Appeal No. UKEATS/0009/19/SS (V)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 19th March 2021
Judgment handed down on
9th April 2021

Before

THE HONOURABLE LORD FAIRLEY

(SITTING ALONE)

MR MICHAEL DALY — APPELLANT

BMI HEALTHCARE LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

Revised

APPEARANCES

For the Appellant	MR M DALY In person
For the Respondent	MR G MILLAR Solicitor of Gilson Gray LLP 29 Rutland Square Edinburgh EH1 2BW Instructed by Capsticks Solicitors 1 St Georges Road Wimbledon SW19 4DR

SUMMARY

TOPIC NUMBER(S): 11 – UNFAIR DISMISSAL; remedy; compensation; perversity.

The Employment Tribunal found that the appellant had been unfairly dismissed. It awarded compensation on the basis that, had the respondent correctly addressed its true reason for dismissing him, the appellant would have been fairly dismissed within six months because he had become unmanageable, and this had led to a breakdown of the respondent's trust and confidence in him. The appellant submitted that the Tribunal's conclusion that he would have been dismissed in any event within six months was perverse, and was based upon an unwarranted assumption that he would not have heeded warnings to change his behaviour. He also submitted that the Tribunal had failed to give adequate reasons for its conclusions.

Held: The Tribunal's conclusion that the Claimant would not have heeded warnings to change his behaviour was an inference legitimately drawn from the primary facts found by it and from its assessment of the Claimant when he gave his evidence. It was not perverse. The Tribunal also gave logical and comprehensible reasons for its conclusions which were **Meek** compliant.

Observed: The Tribunal had correctly recognised that the question for it in applying section 123 of the **Employment Rights Act, 1996** was not whether if the respondent had conducted a further disciplinary hearing on different grounds, that hearing would have been fair, but whether if there had been a fair disciplinary hearing on such grounds, the result would have been a fair dismissal.

THE HONOURABLE LORD FAIRLEY

Introduction

1. This is an appeal by Michael Daly against a Judgment of an Employment Tribunal sitting at Glasgow (Employment Judge M Robison) dated 16 November 2018. I will refer to Mr Daly, as the Employment Tribunal did, as "the Claimant". The Respondent to the appeal is BMI Healthcare Limited ("the Respondent"). The appeal was heard at a sitting of the Employment Appeal Tribunal in Edinburgh on 19 March 2021. Due to Covid restrictions, the hearing was conducted by video conference. The Claimant represented himself. The Respondent was represented by Mr Millar, Solicitor.

Procedural History and Employment Tribunal's Reasons

2. In late 2017, the Claimant presented a Claim Form (ET1) in which he made allegations of unfair dismissal, disability discrimination and protected disclosure detriment. In due course, evidence about his claims was heard by a full Tribunal at a full merits hearing over eleven days in September and October 2018. Disability status was disputed and was considered as a discrete issue during the first two days of that hearing. On the second day of the hearing (11 September 2018) the Tribunal issued an oral Judgment that the Claimant was disabled for the purposes of his claims under the **Equality Act, 2010** ("**EA**"). Thereafter, having considered further evidence and submissions, the Tribunal found that the Claimant had been unfairly dismissed in terms of section 94 of the **Employment Rights Act, 1996** ("**ERA**"), and that he had been subjected to detriment on the ground of having made protected disclosures (section 47B **ERA**). The Tribunal dismissed all of the Claimant's other claims. It issued written Reasons for its Judgment ("the Merits Reasons").

A

3. So far as the unfair dismissal claim was concerned, the Respondent relied upon conduct of the Claimant which was said to consist of (i) repeated failures to comply with reasonable management requests not to contact the Respondent's executive team; and (ii) a single failure to comply with a reasonable request to attend a meeting on 26 April 2017.

B

4. These conduct issues were claimed by the Respondent to have led to a breach of trust and confidence and a breakdown of the working relationship between the parties.

C

5. The Tribunal found that whilst there had indeed been a breakdown in the working relationship between the parties, such breakdown did not arise from the particular conduct of the Claimant relied upon by the Respondent. It accordingly concluded that the conduct relied upon by the Respondent was not the true reason for the dismissal. The Tribunal found (at paragraph 261 of the Merits Reasons) that the real reason for the dismissal of the Claimant was:

D

E

> **" the manner of his communications and his behaviour generally."**

6. The Tribunal noted, in particular, that there was support for that conclusion as to the real reason for the dismissal in the evidence of two of the Respondent's witnesses, Mr Rosenblatt and Mr Buckley (*ibid*, paragraph 263). The Tribunal noted, however, that the manner of his communications and behaviour more generally had never been put to the Claimant during the disciplinary process. At paragraphs 264 and 265, the Tribunal identified certain particular aspects of the Claimant's behaviour which it considered to be the real reason for the dismissal, concluding (at paragraph 269) that:

F

G

> **"…the claimant had become impossible to manage and…the respondent was looking for a legitimate route to dismiss the claimant."**

H

7. The Tribunal accordingly concluded that the Respondent's stated reason for dismissing the Claimant was not genuine and was a sham. It therefore held that the dismissal was unfair.

8. Having found the dismissal to be unfair, the Tribunal made a finding in terms of section 123(6) **ERA** that because of the behaviour of the Claimant which had led to him becoming unmanageable, he had contributed substantially to his dismissal in a way that was culpable or blameworthy such that it would be just and equitable to reduce both the basic award and the compensatory award by 75% (Merits Reasons at paras. 284-289; Remedies Reasons at para. 64). In addition, the Tribunal concluded that because he had become unmanageable, the Claimant would, in any event, have been dismissed within six months of the actual date of dismissal due to the breakdown of the working relationship between the parties. At paragraphs 292 to 294 of the Merits Reasons, the Tribunal stated:

> **"292. While we did not accept that the reasons given for dismissal were the real reasons, we do accept that the working relationship between the claimant and the respondent had broken down, largely because the respondent had lost respect for the claimant such that the respondent could say for their part that mutual trust and confidence necessary to continue an employment relationship no longer existed. Had the respondent recognised that, then they would have taken a very different approach to the dismissal process and their reasons for the dismissal.**
>
> **293. It seemed to us that an alternative approach should have been taken, which might at least have been to make clear to the claimant…if he did not desist behaving in the way that he was that his conduct likely (*sic*) to result in disciplinary action and possibly even dismissal. We considered that this was never actually made clear to him, and that time ought to have been taken to ensure that it was, not least in light of the illness from which he was clearly suffering.**
>
> **294. Given the actions of the claimant, and given our conclusion that he had become unmanageable, and that the working relationship, from the respondent's point of view at least had broken down, we accept that it was only a matter of time before the claimant would have been dismissed. We came to the view, bearing in mind that an appropriate disciplinary procedure would require to have been undertaken, that the claimant would, in any event, have been dismissed within six months of the date of his dismissal."**

9. A remedies hearing was fixed for 6 March 2019 to determine what amount of compensation should be awarded to the Claimant. In advance of that hearing, the Claimant applied for reconsideration by the Tribunal of its decision to reduce the amount of any

compensatory award for unfair dismissal by 75%. The reconsideration request was considered at the remedies hearing on 6 March 2019.

10. Having heard from parties, the Tribunal adhered to its original decision on contributory conduct. In relation to the compensatory award under section 123 **ERA**, the Tribunal accordingly made an award in respect of loss over a period of six months which it reduced by 75%. That resulted in a total compensatory award of £7,524.91. The basic award was also reduced by 75% to £1,344.75, resulting in a total monetary award for the unfair dismissal claim of £8,869.66. The Tribunal also made an award of £15,000 to the Claimant as compensation for injury to feelings due to having been made subject to detriments for having made protected disclosures. The Tribunal issued written Reasons for those awards ("the Remedies Reasons").

The Grounds of Appeal

11. On 31 December 2018, the Claimant presented a Notice of Appeal against the Tribunal's Judgment of 19 November 2018. Paragraph 7 of the Notice set out the Grounds of Appeal in the following terms:

> **"Perversity**
>
> **7.1 The tribunal made a perverse decision regarding the likelihood of dismissal had an unfair dismissal not occurred (paragraphs 290 to 294 of the judgment). The tribunal found that the claimant ought to have been warned about his conduct prior to his suspension and prior to any disciplinary procedure. The tribunal then found that the claimant would have been dismissed within six months.**
>
> **(i) The tribunal erred in law by making an assumption (if it did; the Reasons are silent on the point) that any warning would not have been heeded. There was no evidential basis for doing so. No witness testified on the matter. No reasonable tribunal would have made such an assumption without an evidential basis for doing so, *a fortiori* when there existed counter-indicative evidence (see (ii) below);**
>
> **(ii) the tribunal erred in law by failing to consider that when a warning was given by the respondent on a separate occasion the claimant heeded the warning. No reasonable tribunal would have failed to consider such evidence when considering whether a hypothetical warning would have been heeded.**

Lack of Reasons

7.2 The tribunal failed to give reasons for its conclusions that (i) dismissal would have occurred and (ii) dismissal would have occurred within six months. The claimant is entitled to know why those findings were made. The tribunal erred in law by failing to provide reasons for a material conclusion"

12. Following consideration under Rule 3(7) on 28 February 2019, both Grounds (7.1 and 7.2) were allowed to proceed to a full hearing.

Burns / Barke Procedure

13. At a hearing on 24 July 2019, the parties made a joint motion to sist the appeal pending reference back to the Employment Tribunal of two agreed questions:

"a. whether the Employment Tribunal considers that the Appellant would have been dismissed notwithstanding the implementation of the 'alternative approach' referred to at paragraph 293 and for what reasons; and

b. upon what grounds and upon what evidential basis the (*sic*) Employment Tribunal consider that the Appellant would have in any event been dismissed by the Respondents within six months."

14. On 20 August 2019, the Employment Judge responded in detail to those two questions on behalf of the Employment Tribunal.

15. The appeal was then set down for a full hearing. The full hearing did not take place until 19 March 2021. I was not told why there was such a delay but assume that the intervention of Covid in early 2020 played a part.

16. Before the Employment Tribunal, and in this appeal until early February 2020 the Claimant was represented by Counsel and / or solicitors. Since February 2020, the Claimant has represented himself.

Proposed amendment to Grounds of Appeal

17. On the day of the full hearing of the appeal on 19 March 2021, the Claimant sought to amend his Grounds of Appeal to add a further six Grounds (numbered 7.3-7.8) to the two (7.1 and 7.2) which had been permitted to proceed in terms of Rule 3(7) on 28 February 2019. Notice of these proposed new Grounds had first been given by the Claimant on or about 15 March 2021. A theme of several of those Grounds (7.3, and 7.6-7.8) was a suggestion that the Respondent had deceived the Employment Tribunal and / or deliberately withheld relevant evidence from it. Ground 7.4 referred to the tribunal having "*slipped into a substitution mindset"*. The proposed new Ground 7.5 was in the following terms:

> **"7.5 The tribunal made a perverse decision in finding the Appellant would have been fairly dismissed within 6 months (see point 7.1 above), because the working relationship had broken down (paragraphs 290 to 294 of the judgment), but incorrectly prioritised the need for the Respondent to undertake an appropriate disciplinary procedure but completely ignored the requirement on the Respondent for the matter to be properly, sensibly and practically investigated, to see whether an improvement could not be effected. No reasonable tribunal would have reached the decisions the tribunal did."**

18. Having considered and applied the guidance given in the case of **Khudados v. Leggate and others** [2005] ICR 1013, I refused the application to amend the Grounds of Appeal. I gave oral reasons for that decision. The hearing thereafter proceeded upon the unamended Grounds of Appeal. For completeness, I also refused an application made by the Claimant at the end of the hearing for leave to appeal to the Court of Session against my decision to refuse his application to amend. Again, I gave oral reasons for the refusal of leave.

Submissions

19. In relation to his Ground of Appeal 7.1, the Claimant submitted that it was perverse for the Tribunal to have concluded that if proper warning to change his behaviour had been given, he would not have heeded such warning. He pointed to the findings in fact by the Tribunal at

paragraphs 99, 100 and 211. Paragraph 99 contained findings about an e mail communication to the Claimant on 7 April 2017 in which he had been given certain instructions and recommendations by the Respondent's General Counsel, Ms Catherine Vickery. In summary, these included (i) an instruction not to write directly to the Respondent's CEO, Jill Watts about his grievances; (ii) a recommendation that he desist from password protecting internal communications with the Head of Employment Relations, Mr Rosenblatt; and (iii) a request that he produce a short document of no more than four pages summarising his grievances for consideration by Ms Vickery. The e mail of 7 April concluded:

> **"I will seek your assurance that if we can address and resolve these, then you will use your best endeavours to work with your managers to re-establish a normal working relationship. If you consider that whatever the outcome this is not possible, then we need to have a separate discussion on my return."**

20. At paragraph 100, the Tribunal recorded that the Claimant responded to that e mail by stating *inter alia* that he considered that Ms Vickery had failed to reply to him and that his right to fair (*sic*) speech and a fair hearing were being breached. He also expressed a concern about disciplinary proceedings. It appears from paragraph 101 of the Tribunal's Reasons that expressions such as "*corporate bullying*" and "*corporate assault*" also featured in the Claimant's communications to Ms Vickery at that time.

21. Under reference to paragraph 211 of the Tribunal's Reasons, the Claimant submitted that the Tribunal had accepted that he had complied with the instruction given on 7 April 2017 not to write directly to the Respondent's CEO. He pointed to what was said at paragraph 15 of the Tribunal's supplementary Reasons of 20 August 2019 about his tendency to be "over-literal" and submitted that, standing those two findings, it was perverse of the Tribunal to conclude that he would not have changed his behaviour had a more formal disciplinary warning been given to him.

Had he been given a clear warning, the only possible conclusion was that he would have heeded such a warning.

22. The Claimant further submitted that the passage quoted above from the e mail to him on 7 April 2017 was wholly inconsistent with any suggestion that by 26 April 2017 he had become "unmanageable". It was clear that as at 7 April 2017, Ms Vickery still envisaged the possibility of the employment relationship being repaired. He submitted, however, that the evidence showed that the Respondent had always been going to dismiss him and would never have followed a fair disciplinary process. Specifically, he referred to the Tribunal's conclusions that the Respondent's witnesses had not been frank about the background to the case, and that their stated reason for the dismissal was a sham (Merits Reasons para.195). He referred to the Tribunal's adverse comments about Mr Rosenblatt's evidence (para. 197) and to its conclusions that the dismissing officer, Mr Hely was "*a puppet*" who lacked objectivity, acted on the instructions of the CEO and failed to take advice from human resources (para. 201). He also pointed *inter alia* to the observations by the Tribunal at the remedies hearing that there was a "*fundamental failure*…[by the Respondent] *properly* [to] *investigate issues to establish the facts of the case*" (Remedies Reasons para. 60); that the offer of an appeal was "*hollow*" (*ibid*, para. 61); that "*the failure to comply with the procedures was deliberate"* and that "*had the respondent properly investigated the circumstances of the claimant's alleged misconduct the outcome may have been very different.*" (*ibid*, para. 62). Finally, he referred to paragraphs 69 and 70 of the Remedies Reasons where the Tribunal had found (in summary) that the Respondent "*knowingly chose not to respond appropriately to* [the Claimant's] *concerns"* (para. 69) and deliberately acted in a "*duplicitous*" way in relation to the conduct of the disciplinary meeting (para. 70). Standing those various findings by the Tribunal, he submitted that it was perverse of the Tribunal to have concluded that the Respondent would ever have acted fairly in dismissing him within six months, the more so where all of those who had been involved in his actual dismissal (including Mr Rosenblatt, Mr

Hely and Ms Vickery) would still have been involved at that later stage. In the absence of a finding in fact that the Respondent would have changed its behaviour and followed a fair disciplinary procedure, the finding that the Claimant would have been fairly dismissed was perverse.

23. It is appropriate to note at this stage that Ground 7.1 focusses entirely upon the alleged perversity of the Tribunal's conclusion that the Claimant would not change his own behaviour. It contains no suggestion of perversity in relation to the separate issue of the Respondent's capacity to change its behaviour or mindset in relation to the disciplinary process. The issue of the likelihood of the Respondent being able to carry out a fair disciplinary process such as to lead to a fair dismissal is not mentioned anywhere in Ground 7.1.

24. Though acknowledging that to be correct, the Claimant nevertheless submitted that such an argument was capable of falling within his second Ground of Appeal (7.2 - "Lack of Reasons"). He submitted that the Tribunal had not explained why, in light of its various criticisms of the actual disciplinary process it had concluded that the Respondent would, within a period of six months, nevertheless have carried out a fair disciplinary process and so dismissed him fairly. He submitted that, as a matter of law, a **Polkey** reduction would be appropriate only where the Tribunal was able to conclude that the Respondent *would* rather than merely *could* have dismissed fairly. The Tribunal should have made findings about that issue and its failure to do so was an error of law.

25. For the Respondent, Mr Millar submitted that the issue about whether or not the Respondent would have followed a fair disciplinary process formed no part of the permitted Grounds of Appeal. Had it done so, it would inevitably have featured in the questions remitted to the Tribunal under the **Burns / Barke** procedure in 2019. Since the point had not been raised at that stage, the Tribunal had not been invited to respond to it. To the extent that the issue was

now advanced under Ground 7.2, however, it raised a point of law about the correct interpretation of section 123 **ERA** to which he was able to respond. He submitted that the argument was wrong in law. Under reference to **Polkey** he submitted that the correct question for the Tribunal – and the question that the Tribunal had correctly addressed here – was whether or not there was a different and potentially fair reason for dismissal which, if a fair procedure had been followed, would have led to a fair dismissal. The rule in **Polkey** was simply an aspect of the Tribunal's duty under section 123 **ERA** to award such compensation as was "just and equitable". The clearest answer to the Claimant's contrary argument was seen in the case of **Whitehead v. The Robertson Partnership** UKEAT/0378/03. In that case, it had been argued by a claimant that it was incumbent upon a Tribunal when considering a **Polkey** reduction to consider not only whether an alternative and potentially fair reason for dismissal existed, but also what disciplinary process would actually have been carried out by the dismissing officer in relation to that potentially fair alternative reason. At paragraph [19], His Honour Judge J R Reid QC, delivering the Judgment of the Employment Appeal Tribunal, stated:

> **"In our judgment this attack is based on a misunderstanding of the legal position. The question is not whether if Dr Colville had conducted a disciplinary hearing, that hearing would have been fair, but whether if there had been a fair disciplinary hearing the result would still have been a dismissal."**

26. Mr Millar submitted that such an approach was entirely consistent with **Polkey** as well as with the decisions in **Software 2000 Limited v. Andrews** [2007] ICR 825 and **O'Donoghue v. Redcar & Cleveland Borough Council** [2001] IRLR 615. The approach of the Employment Tribunal in **O'Donoghue**, as ultimately endorsed by the Court of Appeal, bore many similarities to the approach of the Tribunal in this case. In **O'Donoghue**, the dismissal of the claimant had been substantively unfair because the reason was tainted *inter alia* by victimisation and sex discrimination. The Tribunal had nevertheless gone on to hold that the claimant would have been dismissed in any event within a period of six months because of her divisive and antagonistic

attitude to her colleagues. The Court of Appeal held that the Tribunal was entitled to come to that conclusion, and thus to regard six months after the effective date of termination as a cut-off point for the purposes of assessing compensation.

27. Mr Millar accordingly submitted that, in the present case, the Tribunal had been correct not to made findings in fact about whether or not, if the Respondent had carried out a disciplinary hearing on a different ground (or grounds), that process would have been fair. Instead, it had focussed on the correct question of whether, if there had been a fair disciplinary process, the result would ultimately still have been a dismissal for a fair reason. The question, in short, was not whether there would have been a fair process, but whether there would have been a fair dismissal on other grounds had a fair process been followed.

28. In relation to Ground of Appeal 7.1, Mr Millar submitted that the test of perversity as a ground of appeal was a high one. In this appeal, it was not met. He pointed to various findings of the Tribunal both in its original Reasons and in the supplementary Reasons that had been provided under the **Burns / Barke** process. Those provided evidential support for the conclusion that, by the time of his dismissal, the Appellant had become unmanageable and the working relationship between the parties had irrevocably broken down.

29. The Employment Tribunal had noted that the Claimant made a practice of writing long and repetitious letters about his grievances – sometimes exceeding 100 pages in length – despite numerous requests and pleas for him to stop. He failed to allow adequate time to respond to his complaints. The language used by him in relation to these complaints was, on occasion, inappropriate. He took a very literal approach to correspondence and had a "*near obsession*" with confidentiality which led to him password protecting every document. His fixation with process obstructed the consideration by the Respondent of the substance of his grievances. Mr

Miller referred to the Tribunal's summary of these examples of the Appellant's conduct at paragraph 287 of the Merits Reasons.

30. The Employment Tribunal had referred to these aspects of the Claimant's conduct as illustrations of the evidential basis for its conclusion that he had become unmanageable as an employee (para. 288).

31. Further detail about the evidential basis for these problematic aspects of the Claimant's behaviour, citing particular paragraphs from its findings-in-fact, was provided in the Tribunal's **Burns / Barke** response at paragraphs 11-17.

32. Mr Millar submitted that, in light of these findings and associated Reasons, it could not be said that the conclusion that there had been a breakdown in the relationship which would have led to dismissal within a period of six months was perverse.

Claimant's further written submissions

33. The appeal hearing concluded on 19 March 2021 and judgment was reserved. By e mails dated 19 March (timed at 19.12 hours) and 21 March (timed at 20.09 hours) the Claimant sought to make further submissions in writing. In particular, he submitted that he had not anticipated what he described as the "late submission" of the **Whitehead** case and had not felt able properly to deal with it at the appeal hearing when it had been referred to by the Respondent. I took this to be reference to the fact that the **Whitehead** case was not included in the original list of authorities for the appeal hearing.

34. Having had further time to consider the **Whitehead** case, the Claimant submitted (first e mail - 19 March 2021 at 19.12 hours) that the cases of **Turner v. Vestric Limited** [1980] ICR 528 and **Phoenix House Limited v. Stockman** [2017] ICR 84 together represented clear authority for the proposition that before dismissing an employee due to a breakdown of the

employment relationship, the employer must carry out a sensible and practical investigation to see if the relationship could be mended. He also submitted that the true reason for his dismissal was that he had made protected disclosures. In his second e mail (21 March 2021 at 20.09 hours) he made four particular submissions about the applicability of **Whitehead** and **Polkey**. First, he submitted that neither **Whitehead** nor **Polkey** involved extreme conduct by the employers which had been the subject of extensive criticism by the Tribunal. Secondly, he submitted that **Whitehead** and **Polkey** "*rather than punishing the Respondent's conduct…rewards and incentivises and encourages employers' misconduct*". Thirdly, he submitted that neither **Whitehead** nor **Polkey** had concerned the making of protected disclosures. Finally, he invited me to reconsider **Polkey** and **Whitehead** in light of Article 6 of the **European Convention on Human Rights** and the **Human Rights Act, 1998**.

35. Although it is unusual for any party to be allowed to make further written submissions after an oral hearing has been concluded and judgment reserved, and whilst I considered that if these points were to be made, all of them could and should have been made at the oral hearing, I had regard to the Claimant's status as a party litigant and to the overriding objective. I accordingly concluded that his further written submissions should be considered as part of his submissions in the appeal. The Respondent was, accordingly, given an opportunity to reply to them in writing.

36. By letter dated 26 March 2021, the Respondent's solicitors responded to the Claimant's written submissions. The Respondent took issue with any implied criticism by the Claimant of the late addition of **Whitehead** to the authorities relied upon in the appeal, pointing out that the only reason for that was that the Claimant had himself been allowed a degree of latitude in advancing his second Ground of Appeal. This had led to a point being raised which could not reasonably have been anticipated from the generality of the second Ground or the agreed **Burns**

/ Barke questions. The Respondent submitted that, in accordance with its duty to assist this Tribunal, and in response to an invitation to identify relevant authority it had produced the **Whitehead** case which represented an answer to the point taken by the Claimant. In relation to the Claimant's e mail of 21 March, the Respondent submitted that no good reason in law had been shown for distinguishing **Whitehead** or **Polkey**.

37. Although not invited to do so, the Claimant then made further written submissions by e mail dated 29 March 2021, timed at 04.13 hours in response to the letter of 26 March 2021 from the Respondent's solicitors. The Claimant's further submissions were, in places, framed in somewhat intemperate language, accusing the Respondent's legal representatives of "*deception of the court*", and "*misrepresentation"*, and categorising aspects of the letter 26 March and the submissions made by Mr Millar at the oral hearing of this appeal as "*dishonest*". Whilst again I made allowance for the Claimant's status as a party litigant and for his obvious strength of feeling about this case, it is appropriate that I should record that I saw no basis whatsoever for any such criticism of any of the submissions made on behalf of the Respondent in this appeal. In other respects, and whilst I fully considered the Claimant's unsolicited further submissions of 29 March 2021, these were largely repetitive of arguments already advanced by him, and I did not consider that they added to any material extent to the submissions that he had previously made.

Decision and reasons

38. In relation to the first Ground of Appeal (Ground 7.1), it is important to note at the outset that this is framed on the basis of perversity. The test for perversity is a high one. A challenge based upon perversity will succeed where the conclusion which the Tribunal reached is irrational, offends reason, is certainly wrong, makes absolutely no sense, or was not a permissible option on the facts (**Stewart v. Cleveland Guest (Engineering) Limited** [1996] ICR 535; **McGregor v. Intercity East Coast Limited** 1998 SC 440 **Yeboah v. Crofton** [2002] IRLR 634). That can

be the position *inter alia* where there is no apparent evidential basis for a conclusion reached by the Tribunal.

39. The perversity challenge in this appeal relates to the Tribunal's conclusion (at paras. 290 to 294 of its Reasons) that the breakdown in the working relationship between the Claimant and the Respondent caused by the Claimant's behaviour and attitudes would have led in any event to his dismissal within six months. More particularly, the Tribunal's implicit conclusion that any warning about future behaviour would not have been heeded is said to be perverse (a) because it is said to be wholly without evidential basis and (b) because it is said, in fact, to be inconsistent with the evidence about the Claimant's response to the e mail to him of 7 April 2017.

40. Neither of these points is well-founded. The starting point is the Tribunal's conclusion – for which there was ample basis in its findings in fact – that that the Claimant had become unmanageable. In addition to the matters summarised by it at paragraph 287 of the Merits Reasons, the Employment Tribunal also noted that, amongst other matters, the Claimant had repeatedly complained about and resisted the involvement of members of the Respondent's Human Resources team in trying to resolve his grievances (Merits Reasons, paras. 30 *ff*) and had refused to communicate with the director of Human Resources (*ibid* para. 90). The Employment Tribunal also noted that the Claimant's *"fixation*" on minor and irrelevant matters of process obstructed the ability of the Respondent to deal with the substance of his grievances (Merits Reasons, para. 265).

41. Within its **Burns / Barke** response, the Employment Tribunal clarified its reasons for concluding that the Claimant would not have changed his behaviour even in the face of a warning to do so. It stated *inter alia*:

> **"The Tribunal found that the misconduct identified and investigated by the respondent was not capable of justifying dismissal. However, the Tribunal concluded that there was a sufficiency of evidence that if the respondent had accurately set out the allegations of misconduct / conduct**

which was (*sic*) the cause of concern, and had investigated those (this is what is meant by the alternative approach), then the claimant would have been fairly dismissed for misconduct or some other substantial reason." (para. 6)

"The Tribunal deduced from the primary findings in fact that the claimant was unlikely (on a balance of probabilities) to change his behaviour. This was based on the Tribunal's assessment that the claimant was of the view (still when giving evidence to this Tribunal) that he had done nothing wrong and therefore had no understanding or acceptance of the need to change his behaviour" (para. 8)

"The claimant himself frequently said in evidence that what others thought reasonable and appropriate, he did not (para. 190). The Tribunal concluded that much of the claimant's behaviour was unreasonable and indeed irrational (para 192), and that the claimant had contributed significantly to his own dismissal (para 193). The Tribunal concluded that the situation was aggravated by the conduct of the claimant, even if he did not know that to be the case, or…did not perceive his conduct to be inappropriate." (para. 9)

"While giving evidence in the Tribunal the claimant still did not accept that his behaviour might be classed as unreasonable and although he understood that others might consider it to be unreasonable, he did not." (para. 19)

"Based on the findings in fact, the Tribunal deduced that the claimant only heeded warnings to the extent he thought was reasonable and appropriate, and put his own, over-literal, interpretation on any instructions. Yet his actions confirm that he was not acting reasonably and rationally, as he himself accepted in evidence." (para. 20)

42. The Employment Tribunal clearly had regard to the totality of the evidence before it in reaching the conclusions it did. That the Claimant was able to point, within that body of evidence, to a single example of his having complied with a management instruction to moderate his behaviour – by not writing directly to the CEO after 7 April 2017 – does not lead to a conclusion that the decision of the Employment Tribunal was perverse. The Tribunal required to consider the whole picture. In that regard, it is perhaps worthy of note that part of that picture was the Claimant's response to Ms Vickery's e mail of 7 April 2017 in which he apparently accused her of not responding to him, accused the Respondent of interfering with his right to free speech and used expressions like "*corporate bullying*" and "*corporate assault*" (Merits Reasons paras. 100 and 101).

43. For the reasons given by it, especially at paragraphs 6,8,9 19 and 20 of its response to the **Burns / Barke** questions, the Employment Tribunal was perfectly entitled to reach the conclusion

that the Claimant would not have changed his behaviour and would have been dismissed fairly as a result. It is clear that the conclusion that the Claimant would not have heeded warnings to change his behaviour was an inference legitimately drawn from the primary facts and from the Tribunal's assessment of the Claimant when he gave his evidence.

44. In relation to Ground of Appeal 7.2, and for the reasons already noted above, the Tribunal gave entirely logical and comprehensible reasons for its conclusion that the Claimant would have been dismissed in any event. To the extent that the Tribunal's thought processes in that regard may not have been as clear as they might have been in the Merits Reasons, any such defect was remedied in the **Burns / Barke** response, particularly in the paragraphs of that response to which I have already made reference above. As the Tribunal also made clear, its conclusion that the dismissal would have occurred within a period six months was guided by the industrial experience of the members based upon the length of time that the "alternative approach" would have taken (Merits Reasons, paras. 293 and 294; **Burns / Barke** response, para. 33). Again, that is a perfectly logical and comprehensible reason. The reasons given by the Tribunal on the two issues mentioned in Ground 7.2 are **Meek** compliant (**Meek v. Birmingham City Council** [1987] IRLR 250).

45. As noted above, the Claimant advanced a further argument under Ground 7.2 that the Tribunal's reasons were deficient because they did not explain its basis for concluding that, standing its previous behaviour, the Respondent would ever have been able to carry out a fair disciplinary process on different grounds. I agree with the Respondent that this is not an argument of which Ground 7.2 gives notice. The purpose of Grounds of Appeal is to identify clearly the points of law which are to be argued at the appeal. Paragraph 3 of the **Employment Appeal Tribunal Practice Direction** of 2018 makes this clear, especially at paragraphs 3.5 and 3.7. If this was a point that the Claimant intended to raise under Ground 7.2, that should have been made

clear in the Grounds of Appeal. It is also surprising that the Claimant did not suggest the inclusion of questions about it within the agreed list of questions sent to the Tribunal in 2019 as part of the **Burns / Barke** procedure. Had it not been possible to deal with this argument properly on the day of the hearing as a result of these failures by the Claimant, a real issue would have arisen about whether or not he should have been allowed to rely upon it at all. Since, however, the Respondent was ultimately able to respond to the point – albeit under significant pressure of time within which to do so – I have considered it.

46. As was pointed out by Langstaff J in **Stonehouse Coaches Limited v. Smith** UKEATS/0040/13, the rule in **Polkey** is simply is part of the general assessment of loss. Once there has been a finding of unfair dismissal, the task of a Tribunal in applying section 123 **ERA** is to compensate the Claimant for that which he has lost. The award requires to be

> **"such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

47. Where a Tribunal is satisfied that there would have been a dismissal if a fair procedure had been adopted, the compensatory award cannot extend further than the date upon which the Tribunal predicts that would have happened (**Stonehouse** at para. 13). The decision of the Employment Appeal Tribunal in **Whitehouse** exemplifies that approach which is also seen in cases such as **Software 2000 Limited**, **O'Donoghue** and **Polkey** itself. As was noted in **Whitehouse** (paragraph 19) where, as here, the Tribunal has found that there was a potentially legitimate reason for dismissal, the question is not whether if the Respondent had conducted a further disciplinary hearing, that hearing would have been fair, but whether if there had been a fair disciplinary hearing the result would still have been a dismissal.

48. It is important also to examine carefully the Employment Tribunal's reasoning in this case. At paragraph 292 of the Merits Reasons, the Tribunal noted that if the Respondent had correctly analysed its true reasons for dismissing the Claimant, it "*would have taken a very different approach to the dismissal process and* [its] *reasons for the dismissal.*" Similarly, in the **Burns / Barke** response (para. 28), the Tribunal noted that if the Respondent had relied upon the true reason for the dismissal, it "*would have…taken a very different approach to the dismissal process".* These conclusions led the Tribunal to conclude, based on the evidence of the Claimant's behaviour, that "*the claimant would have been fairly dismissed had an alternative approach been taken by the respondent*." The reasons given by the Tribunal on that issue were also perfectly clear and **Meek** compliant. It is apparent from the reasons given by it that the Tribunal directed itself correctly on the application of section 123 **ERA** and reached a conclusion that was open to it on the evidence.

49. For completeness, I require to say something about the various points made by the Claimant in his further written submissions submitted after the hearing had concluded. Dealing first with the Claimant's e mail of 19 March, the cases of **Turner** and **Phoenix House Limited** did not concern the question with which this appeal is concerned, namely the correct application of section 123 **ERA**. The observations in those cases about fair process were concerned with the different issue of whether the underlying dismissals were fair or unfair. The cases are of no assistance when considering the different issue of "just and equitable" compensation. Secondly, the Claimant's submission that the true reason for the dismissal was that he had made protected disclosures is directly contradicted by the clear and unequivocal findings in fact made by the Tribunal (at paras. 225, 260 and 261 of the Merits Reasons), which findings are not the subject of challenge in this appeal. Specifically, at para. 261, the Tribunal stated:

> **"We have concluded…based on the evidence which we heard, that the reason the claimant was dismissed…was not because he had made protected disclosures but rather because of the manner of his communications and behaviour generally."**

50. Turning to the Claimant's second e mail (of 21 March), it is inherent in any consideration of section 123 **ERA** that the underlying dismissal will already have been held to be unfair either substantively – as as was the case in **O'Donoghue** – or by reason of procedural unfairness, or by a combination of the two. The applicability of **Polkey** / section 123 **ERA** is not excluded by a qualitative assessment of how badly the employer has behaved. It is not the role of the Tribunal to punish the employer for its conduct. Rather, where unfair dismissal is established it is for the Tribunal to consider and apply section 123 **ERA** according to recognised and established principles of law. That is what the Tribunal did in this case. The submission that **Whitehead** and **Polkey** should be distinguished because neither involved the making of protected disclosures is misconceived not least because, as I have already noted, the Tribunal made express findings that the Claimant was not dismissed for that reason. In any event, there is no principled reason for limiting the application of section 123 **ERA** in the way suggested by the Claimant. Finally, I could see no merit in the submission that an application of the principles described by the House of Lords in **Polkey** breached any Convention right of the Claimant. Again, whilst it did not seem to me that any of these arguments arose from the Grounds of Appeal that were before me, I have nevertheless considered them and concluded that they are, in each case, wrong.

Disposal

51. For all of these reasons, the appeal is refused.