Appeal Nos. UKEAT/0068/20/AT
UKEAT/0069/20/AT

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 November 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

UKEAT/0068/20/AT

TESCO PLC	APPELLANT
MR C BUSH	RESPONDENTS

UKEAT/0069/20/AT

TESCO STORES LTD	APPELLANT
MR C ROGBERG	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR S RITCHIE QC & MR CRAIG RAJGOPAUL (of Counsel) Instructed by: Freshfields Bruckhaus Deringer LLP 100 Bishopsgate London EC2P 2SR
For Mr C Bush	MR NIRAN DE SILVA (of Counsel) Instructed by: Slater & Gordon Lawyers 90 High Holborn London WC1V 6LJ
For Mr C Rogberg	MS KATIE NOWELL (of Counsel) Instructed by: DWF LLP 5 St Pauls Square Old Hall Street Liverpool L3 9AE

SUMMARY

PRACTICE AND PROCEDURE

The Employment Tribunal's decision that the claims of the two Claimants should be heard separately, by the same Judge, was perverse, because it risked actual unfairness, or the appearance of it, and/or inconsistent decisions being reached. The Tribunal had failed to take sufficient account of a number of common features of the two cases.

The Employment Tribunal's decision that there should be split hearings – liability first, and remedy later – was not perverse. Nor, given the particular features of this case, was it perverse to decide that all *Polkey* and contributory conduct issues should be left to the remedy stage, and not considered at the liability hearing.

HIS HONOUR JUDGE AUERBACH

Introduction and Background

1. Chris Bush is the former UK managing director of Tesco and Carl Rogberg is the former UK Chief Financial Officer. Mr Bush was employed by Tesco PLC, Mr Rogberg by Tesco Stores Ltd. Both of them were dismissed and have presented complaints of unfair dismissal to the Employment Tribunal which are ongoing. The two Tesco companies have challenged case management decisions taken in relation to these two claims by Employment Judge Bartlett at a Preliminary Hearing on 14 January 2020. To avoid confusion, I shall refer to Messrs Bush and Rogberg separately by name, and compendiously as "the Claimants", and to the two Tesco companies compendiously as "Tesco".

2. The following are undisputed facts.

3. An internal report dated 16 September 2014 alleged that there had been a substantial overstatement of the trading profit of Tesco's UK operations. On 21 September 2014 the two Claimants were both, separately, suspended. On 23 September 2014 Tesco published interim results indicating that there had been an overstatement of over £263 million in trading profit in its UK operations, that being the total of figures relating to various particular periods. I will refer to that as "the accounting issue". The Financial Conduct Authority ("FCA") announced an investigation, but this was later discontinued after the Serious Fraud Office ("SFO") began its own investigation on 29 October 2014.

4. Tesco wrote separately to each of the Claimants raising allegations and providing each of them with documents in relation to the accounting issue. Written responses were requested from

each of them. Solicitors became involved and correspondence ensued. Each of the Claimants raised issues about the process and responded in their own ways, directly or through solicitors. Both complained that the process being followed was in various ways unfair. Mr Bush denied wrongdoing, but responded to the substantive allegations so far as he considered he was able. Mr Rogberg, through his solicitors, also denied wrongdoing, but did not respond in substance, referring to the implications of the involvement of the SFO as inhibiting him from doing so.

5. In separate meetings on 26 November 2014 with the CEO, Dave Lewis, each of the Claimants was given a letter dismissing him with effect on 30 November 2014. In each case, the letter set out reasons. The letter to Mr Bush included the statement: "In summary, you have been associated with conduct which has impaired (or had the reasonable prospect to impair) Tesco's reputation and general standing." It set out what was said to be the "pertinent facts" in his case. The letter to Mr Rogberg set out what was said to be the "pertinent facts" in his case. This passage in the letter to him included the statement that his denial of any knowledge of wrongdoing was, "difficult to accept given what appears to have been known by other executives with whom you worked closely and the clear import of contemporaneous documents."

6. Mr Bush's claim form was presented on 17 April 2015 by his solicitors, Slater & Gordon. In its Grounds of Resistance, Tesco maintains that his dismissal was for the fair reason of conduct or for some other substantial fair reason ("SOSR") being: the need to protect Tesco's business from damage in the circumstances of the announcement having been made of the overstatement of revenue; the fact and level of that overstatement and consequent negative reaction in various quarters; and the announcements of the FCA and then the SFO investigations. It is asserted that the dismissal was fair in all the circumstances of the case. However, should the Tribunal find the dismissal to be unfair, Tesco contends that there should be a 100%

Polkey v AE Dayton Services Ltd [1988] ICR 142 reduction, and/or a 100% contributory fault reduction, of any compensation that might otherwise be awarded.

7. Mr Rogberg's claim form was presented on 22 April 2015 by his solicitors, DWF LLP. In its Grounds of Resistance, Tesco maintains that his dismissal was for the fair reason of conduct or SOSR, the latter put on the same basis as in respect of Mr Bush; and that it was a fair dismissal in all the circumstances of the case. Once again, Tesco contends alternatively for 100% **Polkey** and/or contributory conduct reductions.

8. Both claims were stayed, in particular because of the ongoing SFO investigation and then criminal proceedings. In 2017, a deferred prosecution agreement between Tesco Stores Ltd and the SFO was approved by the High Court. Both claimants and a third person, Mr Scouler, were charged with fraud and false accounting offences. Mr Rogberg's trial ended when the jury were discharged on grounds of his ill health and the prosecution was thereafter abandoned. That of Mr Bush and Mr Scouler ended when the court upheld their submissions of no case to answer. The accounting issue also gave rise to High Court litigation brought by shareholders and, I am told, other litigation.

9. The stay on the Employment Tribunal claims was lifted in 2019. By an email of 11 October 2019, Tesco's solicitors, Freshfields Bruckhaus Deringer, submitted that there was significant overlap between the two sets of Tribunal proceedings and that they should be case managed together. They asked that both, therefore, be considered at the same preliminary case management hearing. Such a hearing was indeed listed to take place on 14 January 2020. In the run up to the hearing, Freshfields wrote a letter of 7 January 2020 raising, in particular, issues about the anticipated disclosure exercise and flagging up that, should either of the claimants be

found to be unfairly dismissed, they would also, at the remedy stage, potentially raise what employment lawyers call a **Devis v Atkins** [1997] AC 931 point.

The Tribunal's Decisions

10. The judge produced two records of the Case Management Hearing on 14 January 2020 and the orders made, one in respect of each claim. However, the material parts are identical. It therefore suffices set out the relevant passage from one of the records, relating to Mr Bush.

> **"Background**
>
> **1. This was a one day open preliminary hearing which was listed with case number 33000809/2015 which concerns a Mr Rogberg and Tesco Stores Limited. Despite both claims being lodged in April 2015, there have been no meaningful developments in these cases because they have been stayed pending the outcome of various other pieces of litigation. The stay was lifted at the end of 2019 and the preliminary hearing today was the first preliminary hearing to take place.**
>
> **2. Prior to the hearing, the tribunal had received various pieces of correspondence from the respondent which largely concerned issues relating to disclosure. The respondent's position is that disclosure is voluminous and complicated because it concerns an investigation by the SFO and the peculiarities of obtaining documents from that investigation and other pieces of litigation which include the discharged criminal proceedings and shareholder litigation in the High Court. There was also mention of other High Court litigation relating to another employee of the respondent.**
>
> **3. At the start of the hearing, I reminded the parties that both cases involved only unfair dismissal claims and that all parties, including the tribunal must bear in mind the overriding objective. I was greatly concerned that a proportionate approach was not being taken in relation to this case, particularly in relation to disclosure. I informed the parties of my concerns that the issues raised about disclosure and particularly the volume of documents that it was asserted needed to be checked to determine whether or not they fell with the disclosure obligations related to the general background i.e. the commercial situation from which these claims arose, rather than documents that are relevant to the issues that the tribunal must decide. I repeatedly stated this in the preliminary hearing, and I expect all parties to have due regard to this when preparing the case and pursuing their positions in the Employment Tribunal.**
>
> ***Separate Hearings for Liability and Remedy***
>
> **4. I then suggested listing the liability and remedy (including contributory fault and Polkey) hearings separately and gave the parties time to consider and take instruction on this suggestion. All parties took instructions and made submissions on their position. The respondent's position was that it opposed hearing liability and remedy separately and both claimants were in favour of it. I made the following decision:**
>
> **5. I have decided to list the liability and remedy hearing separately in each of the two cases for the following reasons:**
>
> **a. all parties must have in mind the overriding objective which requires a case to be dealt with justly. This includes dealing with the case proportionately in all aspects;**

b. separating the liability and remedy issues means that only those issues relating to unfair dismissal will be considered in the liability hearing. The respondent relies on conduct and/or some other substantial reason as the reasons for dismissal. The liability hearing will therefore be concerned with what the respondent knew at the time of the dismissal;

c. it will greatly reduce the scope of the disclosure exercise for the liability hearing. This is because after the date of dismissal there have been a number of legal actions which have some, though arguably tenuous relationship to the current proceedings and which have resulted in voluminous documentation;

d. reducing the scope of the disclosure exercise will greatly reduce the potential costs incurred by all the parties at the first stage of the proceedings;

e. it will enable the liability hearing to focus on the relevant issues and the tribunal at that hearing will not be faced with a substantial bundle that may well be out of proportion to the case when it is viewed holistically.

6. I recognise that the respondent's argument was there would be no reduction in hearing length by separating the liability and remedy hearings. Its position was that there would need to be, for each claimant or both claimants, a five-day hearing and a minimum of a 15-day hearing for remedy. I do not accept the respondent's argument that there would be substantial duplication between the hearings. Findings from the tribunal in relation to liability would result in a determination of those facts and it would mean that there would not need to be a rehearing of those factual issues for remedy purposes.

Consolidation

7. The respondent had proposed that both cases be consolidated. I heard submissions from all parties about this issue. The respondent favoured consolidation and both claimants opposed consolidation.

8. I decided not to consolidate the cases of Mr Bush and Mr Rogberg for the following reasons:

a. I accept that both cases relate to the same background commercial situation and cover the same period of time. I also accept that the witnesses from the respondent are likely to be same in both cases and therefore hearing the cases separately would save costs for the respondent. Therefore, I accept that not consolidating the cases will be prejudicial as regards costs to the respondent;

b. it was argued for the respondent that the documentation would be relevant to both claimants. Whilst I accept that the background circumstances and documentation are the same, I am not persuaded that the documentation that would be relevant rather than background would be the same. I accept that there would be some overlap but for example I would expect the investigation report into the whole commercial situation to be a substantial document and I am not persuaded, on the albeit limited information I have available to me at this time, that the entirety of this would be necessarily be relevant and that all the same parts would be relevant to both claimants;

c. whilst there is some overlap of the conduct allegations made by the respondent against the claimants there is also some substantial divergence and the tribunal would need to give careful consideration to the separate issues. It is these issues which go to the heart of liability rather than background information and background documentation. Therefore, I consider that there are important and distinct issues to be decided in each claimant's case;

d. the pleadings before me do not indicate that one claimant is blaming another claimant and therefore I find that there is little risk that this would be a case where joint responsibility should be considered or that there would be separate and opposing findings relating to each claimant;

e. this is not a case concerning a one-off incident in which the claimants were involved instead the background is complicated and covers a protracted period of time during which the claimants are likely to have acted differently;

f. I accept that consolidation would save some tribunal however I find that this would be more limited than the respondent has accepted;

g. overall I consider that the different issues must be considered in each claimant's case (as opposed to the background issues) and the recognition that each claimant is an individual and individual circumstances arose in relation to the termination of their employment mean that that I have decided not to exercise my discretion to consolidate the claims.

9. In light of my decision to list the liability and remedy hearings separately, the disclosure issues identified in the respondent's correspondence fell away and these issues will only potentially arise in relation to the remedy hearing, which, as set out below, I have listed.

11. The judge went on to list a five-day liability hearing of the claim of Mr Bush from 1-5 March 2021, followed by a five-day liability hearing of Mr Rogberg's claim from 8-12 March 2021, and stipulated that both of the liability hearings were to be heard by the same judge. Remedy hearings were listed to take place in the first case in November/December 2021 and in the second case in January 2022. These were listed for 15 days each, although the judge indicated that she considered this listing excessive and expected it in both cases to be reduced in due course. Two joined one-day case management hearings were also listed to take place in April and June 2021, in particular in anticipation that ongoing disclosure issues might need to be addressed, and to allow Tesco the opportunity to apply for the question of whether there should be separate remedy hearings to be revisited.

12. In both minutes the issues to which each unfair dismissal claim gave rise were identified in the same way. The Tribunal referred to the reason relied upon by Tesco being conduct and SOSR, whether, if for a fair reason, the dismissal was procedurally fair, whether the sanction was within the band of reasonable responses, and the questions postulated in **Burchell** [1978] ICR 303. The Tribunal noted also that an "extra factor" in the investigation was the constraints imposed by the SFO as part of their investigation at the time. Other directions were given.

The Appeals and the Arguments

13. By these appeals, Tesco challenges the decisions, first, not to direct that the two claims be heard together: the consolidation issue; and, secondly, not to direct a single hearing in relation to both liability and remedy: the split hearings issue. The Grounds of Appeal are in substantially the same terms in respect of both Claimants, ground 1 challenging the decision not to consolidate, and ground 2, the split hearing decision. Both decisions are said to have been, in the legal sense, perverse. I have considered all the contentions raised in the Notices of Appeal, the Answers, written skeleton arguments and oral submissions today. I identify in what follows what appear to me to have been the most significant points made for each of the parties.

14. In relation to ground 1, Tesco contends, first, that in refusing to direct that the two claims be heard together, the Tribunal wrongly considered that the common territory of the two claims was mere background. The judge, it is said, failed to consider, or adequately consider, the following relevant factors.

15. Both Claimants were dismissed by the same person, Mr Lewis, on the same day, for the given reason, in both cases, of misconduct in relation to the accounting issue and/or because of reputational concerns in relation to that issue which were asserted to be precisely the same in both cases. The documentary and witness evidence related to the reputational concerns will likely be identical, and that relating to the conduct issues will also substantially overlap. The bulk of the disclosure already given by Tesco in the two claims is the same. Mr Rogberg reported to Mr Bush and they worked closely together. The evidence of and about the claim of one will be relevant to that of the other. Documentary evidence supports this, including emails relied on by Tesco, passing between them, and that were included in the materials provided to them for comment following their respective suspensions.

16. Whilst the judge correctly noted that there are differences between the conduct allegations in the two cases, those differences do not detract from the substantial nexus between the factual context, the conduct allegations in each case, nor from the overlap in relation to the SOSR grounds relied upon by Tesco in the two cases. Nor do they detract from the fact that there is substantial overlap in the issues of procedural fairness raised by the two Claimants.

17. Mr Ritchie submitted that the overlap of the SOSR ground relied upon by Tesco, and of the procedural challenges raised by the two Claimants, either separately or together, alone demanded a direction that these two claims be heard together. The procedural issues that overlapped included both Claimants complaining that they only had limited access to materials when asked to respond to the allegations, that more documents were relied upon by Tesco in reaching the decision to dismiss them than were disclosed to them, that they did not have the opportunities they said they should have had to make representations, beyond written responses, and that neither was afforded the right of an appeal. Further submitted by Mr Ritchie, there was no downside to the two claims being heard together in terms of fairness. The judge will still be required, and able, to give proper consideration to the distinctive features of the two cases and, of course, required to give separate decisions in respect of each claim. The judge will further be assisted in that task by the fact that the Claimants will be separately represented.

18. Secondly, Tesco submits that hearing the claims separately will give rise to, or risk, unfairness, because the same witnesses will be cross-examined about the same matters to some extent, but this will occur in two separate hearings. This, and the general consideration of overlapping issues, means that having two separate hearings risks inconsistent findings and decisions. The direction that was made by Employment Judge Bartlett, that the same judge

should hear both matters, does not, submitted Mr Ritchie, cure the problem. Rather, it underscores it. The timetable set by the judge envisages that a decision might be given in the first case before the second is heard. In any event, the judge's decision in the second case is liable to be influenced by evidence heard, and findings made, in the first case. If the decision in the first case, or both cases, is reserved, then the decision in each case is liable to be influenced by evidence heard in the other. This gives rise to the risk of a decision or decisions being reached without all parties having had a fair opportunity to challenge and/or make submissions upon, evidence heard by, or findings made by, the judge which may influence the given decision.

19. Thirdly, said Mr Ritchie, the decision not to hear the claims together had resulted in significant extra days of Tribunal hearing time being allocated with consequent significant extra cost to Tesco. It also requires Tesco's witnesses, in particular the former Chief Executive, who took the decision to dismiss and is no longer in their employment, to commit significant additional time to attending to give evidence which will, itself, be largely repetitive. That, says Tesco, is unfair and severely disproportionate.

20. In relation to ground 2, Tesco contends that, in making the split hearings decision, the Tribunal erred, because it failed to recognise the overlap between the evidence, including documentary evidence, pertinent to the liability issues, and, if either or both of the Claimants are found to have been unfairly dismissed, any **Polkey** issue. The Tribunal seems to have assumed that documentary evidence at the liability hearing will not be needed again and should not be included in the bundle for any remedy hearing. That is plainly wrong, said Mr Ritchie. The same arguments apply in respect of any issue of contributory fault.

21. More generally, Mr Ritchie submitted that the Tribunal failed to take a holistic view of the interaction between the liability and remedy issues in each of these cases. He submitted that the Claimants want vindication on liability and to have a remedy, and they will each need to see the matter through to the end of a remedy hearing in order to achieve that. He submitted that the issues that will arise at the remedy hearing, if they get there, form a major part of their cases. In making the split decision ruling, the judge took a superficially attractive shortcut, but was wrong to do so. Mr Ritchie submitted that he should, therefore, succeed on his perversity challenge in relation to both grounds. Therefore, I should substitute the opposite decision for that which the judge had taken, on both points, rather than remitting them.

22. For Mr Bush, Mr De Silva emphasised that both challenges are, indeed, to case management decisions, and rest, as they must, on grounds of perversity. He highlighted well-known authorities concerning the generous ambit that the EAT must allow to an Employment Tribunal in respect of a case management decision and the applicability of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223 unreasonableness principles. It was a high threshold that must be surmounted for a perversity appeal to succeed.

23. In relation to ground 1, Mr De Silva highlighted that the commercial context of the accounting issue was the same in relation to both dismissals. But the particular facts, or alleged facts, relied upon in Mr Bush's dismissal letter regarding his alleged conduct were materially different from those relied upon in Mr Rogberg's dismissal letter regarding *his* alleged conduct. This, in turn, reflected their distinct responsibilities, activities, the sort of meetings that each of them would or would not have attended, the differing kinds of decisions that each of them would or would not have been involved in, and so forth. Further, the differences between the charges in each case, and their respective responses, were far more significant than the fact that they were

A both dismissed for the headline reasons of conduct or SOSR arising from the accounting issue and on the same day.

B 24. Accordingly, he submitted, the Tribunal properly stated, assessed, and had regard to, relevant considerations in each of subparagraphs (a)-(g) of paragraph 8 of its decision. That decision was well within the generous ambit of discretion that must be allowed to it.

C 25. On the question of holding separate hearings, giving rise to the risk or possibility of unfairness, Tesco's case failed, again, to reflect the divergence of the reasons for dismissal in the two cases. It was unclear what evidence pertaining to one Claimant was being said to be relevant

D to the case of the other. In any event, it was not inevitable that the Tribunal would be influenced in either case by evidence that it had heard in the other case. It would be scrupulous to decide each case on the evidence presented in that case. In oral submissions, Mr De Silva said there

E was, in fact, no need for the two liability hearings to be before the same judge; and any concerns about influence of what was heard in one case affecting the decision in the other could be addressed by a direction that the hearing should, in fact, be before different judges.

F 26. He also submitted that the judge properly took account of the impact on the overall number of hearing days, of either hearing or not hearing the two cases together. The fact that the judge had considered that 15 days for each remedy hearing was excessive but allowed that length

G of listing only, as it were, as a place marker, also needed to be borne in mind. The Tribunal was also aware that it was being alleged that some witnesses would have to give evidence more than once, but no detail was actually put forward by Tesco of specifically which witnesses were to be

H called or how this might occur. It was also not actually spelled out at the hearing before Employment Judge Bartlett that it was Tesco's case that in each case the decision to dismiss was

taken by Mr Lewis. In any event, it does not follow that Mr Lewis, or any other witness, would necessarily have to give evidence on four occasions, or to attend for the whole of given hearing.

27. In relation to ground 2, Mr De Silva submitted that the decision to hold split hearings was clearly strongly influenced by the Tribunal's concerns about Tesco's approach to disclosure. He referred to the particular submissions that had been made in Freshfields' 7 January letter, about the disclosure exercise. Further, there was also liable to be further significant disclosure forthcoming from the Claimants arising from the SFO process. The judge, he submitted, properly took the view that holding a separate liability hearing or hearings in the first instance would considerably mitigate this problem, because the enquiry at a liability hearing would be limited to what Tesco knew and relied upon at the date of dismissal and would not be concerned with materials that emerged later. Nor was it right that all the same documents would need to be put to the witnesses at both the liability and then any remedy hearing. The vast amounts of documentation that came into existence only after the dismissals would not need to be put to any witness at a liability hearing. That being so, and the judge having also weighed the impact on overall hearing days, the split hearing decision was a proper one.

28. For Mr Rogberg, Ms Nowell respectfully adopted the submissions of Mr De Silva and added some distinct submissions of her own. She also particularly highlighted: that Mr Bush had provided a written answer to the allegations prior to his dismissal but Mr Rogberg had declined to do so; that the alleged overstatement took place within the commercial department which reported to Mr Bush but not Mr Rogberg; and the general theme that there would have been significant divergence in their respective activities in terms of meetings attended, colleagues whom they dealt with in relation to matters touching on such issues, and so forth.

29. In relation to ground 1, she submitted that the factors relied upon by Tesco as weighing in favour of consolidation had been properly recognised and weighed in the balance. The judge properly considered that the cases would be unnecessarily complicated by hearing them together and that this outweighed the savings in time and cost that would thereby be achieved. She too submitted that the judge had conducted a proper balancing exercise and reached a decision that was not **Wednesbury**-unreasonable.

30. In relation to ground 2, Ms Nowell too highlighted Tesco's own submissions about the extensive documentation and complex disclosure issues that then would arise. That was why Tesco had proposed, and been granted, two additional Preliminary Hearings to deal with such issues. Splitting the hearings, as the judge did, considerably limited the disclosure needed for the first hearing. There were also, she submitted, a number of possible outcomes on liability. The Claimants could lose. If they won, they could win in different ways, depending on the way in which the Tribunal found the dismissal to have been unfair. That, in turn, potentially would have different implications for what **Polkey** issues might arise. That in turn could potentially have different implications for the scope of material that would need to be considered at the remedy hearing in a successful case. It would, therefore, be of utility to the parties to have the benefit of the outcome of the liability decision in order to be able to see the shape and scope of the issues that would have to be considered in particular in relation to **Polkey**, at a future remedy hearing.

The Law

31. There is no dispute about the relevant rules of the **Employment Tribunals Rules of Procedure 2013**, being rule 2 relating to the overriding objective and rule 29, conferring on the Tribunal general case management powers. There is no dispute that the Tribunal's case management powers include the power to direct that two or more cases or part of them should be

heard together and the power to decide that different issues that arise or may arise in a given case, including as to liability and as to remedy, should be heard and determined on different occasions.

32. Both the decisions here were case management decisions involving an exercise of judicial discretion, and it is well-established that, for an appeal to succeed, the exercise of discretion must exceed the generous ambit within which reasonable disagreement is possible. There are many authorities to choose from, but among those cited to me were **CIBC v Beck** [2009] IRLR 740 at [23], citing early authorities mentioned there. If the Tribunal has properly exercised its case management power within guiding legal principles, then the exercise of that discretion can only be challenged on **Wednesbury** grounds. See also **Adams v West Sussex County Council** [1990] ICR 546 at 550G. Mr De Silva and Ms Nowell also cited **X v Z Ltd** [1998] ICR 43 to similar effect. I was also referred to **Noorani v Merseyside Tec** [1999] IRLR 184.

33. Mr De Silva also cited **Yeboah v Crofton** [2002] IRLR 635 and the dictum of Mummery LJ that a perversity challenge should only succeed where an overwhelming case is made out. I do sound a note of caution in relation to that. **Yeboah** was, of course, concerned with a perversity challenge in relation to findings of fact or conclusions reached by a Tribunal, where it was said that there was no evidence to support such findings of facts or conclusions. For the reasons explained by Mummery LJ, the bar is set particularly high in relation to such a challenge, bearing in mind the appellate role of the EAT, which does not have the benefit of having been exposed to all of the evidence to which the Employment Tribunal was exposed. But that problem does not pose itself in quite the same way where the challenge is to a case management decision. Nevertheless, the authorities are indeed clear that the challenge can only succeed in principle on perversity grounds as I have described.

Discussion and Conclusions

34. I turn to ground 1. The place to start is with the judge's reasoning at paragraph 8 in the case management summary. By way of general observation, the judge was plainly cognisant of the common background context that gave rise to both dismissals and both claims. She also correctly identified that there were material differences between the nature of the conduct said to have been found, and the particular reasons for dismissal given, in each of the two cases. She had a proper basis on which to do so because, as well as the pleadings, she had before her the two dismissal letters in which Tesco set out what they said were the respective pertinent features of the two cases; and on their face these plainly were not, in all respects, the same.

35. I turn to the judge's more particular reasoning. I will take the subparagraphs of paragraph 8 somewhat out of order. At (a) the judge recognised that not hearing the cases together would put the respondent to greater cost. I cannot take issue with that as such. The judge's assessment, at (f), of the implications for Tribunal time of deciding this aspect one way or the other is also, as such, unobjectionable. The assessment at (b), of the degree of overlap between the documentation of the two cases, was necessarily somewhat broad brush and speculative; but the judge's points are not obviously bad ones, given the limited material before her at that hearing.

36. However, what the Judge says at (c), (d) and (e) needs closer examination. The judge's assessment at (c) was that it was the divergent conduct issues, rather than the common background information and documentation, that would in each case, in her phrase, "go to the heart of liability." What she says at (e) it seems to me speaks to the same theme: that the conduct issues (and the evidence related to them) were going to be materially different in relation to each case. As a general proposition, this is not necessarily problematic. Plainly, even if they were to be heard together, the two claims could not, and should not, be decided as one. The judge's point

was that, in any event, in each case, the Tribunal will be concerned to focus on the particular conduct for which *that* Claimant was said to have been dismissed. The Tribunal will need to consider whether a belief in *that* conduct was the reason for his dismissal, and if so whether that dismissal, for that particular found conduct, was fair in all the circumstances of that case.

37. It appears to me from what she said at 8(g), that it was the judge's conclusion on this aspect that, in particular, tipped the scales in her mind in favour of separate hearings. She does not actually say so, but it may be that she considered that factors such as the cost and time savings to the Claimants in having separate hearings outweighed the cost and time that would be saved to Tesco in having the cases heard together.

38. But, however that may be, what it was *also* critically important for the judge to consider in any event was whether there was a material risk of any party not getting a fair hearing if the claims were heard either separately or together. In her remarks at (d), I agree with Mr Ritchie that it rather looks as if the judge was responding to particular authorities that were cited to her in an extract from *IDS Brief* put forward to her, and she had reflected on whether these cases had any parallels with those cases. But, again, be that as it may, I agree with Mr Ritchie that this subparagraph does not really grapple with the substance of the issue of whether there was a material risk of an unfair hearing or hearings, by the two claims being heard separately.

39. In particular, it was clearly Tesco's case that, while the particular conduct for which each Claimant had been dismissed was, in important respects, distinct and unique, it was *also* their case that there was significant interaction between the two of them at work, and between the conduct allegations that they faced. Tesco's submissions for this appeal highlight that it was their case that, Mr Rogberg, being the UK finance director, who reported to Mr Bush, the UK

managing director, the two of them, inevitably, worked closely together. Further, it was their case that Mr Bush's own written representation prior to his dismissal made reference to discussions and communications he said he had had with Mr Rogberg, and what he said he had been shown by Mr Rogberg. Further, as I have noted, Mr Rogberg's dismissal letter referred to what, in the words of Tesco, "appears to have been known by other executives with whom you worked closely", which said, Mr Ritchie, included Mr Bush.

40. Mr Ritchie also submitted that it could be seen that there were some overlapping strands in the two dismissal letters. In particular, both Claimants stood accused of having been insufficiently proactive to escalate the concerns raised by the 16 September 2014 letter, after they first became aware of them; and both, albeit in different ways, were accused of conduct falling short of what should have been expected of them, in a context where colleagues were under pressure to deliver figures or results leading to the risk (or as it turned out, the actuality) of steps being taken to present figures in a way that crossed an improper line. Tesco also submitted that it is pertinent to consider materials sent following their suspensions including emails in passing between the two of them.

41. What Tesco did in fact believe, and whether it fairly dismissed either Claimant, in light of what it did believe, is, in each case, contentious. But in my view, the judge at this Preliminary Hearing needed to consider with care, in light of the general shape of Tesco's cases regarding conduct, whether there was a real risk of unfairness in the two claims being heard separately. Tesco said that there was, because, in short, these features of the two cases mean that there will be important, common and overlapping evidence as to issues which go not merely to matters of background and context, but to the question of whether each Claimant was fairly dismissed for the particular alleged conduct on which Tesco relies in their case.

42. Now, in fact, as I have said, Mr Ritchie has told me that it is Tesco's case that the same individual took the decision to dismiss in both cases. Mr De Silva submitted that this was not apparent either from the pleadings or the dismissal letters which, in particular, use the passive tense or refer to "Tesco" rather than to any individual or group of individuals having taken the dismissal decisions. Nor, he said, was this point made to Employment Judge Bartlett. Nor was she told about what Tesco said was, for example, the overlapping documentary material relied upon, or email communications passing between the two Claimants. Mr Ritchie says in reply that it is enough that there was a plain overlap of the SOSR ground relied upon in both cases, and in the procedural grounds of challenge to the fairness of both dismissals. These features alone, he said, dictated that the two claims needed, fairly, to be heard together.

43. I have come to the conclusion that this question, of the implications of holding separate liability hearings, for the fairness of such hearings, was not properly or sufficiently addressed by the judge. What she said at paragraph 8(d) does not do so. The propositions that the Claimants were not blaming each other and/or that this was not a case of alleged joint responsibility (not, I interpose, precisely the same thing) does not dispose of the risk of inconsistent findings, for example, as to what Tesco believed and/or reasonably believed about whether a particular piece of information was shared between the Claimants or a particular aspect of the matter was discussed by the two of them, or possibly even whether some particular decision about the matter taken by them together, or some decision or action of one was known to the other.

44. Mr Ritchie's submission, that the judge's direction that both hearings should take place before the same judge did not cure the problem, but rather underscored it, is also, in my view, well made. His point is that this direction gave rise to the risk that the judge will be influenced

in deciding one case, by something that they had heard in the other. Indeed, they may have made them made their mind up about it by the time of hearing the second case, on the basis of what they heard in the first case. That risk would be particularly obvious and could possibly even demonstrably transpire, if the judge actually made the decision in case 1 before hearing case 2; but it would still be present even if they did not.

45. I also agree with Mr Ritchie that is it not a sufficient answer to say that the judge can be expected to be alive to the importance of deciding each case scrupulously on its own evidence alone. That is for the following reasons. First, being realistic, it is quite a tall order to expect a judge hearing two such cases back to back, arising out of the same background, and with such significant overlap of subject matter and evidence, not to allow themselves to be influenced consciously or unconsciously by findings made in one case, or evidence heard, when deciding the other, however conscientious and scrupulous that judge may endeavour to be.

46. Secondly, the appearance does matter as much as the reality. I prefer in this context to use the term "procedural irregularity" to the term "apparent bias", although bias does not always denote a partiality to one party but may denote, for example, some form of cognitive bias in the reasoning process, to the many forms of which, even the liveliest and most well-trained judicial mind may be vulnerable. But in all events, the test adumbrated in **Porter v Magill** [2001] UKHL 67, of whether the fair-minded and informed observer would conclude that there was a real possibility of bias or unfairness, would apply. In that respect, it is the appearance or real possibility of unfairness that matters as much as whether it actually occurs. I do not think that the judge gave sufficient consideration to this ramification of her approach.

47. Mr De Silva, confronted with this aspect in oral submissions, submitted that the solution would then be for a different judge to hear each case. Mr Ritchie, in reply, fairly acknowledged that would solve what I have called the procedural irregularity problem. But he said that it would not solve the risk of inconsistent findings. I agree. I also agree that, even leaving aside the overlap in the conduct allegations, the problem presents itself in relation to the overlap of the SOSR ground and the common themes of procedural unfairness alleged by the Claimants. Further, the dismissal letters do, arguably, bespeak some overlap of the conduct allegations which cannot safely be dismissed as negligible.

48. I recognise that the judge did not have before her the disclosure and email material to which Mr Ritchie has referred; but she did have the dismissal letters, and she knew what jobs Mr Rogberg and Mr Bush each did and that one reported to the other. In fairness to her, she did not purport to reach her decision on the basis that they inhabited, as it were, entirely separate parts of the Tesco forest, each unaware of the other's activities. But the fact that they did have different roles and were accused of different misconduct in a number of respects does not provide a sufficient answer to the risk of unfairness raised by the element of alleged material interaction that was relied upon by Tesco.

49. Similarly, regarding the question of who took the decision to dismiss, Mr De Silva is right that the dismissal letter and Tesco's pleadings, did not state a clear position. But I was told in the course of submissions that this issue was simply not ventilated or considered at the Tribunal hearing by anyone. Certainly, it is clear the judge did not take her decision, on the basis that the dismissal decisions were taken by a different person or two entirely different groups of people. Given the seniority of these individuals, that one reported to the other, that the senior of the two reported to Mr Lewis, that both received letters written by Mr Lewis and delivered by Mr Lewis,

A and the general content of those letters and context, I do not think that the judge could realistically or safely have proceeded on the assumption that entirely independent decision makers were involved unless she had been told that that was an undisputed fact.

B

50. The judge, I conclude, did err in relegating the common features of the two cases to the status of background. She failed to take sufficient account of the overlapping evidence of the conduct charges, the signs that there was commonality of decision-making in relation to these C dismissals or that this certainly could not have been discounted, and the overlapping SOSR and procedural fairness issues. She failed, having regard to these features, to consider or sufficiently consider, the risk that separate hearings would result in inconsistent decisions. Whether or not D that might formally give rise to some form of issue estoppel, which was not fully argued before me, it is, I think, clear that it would not be a satisfactory or fair outcome to risk occurring, given that it could give rise to the perception of unfairness and possible other real difficulties further down the line, and that all of that could be avoided by directing a combined hearing. These E problems were not solved by directing that the same judge hear both matters, because that gives rise either to the actuality or, at least, the perception or risk, of procedural irregularity.

F

51. I would not have interfered with the judge's decision by reference to her assessment and weighing of other considerations that do not go to the question of a fair hearing, as such, but go to other matters such as cost, convenience of witnesses, gains or loss in terms of duration of G hearings and so forth. Her approach to all of those matters was entirely within the generous ambit of her discretion. There were pros and cons on both sides of the argument. But the issues which I have highlighted go to the fairness or at the very least, the apparent fairness, of the hearing process. Had the judge engaged sufficiently with these issues, it would or should have been H

apparent to her that, at the very least, there was a real risk to the fairness of the process or to the appearance of fairness and, indeed, I think a significant risk of unfairness in this case.

52. For these reasons, I conclude that the decision not to direct that the two claims be heard together was wrong. No judge, considering this aspect, could reasonably have concluded that holding two separate hearings on liability was appropriate, whether before separate judges or the same judge. For these reasons, ground 1 succeeds and I will not remit this point but will substitute a decision that there should be a single liability hearing. I will leave further directions about arrangements for that to the Employment Tribunal.

53. I turn to ground 2. Whether an unfair-dismissal claim is suitable for a single hearing as to both liability and remedy (if appropriate), or a split hearing, is entirely dependent on the features of a particular case. Where a split hearing is directed, consideration also needs to be given, more precisely, to whether there are *some* remedy issues that will, or at least may be, considered at the liability hearing. The parties need to know where they stand so that they can prepare accordingly. If issues about loss of remuneration or mitigation are put off to another day, the evidence relating to those matters will not need to be prepared or presented at the first hearing. But consideration also needs to be given to whether other issues such as **Polkey** and contributory conduct will at, or at least, might, be considered at the first hearing.

54. It was common ground in this case that if either or both of these Claimants succeed, there is unlikely to be much, if any, argument about their underlying losses, given their seniority and high earnings and that it is not anticipated that there will be any significant, if any, mitigation issues raised. It was the issues of contributory conduct **Polkey**, and **Devis v Atkins** that were foreshadowed as the real battlegrounds of any remedy hearing (although I note also that both

claimants are seeking an ACAS Code uplift under section 207A **Trade Union and Labour Relations (Consolidation) Act 1992**).

55. It is axiomatic that determination of liability for unfair dismissal calls for an assessment of the decision to dismiss taken by the employer (and/or where there is an appeal, on the appeal) at the time when the decision was taken and in light of the employer's reasons for that decision and the process that was followed and the information which informed its decision at the time. Determination of whether there has been conduct by the complainant within the scope of section 122(2) **Employment Rights Act 1996** and/or action of the complainant within the scope of section 123(6), falls to be determined by the Tribunal making its own findings of fact and assessment in light of the evidence available to it when it determines those questions.

56. **Polkey** issues, it is now well-understood, come in many shapes and forms. Sometimes, the nature of the particular reason why the dismissal was unfair, and the findings made in the liability decision, give the Tribunal everything it needs to be able to determine the **Polkey** issue, perhaps subject only first to receiving further submissions. But in other cases, further evidence and fact-finding may be required. In many relatively straightforward cases, it will be apparent that the additional evidence that would enable the Tribunal to determine such issues will not be very great, and can be readily marshalled for the liability hearing; and that including such issues among those to be potentially considered at the liability hearing will not greatly prolong it, if at all, or significantly add to the preparatory work involved, nor will it call for the attendance of any additional witnesses. Knowing where they stand in relation to such issues at the end of the liability hearing may also assist the parties to reach a settlement and so dispense with a further remedy hearing altogether. For this reason, it is very common to list the liability hearing on the

basis that it will, or at least may, consider **Polkey** and contributory conduct issues at that same hearing, should they arise.

57. The Tribunal may not be able to cater for every eventuality in advance. In relation to both **Polkey** and contributory conduct, a particular issue may only emerge, or take on a particular shape, as the liability hearing unfolds, or in light of the Tribunal's liability decision and findings. But if an unanticipated issue of that sort does present itself in light of the Tribunals findings and conclusions, then it has a duty to address it in order properly to determine remedy in accordance with the **1996 Act**. The Tribunal always has the safety valve in such cases that it can in the event decide if necessary, having decided liability, that it will refrain from going on to determine such an issue, until further evidence or argument can be marshalled; or it can at least invite submissions as to whether it ought to allow for that.

58. In the present case, however, the Tribunal took a different course. It ruled at the case management stage that the first hearing in each case would be confined to determining liability only and that any **Polkey** or contributory fault issues would *not* be considered on that occasion but left over to the remedy hearing if the claim in question succeeded. Implicitly, the way that the judge decided this would mean that any **Devis** issue would be left over as well along, indeed, with any ACAS Code adjustment issue.

59. Was the Tribunal wrong to take this approach? Should the EAT interfere? The reason why the judge took this course is, I think, clear. She concluded that a significant quantity of additional documentary evidence would or probably would need to be presented in order to determine such issues. She did so in particular having regard to the events that had taken place since the date of the dismissals in terms of criminal processes and investigations and civil

litigation, and taking account in particular of what was said in the Freshfields 7 January letter specifically on the subject of discovery. It seems to me that she was plainly entitled to do so.

60. As for **Polkey**, in this case, the Claimants, between them, assert that their dismissals were unfair for a range of reasons. I, of course, express no view about these issues, which will fall to be considered by the Tribunal. But I note that if some or all of their contentions are accepted, and lead to a finding that either or both of these dismissals were unfair, then the Tribunal may need to consider at the **Polkey** stage what further evidential material would or might have been considered by Tesco, not only had greater initial disclosure been given but also, possibly, had the Claimants been given a greater ability to gather evidence than the limited access to emails they were apparently given; and/or had there been an appeal process; and/or (at least in Mr Rogberg's case), had the matter been put off until a much later stage, in light of the SFO process.

61. As for contributory conduct, it was logical to assume, that the evidence that could be relevant and would need to be presented to the Tribunal to enable it to determine whether there was any such conduct on the part of either Claimant, would be considerably greater than that which would be relevant to the determination of liability in either case. Though the judge had only a bird's eye view, it was clear that significantly more documentation would be involved. Further, it had been flagged up by Freshfields that some tricky issues relating to privilege and so forth would need to be navigated in order to agree or determine the precise scope of disclosure. All of this was foreshadowed in their letter, and it was the chief reason for the listing of two further case management hearings. It is also why, though the judge put down a marker that she considered 15 days excessive, long remedy hearings were envisaged as likely to be needed.

62. I should, for completeness, also address the fact that each Claimant pleaded that any compensatory award should be increased for non-compliance with the ACAS Code. This may prove to be a less significant feature if these claims go the distance, but not necessarily. And it needs to be borne in mind that the Tribunal may not be in a position fairly to determine whether there should be any adjustment for non-compliance with the ACAS Code, if found, and if so, what adjustment under section 207A, unless or until it can ascertain the underlying loss or at least has a sufficient handle on its likely scale (see the discussion in **Wardle v Credit Agricole Corporate & Investment Bank** [2011] ICR 1290, **Acetrip Ltd v Dogra** UKEAT/0238/18 and the recent case of **Bannerjee v Royal Bank of Canada** [2021] ICR 359).

63. I was not persuaded by Mr Ritchie's submissions on this ground. In particular, I do not think that the judge made the error of assuming that there would be no overlap of documents at all, as between the liability and remedy hearings. That was not what she said in the body of her decision. Even if perhaps her specific disclosure order was somewhat infelicitously expressed, I suspect that reflected a further attempt to signal her concerns about the need for proportionality in disclosure and compiling bundles, in particular, and the liability stage. It is, of course, likely to be the case that documents that were referred to at the liability hearings will, if in either case there is a remedy hearing, be referred to again at the remedy hearing; but that is a different point. What the judge was focused on was the considerable disclosure exercise and documentation that would be involved for any remedy hearing, and she was entitled to attach significance to that.

64. Nor am I persuaded by Mr Ritchie's arguments that the judge failed to take a sufficiently holistic view of the interaction between the liability and remedy issues; and engaged in what amounted, as it were, to a false economy. Whilst he stressed that the Claimants want to win on liability *and* remedy, it remains to be seen who will win. If Tesco wins, there will not be any

A further remedy hearing unless such a decision is successfully challenged. If the Claimants win, as was fairly pointed out by Ms Nowell, the scope of the remedy hearing at least in relation to **Polkey**, if not in relation to contributory fault, may be affected by *how* they have won.

B

65. I do not see why, in principle, the judge should have concluded that the only fair and sensible way that these issues could be managed was by not having a split hearing in either case. She weighed the potential savings of time that might be involved. She put down a marker about

C whether 15 days for a remedy hearing was really needed. It is less common, perhaps, to see a case in which the Tribunal orders a split hearing but also orders *in terms* that **Polkey** and contributory fault will *not* be considered at the first stage; but I consider that this was a perfectly

D justified decision for the judge to have taken in this case. The EAT therefore cannot and should not interfere with it. Ground 2, therefore, fails.

E

F

G

H