or 116(3)(c) may be in play, but this will not be so in cases where the conduct said to have harmed trust and confidence did not cause or contribute to the dismissal; and the statute does not confine the consideration of the potential impact of conduct on practicability to cases where those sub-provisions are engaged.

78. Nor is there any reason in principle why an employer should only be permitted to raise an issue of trust and confidence where the matter said to have damaged it is something that can properly be described as conduct. There is no reason in principle why, as here, what is said to be a belief about the employee's capability or performance cannot be relied upon as the source of concern. I do not agree with Mr Mitchell that this sets the bar too low or devalues the remedy. To repeat, an employer cannot merely invoke the mantra of trust and confidence. They must identify the particular conduct, or other factual state of affairs, on which they rely; and the Tribunal must then consider, on the evidence, whether the individual(s) concerned genuinely and rationally believed, both that this conduct had occurred or other factual state of affairs existed, and that it meant that trust and confidence had broken down, so as to point to the conclusion that re-employment would not be capable of being carried into effect with success.

79. I turn to this Tribunal's Decision, first in relation to the general question of whether re-engagement was practicable in this case, that is, the territory covered by grounds 1 to 3. The central issues here are whether the majority of the Tribunal erred by not correctly applying the **Farren** test and/or by not taking proper account of, or departing from, pertinent findings of fact that had already been made in the 2016 Decision, and which could not now be revisited.

80. What the Tribunal said at [12] of the Remedy Decision is plainly wrong. It is not only not the **Farren** test. It is the negation of it. However, although, in this section of the Decision, the Tribunal only expressly cited one authority by name (**Lupton**), this paragraph forms part of a series of concise propositions of law, that are plainly and recognisably derived either from the words of the statute, or from the authorities, and all the others of which are fairly stated. Later, at [51], the Tribunal also refers to a submission by the Respondent, which includes an accurate

paraphrase of the **Farren** test. Overall, I am inclined to think that it does rather look as if the Tribunal *intended*, at [12], to capture the headline **Farren** test, but simply mis-rendered it.

81. Before turning to consider the dispositive passages in the Remedy Decision on this point, I need next to address the issue concerning the significance, or not, of the findings in the 2016 Decision. The two matters relied upon by the Respondent at the Remedy Hearing, as having caused in particular Mr Pelley's trust and confidence in the Claimant to be undermined, and re-employment to be impracticable, were what has been called, for short, the capability issue, and the Claimant's conduct in recording the meetings with Mr Pelley.

82. As to the former, the Respondent drew on the 2016 Decision. The context was, as the Tribunal described in that Decision, the strategic review and the arrival of a new Chief Executive, with a mandate to ensure that he had the right team to deliver the commercial success and strategic vision. The Tribunal, in that Decision, accepted that Mr Pelley soon formed the view that the Claimant was not capable of fulfilling the role he wished him to perform going forward [47], and considered that he was not suitable for the role of commercial director [53]. That was found not to be an after-the-fact rationalisation, but a view reached at the time, as a result of Mr Pelley's due diligence, his own dealings with the Claimant and negative feedback he had received from members of the Claimant's team [53]. It was found that Mr Pelley also concluded that the Claimant had not bought into his ideas and had been unable to embrace a change of CEO [54]. It was this set of conclusions that the Respondent – specifically Mr Pelley – then relied on at the Remedy Hearing, and developed in his evidence to that Hearing, as the "capability" strand of the factual basis for opposing re-employment.

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83. Mr Mitchell, as I have noted, argued that these aspects of the 2016 Decision could not properly be relied upon at the Remedy Hearing. The only issue at the 2016 Hearing had been whether the dismissal was because of age. The Tribunal had not, in the 2016 Decision, actually even determined whether dismissal was, for the purposes of section 98(1) of the **1996 Act**, for a reason or principal reason falling within section 98(2)(a) relating to capability (or a substantial reason falling within section 98(1)(b)), because the Respondent had, by admitting unfair dismissal, deprived it of the opportunity to do so. Everything that the Tribunal had said on this subject had been solely in the context of consideration of the age discrimination claim. Further, these findings could not properly be relied upon in the context of a Remedy Hearing taking place some 14 months later and determining a very different issue.

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84. I do not agree. These passages in the 2016 Decision were properly relied upon at the Remedy Hearing, as binding upon the Tribunal when deciding the remedy issues, because they were findings *of fact*, made by the Tribunal in litigation involving the same parties, indeed the same litigation. It does not matter that they were reached in the service of determination of the age discrimination claim. They were positive findings of fact about views and beliefs that Mr Pelley had in fact formed. They were made by the Tribunal, having found that the burden had passed to the Respondent to explain, and show, the reason or reasons for dismissal. For completeness, I also note that whether certain passages might be construed as merely recording Mr Pelley's evidence, without implying it was accepted, was the subject of minute analysis by Choudhury J when considering the appeal against that Decision.

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85. As for the section 98(1) point, I note that the Tribunal, at [55] of the 2016 Decision, referred to this as a "capability" decision; and that the definition of capability in section 98(3)(a) embraces capability assessed by reference to "skill, aptitude… or any other…mental quality".

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A While Mr Mitchell is right that the Tribunal did not – because it did not need to – formally determine the section 98(1) point, this makes the suggestion that the Tribunal's findings would not necessarily point to the reason for dismissal falling within section 98(2)(a) something of a stretch. But the bigger point, once again, is that determination of this question was not necessary B to the proposition that the findings of fact in the 2016 Decision could not be reopened or departed from at the remedy stage.

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86. As to the conduct strand of the Respondent's case, relating to the covert recordings, these were discovered after the dismissal, and the Tribunal in the 2016 Decision made no particular finding about them, or Mr Pelley's view of this conduct of the Claimant. However, at [32] of the D Remedy Decision the Tribunal summarised the evidence that he had given about this aspect, in his witness statements for both the 2016 Hearing and the Remedy Hearing. In the former he had stated that he was "extremely shocked and disappointed" to discover this conduct, which he described as "extremely underhand a gross breach of trust." In the latter he said that he would E "really struggle to be able to work again with somebody who had breached trust in this way"; and in oral evidence he said that he "could not get past" this conduct.

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87. What the Tribunal had to decide, then, in accordance with **Farren**, was whether Mr Pelley genuinely and rationally concluded that the capability issue, and/or the covert recordings issue, separately or together, undermined trust and confidence so as to render re-engagement G impracticable. It had to do so, by applying that test to the relevant facts that it had already found in its 2016 Decision, and such further facts as it might now find in light of the further evidence that it had. As, in the event, it split on this issue, it is the Decision of the majority with which I am now concerned. The relevant passages are at [17] and then at [57] – [61].

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88. At [17] the Tribunal referred to the Claimant's view that the deterioration in the relationship since his departure was something that, with the right approach, could be overcome. It stated that the majority "accept that this is so." This is not a promising start, as it reads as an expression of the majority's *own view* (coinciding with that of the Claimant) rather than the product of consideration of what it found to be the Respondent's position, and whether it met the **Farren** test. But I recognise that this might be seen, nevertheless, as a brief aside, when summarising the submissions, and before the Tribunal came, later, to set out, in terms, its various conclusions. Those of the majority on this point are at [57] – [61].

89. At [57], in the first sentence, the majority state in terms that their *own view* is that the issue of trust arising from the matters in question is "not so significant" as to make re-engagement impracticable. In the second sentence, the phrase "when tested" is used, which, submitted Mr Mitchell, was language taken from **Farren**. But whether or not the majority, consciously or otherwise, picked up the word "tested" from that authority, what **Farren** discusses, is a process by which the Tribunal should "test", by reference to the evidence, whether *an employer's stated belief* is genuinely and rationally held, "from the perspective of" the employer. What this sentence in paragraph [57], however, states, is that "the majority consider" that, when tested, these matters "are not" so serious as to prevent re-employment.

90. At [58] the majority state their view that there was "no reasonable basis" for concluding that the Claimant did not have the requisite ability. But this does not follow the language of the **Farren** test. Further, the explanation for the majority having formed that view appears, from the remainder of that paragraph, to be that they reached it because they considered that the Claimant had not been subjected to a fair process prior to being dismissed. While the majority also state here that Mr Pelley "formed a view" and "dismissed without more", this fails to address the

detailed findings made in the 2016 Decision about the basis for his having formed that view. It certainly does not address whether he had a rational basis for it.

91. The opening sentence of [59], and the discussion of Morocco, could be read as casting doubt on the genuineness of Mr Pelley's view. But, if so, for the reasons I have stated, that was not a conclusion open to the majority at this point, given the 2016 Decision's findings. Short of that, it seems to me, the nub of this paragraph is the contrast that it draws between the Claimant's "26 years of successful service" and what the majority call "concerns about the Claimant's style". The former perhaps drew on the 2016 Decision's finding, at [11], about his "considerable success throughout the period of his tenure", but this seems, implicitly, to be directed to questions that might arise when considering whether the Claimant could have been fairly dismissed by reason of capability, rather than to consideration of whether Mr Pelley's concerns about his capability provided a genuine and rational basis for concluding that he could not have trust and confidence in the Claimant, so that re-engagement was not practicable.

92. At [60] the majority turn to the matter of the covert recordings. They do not actually address here how far they accepted Mr Pelley's evidence, as to the view which he took of this conduct, as having been genuine, nor whether he had a rational basis for it. That said, given that it was not disputed that the Claimant did make such recordings, that this paragraph has no equivalent to the opening sentence of [59], and that it instead opens by referring to "the question of trust" which "could be overcome by all", it appears that the majority at least accepted that this conduct had caused Mr Pelley *some* concern. But in any event the substance of this paragraph simply sets out the majority's own view, that, as this was "merely" a covert recording, it was not "underhand", and there was no attempt to exploit the recording, they agree with Mr Schofield – a witness for the Claimant who, the Tribunal recorded at [30], said he would encourage Mr Pelley

not to think so badly of this conduct, as, going into the meeting, "only one man had the power." So, again, the majority appear to have expressed their own view (by way of agreement with the view of a particular witness), rather than to have evaluated the genuineness and rationality of Mr Pelley's asserted view.

93. Paragraph [61] tends to reinforce the picture that the majority relied upon their own assessment of the impact of the two matters relied upon by the Respondent as undermining trust and confidence, rather than properly considering whether the Respondent, in the person of Mr Pelley, had formed a genuine view of them which was founded on a rational basis.

94. Standing back, I conclude, therefore, that the Tribunal, in considering these aspects of the Respondent's general case as to loss of trust and confidence and whether re-engagement was practicable, whether by reference to the capability and/or the conduct issue, did not apply the correct legal test, and impermissibly reached conclusions which were at variance with findings that had been made in the 2016 Decision. Accordingly Grounds 1 to 3 succeed.

95. I turn to Grounds 4 and 5, relating specifically to the Commercial Director, China, role. The factual hinge of this pair of grounds is the proposition that being able to speak Mandarin, as well as English, was an essential requirement of the post. As to this, Mr Mitchell took me through the various witness and documentary evidence that was presented to the Tribunal during the course of the Hearing about this post. In the course of oral submissions he clarified that he was content to proceed on the basis that the Tribunal *had* made such a finding of fact, albeit, he suggested, the majority had not done so expressly. Nor did I understand him to be contending that such a finding was perverse. Rather, he said, the wider evidence, including that the job had

yet to be advertised, and as to the significance attached to this requirement, was all part of the relevant context when determining practicability.

96. I think that the concession as to the facts found was correctly made. The person specification, as recorded at [66], stated, in terms "bilingual essential (spoken, written, listening). Mandarin and English (Cantonese is preferred but not essential)." The majority at [64] referred to the role being "expressed by the Respondent" as being one for which a Chinese speaker is required. But the sense of this, and of paragraphs [64] and [65], is not that the majority do not accept that this was a requirement. Rather, they are referring to the fact that it *was* an express or stated requirement, as being the thing relied upon as calling into question the practicability of putting the Claimant into that position, before, in [65], expressing their view on that argument.

97. Proceeding from this finding of fact, ground 4 argues that the effect of the re-engagement Order that the Tribunal made was to require the Respondent to create a job that did not exist, namely a job for a non-Mandarin speaker. The proposition that the Respondent would have had to engage additional resource by way of an interpreter or translator was relied upon as illustrative of the practical significance of this, and why it crossed the line, in terms of what the Tribunal could properly require. Ground 5 argues, in the alternative, that, having regard to the fact that the Claimant did not meet this mandatory requirement, the conclusion that it was practicable to put him into this role was perverse.

98. As to the law, it is clearly established that a re-engagement Order should not require the employer to create a job for which no vacancy exists – see **Lupton** at [18]. This can be seen as a facet of the general concept of practicable as being something more than merely "possible", and

of the need for this to be judged in light of the actual circumstances of the employer's business at the relevant time (**Port of London Authority v Payne** [1994] IRLR 9 at [57]).

99. As so often, though the legal principle can be clearly stated, it may sometimes be hard to apply to the facts. In this case, said Mr Mitchell, there plainly *was* a job for which there was a vacancy, being the China job, and the Tribunal plainly ordered the Claimant to be re-engaged to *that* job. But, contended Mr Nicholls, if the Claimant did not meet an essential requirement, he would not be doing the *same* job.

100. Questions about what gives a person, or thing, its distinct identity, and hence as to how the impact of partial or incremental changes on identity are to be determined, have formed a rich stream of philosophical thought and debate over the millennia. One lesson, I venture, is that such questions can only sensibly be answered by reference to the context, and in particular, the reason why the question is being asked, and the answer is thought to be important. So, here, the purpose of considering the impact of this finding of fact is to determine its significance for whether the re-engagement order sought was practicable, applying that test in accordance with the guidance in the authorities. If an employee does not, in fact, meet an essential requirement of the job, then whether or not that is regarded as meaning that the job itself is no longer the same, the underlying issue of substance is, in any event, whether it sets the bar too high to require the employer nevertheless to take the employee back in that role on that basis.

101. Approaching the question in that way, it seems to me that, in a case where the employer has genuinely, for cogent reasons, distinguished between essential and preferable elements of the job specification, and the employee does not meet an essential requirement, it will usually be an error to require the employer to re-engage the employee in that post. That does not turn on

whether the post is viewed, philosophically, as the same or a different post, but arises because requiring the employer to put someone into a post for which they do not meet one of the essential requirements, is the wrong side of the line between what is practicable and what is possible.

102. Once again, of course, the matter is fact sensitive, and the evidence presented to the Tribunal in the particular case should be scrutinised and tested by it. In some cases the employer's assertion that a particular skill, qualification, or other attribute is regarded as essential may not survive such scrutiny. But the approach required is essentially the same as that discussed in **Farren** in relation to the trust and confidence issue. As Neill LJ put it in **Payne** at [57]:

> **"On the one hand it is necessary to bear in mind that the issue of practicability was a question of fact for the Industrial Tribunal to decide. An appellate court must therefore be very careful before it interferes with such a finding. But the test is practicability not possibility. The Industrial Tribunal, though it should carefully scrutinise the reasons advanced by the employer, should give due weight to the commercial judgment of the management unless of course the witnesses are disbelieved. The standard must not be set too high."**

103. Each case must go on its own particular facts. But, where it is accepted, or found, that a particular requirement was genuinely designated as essential to a particular job, and accepted, or found, that the employee plainly did not meet it, it would usually be wrong for the Tribunal, based on its own view, to hold that, despite this, re-engagement to that role was nevertheless practicable. There might, perhaps, be cases, where the employee's failure to meet the requirement was so minor or technical, or where, for some other particular reason, it ought not to be regarded as fatal to practicability. But in a clear-cut case it would be wrong for the Tribunal effectively, by making a re-engagement Order, to substitute its own view of whether the requirement in question was essential, for that of the employer. Such an approach would not give "due weight to the commercial judgment of the management".

104. In my judgment, the facts as found by the Tribunal in this case, were not near the margin. There was a specific and unambiguous requirement that the incumbent be able to speak, write and listen in Mandarin. The Remedy Decision referred, at [40], to evidence given by Mr Pelley and the HR Director (though apparently it misnamed her) as to why that was regarded as important. The majority did not, in their Decision, cast any doubt on the genuineness of that stated requirement, or the explanation given for it; nor, for example, did they suggest that they considered that, though essential, it was yet in some way minor or peripheral to the job as a whole. There was no dispute that the Claimant, at the time when the Tribunal was taking its decision, did not meet that requirement at all. Rather, the majority's very shortly stated conclusion was simply that his expressed willingness to learn, and his proficiency in languages, meant that it was practicable for him to be re-engaged in this role.

105. I think it can be inferred from this that the majority accepted that it was realistic to suppose that the Claimant could, over time, acquire sufficient proficiency in Mandarin. I was told that the gist of his case, at its highest, was that he would "make good progress after a year". But in all events, it was not suggested, nor found by the majority, that the time it would take him to do so was so short as not to be of any material significance. Rather, it was common ground that he would, in the meantime, have to use an interpreter or translator (the Tribunal referred to his own evidence at [28] to that effect). The unstated, but necessarily implied, premise of the majority's conclusion was that it *would* be practicable for the Claimant to do the job using Mandarin interpreters or translators, until such time as he acquired sufficient command of the language to no longer need them. It was this implied premise which was at the heart of the battle ground on this appeal, in relation to the order that the Claimant be re-engaged in this particular role.

106. As to this, Mr Mitchell said that, although this strand of the reconsideration application also did not succeed (and was not the subject of appeal), it would have been properly open to the Tribunal to stipulate in the re-engagement Order that the Claimant be re-engaged on terms that he had the assistance of an interpreter (and language lessons). This is because section 115(1) confers on the Tribunal the power to make a re-engagement Order "on such terms as [it] may decide". He referred, as I have noted, to the "sensible creativity" dictum in **Wolff**. If this was something that the Tribunal could have expressly stipulated, it was equally open to it to conclude that the possibility of the Claimant working with an interpreter meant that his lack of Mandarin did not render his employment in this role impracticable. It was certainly, he said, a proper "provisional" finding at the first Remedy Hearing. The Respondent, he said, will still be able to run its arguments at the second Hearing, which was the proper place for them.

107. I am not persuaded by these arguments. The dictum in **Wolff**, it may be noted, was strictly *obiter*, and provisional. The paragraph in which it falls raises issues of construction that the EAT did not, on that occasion, need to resolve. The terms at issue in that case concerned requirements to be placed on the employee in that case not to seek to revive past disputes, to abide by the Respondent's procedures and comply with reasonable management instructions.

108. In any event the real issue in this case is not whether the incorporation of a term into the Claimant's contract, that he have the support of an interpreter or translator (and/or language lessons, and whatever such a term might say about who would bear the cost) would, as a matter of construction, be within the scope of "terms" that might fall within section 115(1) and/or 116(2). The issue is whether the making of an Order on that basis failed to take proper account, as required by section 116(3)(b), of whether it was practicable for the Respondent to comply with such an Order, following the guidance in the authorities on the meaning of that word.

109. For reasons I have set out in my earlier discussion of the authorities, the word "provisional" is apt to mislead. The meaning of "practicable" is the same wherever it appears in sections 116 and 117, and the Tribunal was required to make an actual finding as to whether it was practicable to comply with the Order sought. Nor do these provisions provide for some sort of re-assessment after a trial period in the new role, as to how things are working out. Whether prospectively (under section 116) or retrospectively (under section 117) the assessment is of practicability as at the date for compliance with the Order.

110. I have concluded that, in this case, the majority decision overstepped the mark. In short, the Tribunal having accepted and found that an ability to speak, listen and write in Mandarin was genuinely an essential requirement of the job, the majority failed to give due weight to the Respondent's commercial judgment in that matter, when considering the issue of practicability. By implicitly concluding that it was an acceptable solution for the Claimant instead to work with an interpreter or translator while he was learning the language, they reached a conclusion which was at odds with that finding, as to the importance which the Respondent attached to this requirement from day one.

111. For reasons I have explained, I consider that the substance of the challenge to the particular Order for reinstatement to the China job lay in ground 5, not ground 4. I am inclined to think that what the majority did was order the Respondent to employ the Claimant in the job for which it had identified a vacancy, but despite the fact that he lacked one of the essential skills that he would need to perform that job. Strictly, I would on balance conclude that ground 4 fails; but, for the reasons I have given, I conclude that it was not open to the majority, properly applying the law to the facts found, to make this Order, so that Ground 5 succeeds.

112. In relation to Ground 8, as I have noted, the first limb was, on the basis I have set out, withdrawn; and the Claimant accepted that the second limb was made out. But both limbs related to the calculation of the back-pay element of the re-engagement, and, for the reasons I have given, the re-engagement Order overall in any event cannot stand.

Claimant's Appeal

113. It is convenient to consider next, the Claimant's appeal, as this concerns the re-engagement Order, albeit that it challenges the decision to refuse a reconsideration of it. Although I have held that the Order itself cannot stand, it has a potential bearing on the question of whether, and if so, on what basis, I should remit.

114. My starting point is the core provisions of the statutory framework. These are that a re-employment Order will require the employer to comply with its terms by the date set in the Order, under section 114(2)(c) or section 115(2)(f). That means that the question of whether it is practicable for the employer "to comply with" such a proposed Order, whether under section 116(1)(a) or section 116(3)(b), must be judged by reference to the time window between when the Order is made and the date by which it must, at the latest, comply with it.

115. As the authorities establish, this is therefore to be judged by reference, not to the circumstances as they were at the date of dismissal, or some other past date, but on the basis of the picture which the Tribunal has, of the current and prospective position, when it is considering whether to make such an Order. It will therefore be generally concerned with how matters stand on the date of the remedy hearing itself, or, in a case where post-hearing submissions or information provide some update, the date of receipt of the last such submission. (See: **King v**

Royal Bank of Canada (Europe) Limited [2012] IRLR 280; **Rembizewski v Atkins Limited** UEAT/0402/11.) I will refer hereafter just to the date of the remedy hearing.

116. It follows that, in principle, when considering whether to make a re-engagement Order, the Tribunal is concerned with those suitable jobs for which there are vacancies at the date of the remedy hearing. It also follows that, as it cannot be proper for the Tribunal to order an employer to re-engage an employee in a job for which no vacancy exists, it cannot be proper to so order in respect of a job for which a vacancy existed at the date of dismissal, or arose following the date of dismissal, but which has, in fact, been filled by the date of the remedy hearing.

117. In the nature of things, whether to reinstate or re-engage will only be decided some appreciable time after the date of dismissal. The employer may protest that it cannot reasonably be expected to hold the employee's former job open until that question is resolved, or, if it has permanently replaced the employee by the time of the remedy hearing, to turn back the clock. The employee may protest that, to allow the employer free rein to deploy such arguments, would fatally undermine the effectiveness of the remedy. Parliament has specifically identified how the balance is to be struck between these competing arguments, in sections 116(5) and (6). These, at least, have the effect that, where the employer has engaged a permanent engagement *for the complainant*, this is to be disregarded in deciding the practicability of that remedy, *unless* the employer can show that the conditions in section 116(6) have been fulfilled.

118. The issue of law raised by the Claimant's appeal, however, is whether these provisions go further than that, and have the effect that, where a suitable vacancy has arisen since the date of dismissal, by the dismissal of another employee, then the employer cannot rely on having permanently replaced that *other* employee with someone other than the Claimant, to argue that

re-engagement of the Claimant to that *other* position is not practicable, unless the section 116(6) conditions are fulfilled in respect of the decision to fill that role, as well.

119. This argument bears some examination. Given the existence of the remedy of re-engagement, as an alternative to re-instatement, it is not impossible that Parliament could have decided that an employer should have to justify filling *other* vacancies that arise following a dismissal, which might have been suitable for the dismissed employee, as well having to justify filling that employee's old job. The question is, however, whether Parliament did so provide.

120. As a matter of pure grammatical construction of the statute, that argument can, in my view, get at least some way down the road. First, in isolation, I do not think it necessarily, grammatically, follows that the reference to "a dismissed employee" in sub-section 116(5) *must* be to the employee who brought the claim. It would not be a grammatical nonsense to refer to the employer having permanently replaced some other dismissed employee; and it is noteworthy that sub-sections 114(1), 115(1) and 116(1) and (3) all refer to the person who is entitled to the remedy as "the complainant", whereas section 116(5) does not refer to "the complainant" but to "a dismissed employee". Further, sub-section 116(5) states, in terms, that the engagement of such a replacement is to be disregarded when deciding the practicability not only of re-instatement but also of *re-engagement*. Further, while, in isolation, the reference in section 116(6)(a) to "the dismissed employee" must be a reference back to the same dismissed employee who was referred to in section 116(5), that provision does not by itself, I think, show, that the employee being referred to there must be the complainant.

121. However, this line of interpretation hits the rocks at section 116(6)(b)(i), which refers to the employer not having heard from the dismissed employee within a reasonable period "that he

wished to be reinstated or re-engaged". That, grammatically, indicates that the dismissed employee is the employee who is the complainant in the current action, and who has sought reinstatement and/or re-engagement, but may not have given the employer fair warning that this was their wish, if successful in their unfair dismissal claim. As, again, the dismissed employee referred to here, is the one referred to in section 116(5), that points to the conclusion that the dismissed employee in section 116(5) *is*, after all, the complainant.

122. That specific argument was advanced by the Respondent in its Answer to the Claimant's appeal. In his skeleton argument, addressing that part of that Answer, Mr Mitchell stated that it was "uncontroversial" that the dismissed employee in section 116(5) refers to the claimant in the case – the same person who is referred to as the complainant in section 116(3), and that the Claimant had not sought to suggest otherwise. But that interpretation is, I think, then fatal to the Claimant's appeal. It means that what emerges at the end of the exercise, is that Parliament has made no provision qualifying the right of the employer to rely on having filled any vacancy other than that created by the dismissal of the complainant; and the authorities establish that it cannot be regarded as practicable for the employer to be expected to re-engage the employee into a role for which a vacancy does not exist.

123. I cannot see that any of Mr Mitchell's arguments successfully then chart a path around those rocks. He submitted that section 116(5) has to be "read in light of" section 115(1), with the effect that section 116(5) "bites on" any comparable or suitable alternative employment. He referred also to the fact that section 116(5) refers to re-engagement. But the only way in which that reference could assist the result contended for, would be if it were taken to cast light on the meaning of "a dismissed employee". If that refers only to the complainant, then this section can

only be contemplating a scenario in which the complainant's old job has been filled by the time of the remedy hearing, not any other vacancy.

124. Nor do I see how the cost Rule 76(3)(a) advances the argument. I cannot see why its reference to the availability of the claimant's old job or other suitable or alternative employment should be construed as referring to anything other than current availability at the time of a Hearing which, the Rule postulates, has been adjourned because of the employer's failure to provide the requisite information. Nor can I see that the Respondent's argument confused the time as at which the Tribunal determines practicability with the temporal scope of the ongoing disclosure obligation. If all that matters is what other suitable vacancies exist at the time of the Hearing, then the disclosure obligation simply does not apply to vacancies which did exist but have been filled. The employer will need to deal with the fact that the target is a moving one, in its approach to disclosure, and in particular, may need to refresh the exercise if the Remedy Hearing is, as in this case, postponed. But the ultimate test of compliance with the disclosure obligation must be by reference to vacancies existing at the date of the Hearing which leads to the adjudication.

125. For these reasons, the Claimant's appeal is dismissed.

Respondent's Appeal – Ground 7

126. I return to the remaining ground of the Respondent's appeal – Ground 7. I start with a reminder of some basic points about *Polkey*, most of which were articulated in **Software 2000 Limited v Andrews** [2007] IRLR 568 and encapsulated there in the summary at [54]. First, the fount of the principle is that, when determining a compensatory award, the Tribunal must, under section 123(1), have regard to the loss sustained by the complainant in consequence of the dismissal, so far as attributable to action taken by the employer. If, had they not been unfairly

dismissed, the employee would, or might, at a certain point have been fairly dismissed, the Tribunal ought to take that into account, as it bears upon the true measure of their loss.

127. Secondly, the principle is not confined to cases in which the unfairness is said to have been procedural, or to arise only at the section 98(4) stage. The categories or types of case in which the principle may be engaged or require consideration are not limited or closed.

128. Third, consideration of the principle will invariably involve some element of speculation, because the Tribunal is considering a counter-factual: not what did happen, but what would, or might, have happened. The Tribunal should not, merely on that account, decline to engage in the task, as to do so would risk over-compensating the employee and doing an injustice to the employer. The Tribunal is not required to resolve with absolute confidence or certainty what would have occurred, but, drawing on the evidence available, to make an assessment of what would or might, with some degree of probability, have happened. The Tribunal should have regard to any evidence available to it, which may be relevant to this assessment, whether that comes from the Claimant or the Respondent.

129. Finally, where the proposition under consideration is that the employee would, or might, at a certain point, have been dismissed, what needs to be considered is whether they would or might have been *fairly* dismissed, as, if any such dismissal would, inevitably, have, itself, been unfair, then it would be wrong to limit the employee's loss by reference to it: **Johnson v Rollerworld** [2010] UKEAT/0237/10, 30 November 2010.

130. In this case, because the Tribunal had determined that the Claimant should be re-engaged it was not, strictly, required to go on to consider the *Polkey* argument, but it in fact did so, at [74]

to [76] of the Remedy Decision, deciding that"[w]e are unable to form conclusions" on this issue. In particular, it observed that, whilst it had made number of findings about the reasons for dismissal, in the 2016 Decision, it was "not considering whether those reasons would have resulted in a fair dismissal."

131. The question arising on appeal is whether the Tribunal erred in taking that approach. I conclude that it did. My reasons can be shortly stated.

132. The fact that the Tribunal was not considering, in the 2016 Decision, and did not determine in it, whether the reasons for dismissal could have supported a fair dismissal did not, by itself, necessarily mean that the Tribunal was not in a position to engage in the *Polkey* exercise at all. Nor did the fact that the Claimant had not been taken through a fair performance process prior to dismissal. These features did not, by themselves, absolve the Tribunal of the task of considering what evidence, or previous findings, it might have, that might assist it in assessing what would, or might, have happened, had a fair process been followed, or whether there was such a paucity of material that this exercise would be wholly speculative.

133. The Tribunal was, perhaps, saying, at [75], that, because there had been no fair performance assessment process, it was simply unable to say what would or might have happened, had one been run. However, although it did not have any evidence from a formal performance review process having been run, it did have evidence, and indeed had made some findings, in the 2016 Decision, about other ways in which, between his arrival and the Claimant's dismissal, Mr Pelley had gathered information, and formed conclusions, about the Claimant's capability – drawing on his own interactions with the Claimant, feedback from colleagues, and so forth. This did not form part of a fair process, but it was at least a potential source which might

A arguably have assisted the Tribunal to form a view as to what might have happened had such a process been followed. However, the Tribunal does not appear to have engaged with it.

B 134. I therefore consider that the matter should be remitted, for the Tribunal to consider the *Polkey* question, in particular, including consideration of this feature of the previous findings, and the evidence, and whether it offers it any assistance on the *Polkey* question. I should be clear that I am saying no more, and can take it no further than that. What view the Tribunal forms C second time around will be a matter for it. I cannot say that there is only one right answer possible to the questions of whether, or with what probability, the Claimant would have been dismissed, or when, or whether such dismissal would have been fair.

D

Outcome

135. The Respondent's appeal against the re-engagement Order is accordingly upheld.

E

136. For reasons I have stated, I do not think it was properly open to the Tribunal, on the facts found, to order that the Claimant be re-engaged in the China role. Nor do I think that it was properly open to it, given the facts found in the 2016 Decision, to order re-engagement at all. F Those facts could only, properly applying the guidance in the authorities, point to the conclusion that Mr Pelley genuinely had lost trust and confidence in the Claimant's capability, and had a rational basis for that view, pointing in turn to the conclusion that it would not have been G practicable to re-engage him in any senior, otherwise suitable, position. Given the clear findings of fact made in the 2016 Liability decision, I do not think the additional fact that the Respondent offered him the Morocco consultancy, could properly support any other conclusion.

H

137. As the only possible legally correct outcome, given all the findings of fact, is that re-engagement should have been refused, I will substitute an Order to that effect.

138. The Claimant's appeal has also failed.

139. The matter must, however, be remitted to the Tribunal to give fresh consideration to the *Polkey* question and determination of the compensatory award. Having had sight of this decision in draft Mr Mitchell invited me to remit to the same Tribunal. Mr Nicholls was neutral on that question, as such, but invited me to direct that it be listed as soon as possible, whether that might be before the same or a different Tribunal.

140. I consider that there are appreciable advantages to the matter being remitted to the same Tribunal, if available, given their previous exposure to the evidence and the issues, and notwithstanding the lapse of time. There is no reason why they cannot be trusted to carry out the task professionally. If they are all in fact available, then it is not obvious that assigning to a different panel would achieve an appreciably sooner hearing date. I will therefore direct that the matter be remitted to the same Tribunal, if all are available, or, if one or more of them is not, to a Tribunal panel designated by the Regional Employment Judge.