Appeal No. UKEAT/0070/20/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 May 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(Sitting Alone)

MR G MOORE — APPELLANT

PHOENIX PRODUCT DEVELOPMENT LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR RICHARD POWELL (of Counsel) Instructed by: Webster & Co 5 Chancery Lane London EC4A 1BL
For the Respondent	MR DANIEL STILITZ QC (of Counsel) Instructed by: Brahams Dutt Badrick French LLP Kings House 36 King Street London EC2V 6BB

SUMMARY

UNFAIR DISMISSAL

The Claimant is the inventor of a water-efficient toilet, called the "Propelair Toilet", which is manufactured and marketed by the Respondent of which he was a founder. The Claimant was the Chief Executive Officer of the Respondent from 2001 until 2017, when he was replaced by a Mr Dylan Jones. The Claimant had difficulty in accepting that the Respondent was no longer his company and that he was not in charge of it, although he remained an employee and a director. Following a series of incidents, the remaining members of the Board lost confidence in the Claimant's ability to change his ways, and he was dismissed without being offered a right of appeal. The Claimant claimed that the dismissal was procedurally and substantively unfair. The Tribunal rejected his claim, finding that he was dismissed for SOSR in that there was an irreparable breakdown in relations and that the dismissal was not unfair. The Claimant appealed on six grounds including that the Tribunal had failed to address the specific allegations of unfairness levelled against the Respondent.

Held, **dismissing the appeal**, that the Tribunal had not erred. The Tribunal had considered the principal allegations as to unfairness and was not required to deal with every evidential point raised. The Tribunal was entitled to conclude, in the circumstances of this case, that an appeal would have been futile. Although an appeal will *normally* be part of a fair procedure, that will not invariably be so, as to take that fixed approach would be to disregard the clear terms of s.98(4) of the **Employment Rights Act 1996**, which dictate that the circumstances are to be taken into account.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. I shall refer to the Parties as the Claimant and the Respondent, as they were below. The Claimant appeals against a decision of the East London Employment Tribunal ("ET/the Tribunal"), Employment Judge Prichard presiding, rejecting his claim of unfair dismissal. He contends, amongst other matters, that the judge erred in failing to consider properly or at all the numerous allegations of unfairness levelled against the Respondent. The Respondent resists the Appeal on the basis that it was a straightforward unfair dismissal claim which the Tribunal was right to reject.

Background

2. The Claimant is the inventor of a water-efficient toilet, called the "Propelair Toilet", which is manufactured and marketed by the Respondent. As the name suggests, the toilet uses a combination of water and air to produce the flushing operation, thereby reducing the amount of water required to flush. As the Tribunal noted, this is "a product for the moment, with growing concerns around water shortage and climate change". However, whilst the product had potential, its production and commercial development has been slow and problematic with only 715 units being sold as at 2016, despite millions of pounds of external investment

3. The Claimant was the Chief Executive Officer of the Respondent from 2001 until 2017, when he was replaced by a Mr Dylan Jones. The Claimant had difficulty in accepting that the Respondent was no longer his company and that he was not in charge of it, although he remained an employee and a director. The Claimant did not appreciate the role of the Respondent's institutional investors in keeping the business afloat; he was found to have described the investors

as "fucking leeches". His attitude and conduct within the Respondent and towards others caused a deterioration in his relations with his fellow directors. In March 2018, the new CEO, Mr Jones commissioned Mr Nicky Bicket, an external specialist in organisational development and HR, to conduct a review of the company. Mr Bicket's assessment was that the fundamental problem lay not with Mr Jones but with the Claimant, and he was of the view that "Gary would attempt to sabotage any CEO coming into the business".

4. At a subsequent meeting, described here as the "off-site", held on 26th and 27th March 2018, the Tribunal found that the Claimant and Mr Jones were told that:

> **"acting in the best interest of the company was paramount. Politics and finger pointing had no part in an acceptable constructive culture … both DJ and GM admitted that they had not got on top of either business performance or, in particular, the relationship between them. They agreed that they would work on this.**
> **… The Board informed both that their patience was wearing thin and that this review meeting was the last which should be held to discuss performance. The focus was on delivery."**

The Tribunal found that the Claimant and Mr Jones shook hands at his point and agreed to attempt to make it work.

5. Notwithstanding the message from the Board that its patience was "wearing thin", in late April 2013, the Claimant had a conversation in South Africa, which is one of the Respondent's key markets, with a Mr David Vinokur, one of the Respondent's investors. During that conversation, the Claimant was critical of the company's performance and, in particular, of Mr Jones's performance. The Respondent viewed this as a breach of the agreement reached at the end of the off-site. Other concerns about the Claimant's conduct came to light during this time, including an intemperate e-mail exchange in early May 2018 with the recently-appointed Director of Operations, Mr Mosscrop. Mr Jones's attempt to caution the Claimant against giving Mr Mosscrop what he described as a "public bollocking" seemed to fall on deaf ears.

6. In view of these and other matters, the Board considered that the Claimant's behaviour was not in the best interests of the company and it considered how best to respond. At a Board meeting on 11th May 2018, the Claimant was told that there would be a formal Board meeting concerning his future. The Claimant was described as being "combative" in response to being told about this meeting. Mr Smith, one of the non-executive directors, stated that his desire was to avoid a legalistic process and the Claimant commented in response "Tough shit. I'm sure you would wish to avoid a legal fight".

7. The Claimant was sent a letter, also on 11th May, informing him that there would be a Board meeting to:

> **"discuss your employment with Phoenix Product Development Limited in the light of serious concerns that have arisen regarding your performance and conduct as an employee and director of the company."**

8. The Claimant was permitted to have a Mr Ian Peck, Director of Partnerships to accompany him to the meeting. At the meeting, the Claimant was invited to respond to six separate allegations which had been notified to him in advance. The first of these and, in the Respondent's view the most serious, was the conversation that the Claimant had had with Mr Vinokur in South Africa. Other allegations included the failure to observe key company values following the off-site and subsequent meetings; a lack of engagement with product development regarding the quality of ceramic pans from Thailand; allowing industry accreditations to lapse; and the delay in obtaining product approval from South Africa. There was also an issue about effecting a director's loan of £60,000 without authorisation from the Board.

9. Shortly before the meeting, the Claimant had submitted a long and detailed written statement refuting each of the allegations. In that document the Claimant was unrepentant and continued to refer to the Respondent as "my company", something which the Respondent had

indicated was problematic. The Tribunal found the Claimant had entered that meeting in a "thoroughly confrontational manner" showing no insight, no regrets, no contrition and blaming others, particularly Dylan Jones. The Claimant's written submissions consisted largely of criticisms of Mr Jones' performance and sought to blame Mr Jones for many of the flaws or shortcomings in the company's performance as the Claimant saw it. As to the particular allegation about the conversation with Mr Vinokur, the Claimant did not seek to deny what he said to Mr Vinokur, but sought to justify it by saying he was telling the truth in response to direct questions from an investor.

10. The meeting on 18th May took over three hours in total. At the end of the meeting, four of the five directors voted to terminate the Claimant's employment, with only the Claimant himself dissenting. On 22nd May 2018, the Claimant was given six months' notice of termination and placed on garden leave. The letter notifying the Claimant of his termination made no mention of any right of appeal against his dismissal. The Claimant had raised various issues in his statement which the Respondent treated as a grievance. That grievance was investigated by one of the non-executive directors, Mr Smith, and was subsequently dismissed. Although a right of appeal against that grievance decision was notified to the Claimant, no such appeal was, in fact, lodged.

11. On 16th August 2018, half-way through the Claimant's period of garden leave, the Respondent wrote to the Claimant informing him that the Board had resolved to end his employment and to pay the balance of his notice in lieu. The Claimant then issued proceedings in the Tribunal claiming that he was unfairly dismissed.

The Tribunal's Judgment

12. The Tribunal made findings as to the Claimant's conduct at paras. 94 to 97 where the Tribunal stated as follows:

> **"94 It is best to focus this judgment most on the most important allegation of all - the David Vinokur conversation in South Africa. It is extraordinarily hard to understand how anything good for the company could have come out of that conversation. Indeed, reading David Vinokur's account and reading the claimant's own account in his submission before the Board meeting, it was quite clear it was a continuing polemic against Dylan Jones and a desire to promote the claimant himself as the responsible figure within the business who places purchase orders on time etc.**
> **95 The claimant had no need to tell David Vinokur that he had raised complaints against the continuing work or lack of work by Dylan Jones. It went further than Dylan Jones, it ran down the entire strategy of the company for which Dylan Jones was responsible. David Vinokur had been left with a very bleak outlook. Andrew Birrell's subsequent response to the feedback email made it clear that he, Mr Birrell, was in real trouble, and in an invidious position with the shareholders at Universal Partners.**
> **96 Perhaps the second most important allegation, and it was a more general one, was allegation number 3 - failure to observe the company values agreed at the four-day strategy workshop in March, and a later one in April (the off-site). The "finger pointing" as it has been called, started soon after the apparently amicable agreement between the claimant and Mr Jones on 27 March. That was an important session attended by all. The company had invested a lot of money in getting the help of Mr Bicket to oversee this process. At the end of it they believed that it might turn the company in general, and the claimant in particular, around. But optimism was short lived.**
> **97 The tribunal considers that the email sent to Dave Mosscrop about the toilets in McDonalds in the Strand was indeed a disrespectful email which was circulated far too widely to all field technicians (hence Mr Jones' reference to a "public bollocking"). A subsequent exchange between himself and Dylan Jones showed the claimant to be entirely unrepentant and lacking any insight into the tone of his mail. It could be seen, and reasonably was, as the claimant "pulling rank" over a newer recruit. His submission on the topic repeatedly harped on about his resentment of the fact that when this crisis was happening over a May Bank holiday, Dave Mosscrop was 200 miles away in Wakefield. That was not the point. Managers are hired to manage, wherever they live."**

13. The Tribunal then went on to reach conclusions as to the reasons for dismissal at paras. 109 to 111 of the Judgment:

> **"109 Starting with the basics, under section 98 of the Employment Rights Act 1996, the reason for the claimant's dismissal is not easily pigeon-holed. If I had to choose one, I would choose conduct. There are elements of capability, particularly to do with the performance of his responsibility in respects of pan quality assurance. Much of the claimant's behaviour appeared to the respondent reasonably viewed as deliberate, and was therefore "conduct", namely (1) the David Vinokur conversation; (2) the finger-pointing following the outcome of the off site on 27 March 2018; (3) the Dave Mosscrop email giving him a public dressing down over the McDonalds incident. It was all symptomatic of a deep-seated inability or refusal by the claimant to let go of the reins, despite the fact**

that his shareholding was at the time of termination only 10%. (Since it has gone down to 5.3% and he therefore no longer has a right to be on the Board below 6.5%).

110 I am also invited by the respondent to find that this is a case of irreparable breakdown relations between the claimant and the respondent and as such, constitutes "some other substantial reason" for termination, or a breakdown of the implied term of trust and confidence which must subsist in a contract of employment.

111 This factor is one that could found a case for gross misconduct and certainly found a case for dismissal for a first offence, even if it was not considered gross misconduct for the purpose of paying no pay in lieu of notice. Lapse of accreditations, and the continuing poor pan quality would not be such reasons for termination."

14. The Tribunal then went on to consider the fact that there had been no offer of an appeal. As to this matter, the Tribunal stated as follows:

"115 This has been the aspect of the case which has troubled me most and hence, in my judgment, I have given alternative reasoning, in case I am found to be wrong. The lack of an appeal is a serious procedural omission in any unfair dismissal case. I take into account the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 as I have to. Paragraphs 26 - 27 of the ACAS Code provide:

> **"26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.**
> **27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case."**

116 It is a fact that the claimant did not appeal. The Code is phrased in such a way that it gives the claimant a right but does not give the respondent a corresponding duty to inform the claimant of the right, which is curious.

117 Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> **"207 (1) A failure on the part of any person to observe any provision of code of practice issued under this chapter shall not of itself render him liable to any proceedings.**
> **(2) In any proceedings before an Employment Tribunal any code of practice issued under this chapter by ACAS shall be admissible in evidence and any provision of the code which appears to the tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question."**

118 The fact is, it is usual in a termination letter for the employer to expressly offer a right of appeal subject to time limits but it does not seem that the Code mandates that. I also note with interest that the claimant was given an express invitation to appeal the grievance outcome of 25 July and did not do so. I am therefore not convinced he would have appealed against his dismissal either.

119 The right under Paragraph 41 of the ACAS Code is in similar terms to Paraphs 26-7 in relation to disciplinary appeals:

> **"Where an employee feels that their grievance has not been satisfactorily resolved they should let their employer know the grounds for their appeal without unreasonable delay and in writing."**

120 If the claimant had expressly asked for an appeal and it had been refused it might be a different matter, but I only say "might". My primary determination is that this was a fair dismissal.

121 The respondent's counsel has referred me to authority - Jefferson Commercial LLP v Westgate UKEAT/1028/12, a case before Langstaff P and

members. This involved a termination process where the claimant had been off sick. It had been argued in the tribunal, and before the EAT, that a further meeting in his case would have been futile and of no purpose given that there had been a total breakdown in trust and confidence. However, the tribunal in that case had said: "There was no further meeting, no further discussion and that cannot be a fair dismissal".
The EAT stated:
"The tribunal appears to be stating a proposition of law. If so, it was wrong to do so. The law is contained in section 98(4). Section 98(4) does not in terms require a given or any procedure involving further meetings. That is not to say that in most contexts a decision would not be unfair if there were no such meetings".
Subsequently, paragraph 25:
"It is no part of a fair procedure to be conducted for the sake of it if the procedure is truly [tribunal's emphasis] pointless.""

15. In dealing with the remaining aspects of the fairness of the dismissal, the Tribunal held as follows:

"123 Mr Stilitz for the respondent urges me to find that this is such an exceptional case as Jeffrey. This was within the terms of section 98(4). I accept the legal premise and basis of the Jeffrey decision, as I must. It is not the first appeal case that has stressed the primacy of section 98(4) ERA (e.g. Cabaj v City of Westminster Council [1996] IRLR 399, EAT).
124 Even section 207 of TULR(C)A only requires that the Code shall "shall be taken into account". It can be taken into account, and then disapplied if the circumstances and the context are right. I consider that this is such an exceptional case.
125 I also consider that this was a case where trust and confidence between the respondent and the claimant had broken down irreparably. The numerous emails I have quoted extensively above, particularly from Andrew Birrell, and also Dylan Jones who was far closer to the situation in the UK, bear it out.
126 The claimant stated that his termination was somehow pre-decided by the Board. I cannot accept that. The termination at the Board meeting on 21 May was eventually held after a considerable amount of "pushback" from the non-executive directors, particularly Richard Smith and David Phillips. They both urged caution and a need to follow fair process. It was, following advice, when the NEDs realised how long this process could take (6 months or more), that they had to leave the option of an immediate termination open.
127 The final Board meeting had all options open but it clearly stated what the concerns were in the 6 allegations raised in the letter of 11 May convening that Board meeting. Mr Birrell had wisely said that just to put the option of demotion before the claimant without the whole context in which it arose would be wrong and unfair on the claimant. Eventually it was the wholecontext that caused the claimant's termination rather than any failed demotion/trial period. The claimant entered that Board meeting in a thoroughly confrontational mode and showing no insight, no regrets, no contrition, admitting no fault, and blaming others, particularly Dylan Jones.
128 That is just the sort of stance that tends to undermine trust and confidence. I consider that, had the claimant's tone been more conciliatory, the outcome might have been different but it had never been likely to be so. The last time he had stated a willingness to work together and collaboratively had been on 27 March and that had not lasted long at all. The prognosis was never good and Dylan Jones' assessment that the claimant could not change was accurate.
129 There was urgent financial pressure on the company which needed to improve immediately. When 2 out of 4 of the Board were pushing back on the termination option I cannot see how the claimant could persuade this tribunal that his immediate termination was pre-decided in any way.

130 Those emails are a genuine contemporaneous expression of views as they developed and evolved. They are potent source of reliable evidence. In a way it is fortunate that the NED's were so far apart in different time zones so this had to be conducted by email rather than telephone.

131 In this decision I do not need to precisely categorise all of the allegations against the claimant as relating either to conduct, capability or some other substantial reason under section 98(1)(b). There are significant conduct allegations which also fall under some other substantial reason that led to a breakdown between them justifying dismissal without a prior written warning. It is classic unfair dismissal law. Even though the claimant was paid his notice pay, and this was not treated as gross misconduct. An employer can do that without invalidating an argument, at the final tribunal hearing, that this was a breach of the implied term of trust and confidence.

132 Misconduct is also important when I come to my alternative analysis that I would have found that the claimant was guilty of 100% contributory conduct. As it started out, the investors all wanted to carry on working with the founder. That was the usual modus operandi. Dylan Jones was recruited because he was the candidate least likely to upset the claimant. Everybody wanted this relationship with the claimant to work.

133 That leads me to conclude that, if this relationship did not work, that was totally the claimant's fault. There was will in the Board to make it work. Despite Mr Powell's arguments I cannot accept that the claimant was not guilty of "culpable" conduct such as would found a total deduction for contributory conduct reducing any basic and compensatory awards to nil (Nelson v BBC (No 2) IRLR [1979], 346, CA).

134 Similarly, the respondent had good reason to dismiss the claimant as, and when, it did and therefore as in the above judgment the Polkey principle does apply. There were urgent financial concerns.

135 On the question of the disciplinary appeal, I note first that it is unlikely that the claimant would have appealed as he did not take that opportunity when invited to do so by Richard Smith in relation to the grievance outcome on 25 July 2018.

136 For all these reasons the claimant's unfair dismissal complaint fails and is dismissed."

Grounds of Appeal

16. Following a preliminary hearing before HHJ Tayler, the Claimant was permitted to proceed to a Full Hearing on the basis of six Grounds of Appeal. These are as follows:

(i) Ground 1: The ET failed to direct itself correctly in law in that it did not reach a reasoned determination as to whether the dismissal was fair and, in particular, failed to address the alleged grounds of unfairness raised on behalf of the Claimant in his submissions;

(ii) Ground 2: The Tribunal erred in applying the case of **Jefferson (Commercial) LLP v Westgate** EAT/0128/12/SM in finding that the absence of an appeal did not render the dismissal unfair;

(iii) Ground 3: The Tribunal erred in finding that the Claimant would not have pursued an appeal against dismissal if it had been offered to him;

(iv) Ground 4: The Tribunal failed to direct itself in accordance with the case of **Andrews v Software 2000** [2007] IRLR 569 in making a **Polkey** deduction of 100%;

(v) Ground 5: The Tribunal failed to make the necessary findings of fact and/or apply the correct burden of proof in finding that the Claimant was 100% culpable for his own dismissal; and

(vi) Ground 6: The Tribunal failed to give adequate reasons for its decision.

17. I shall deal with each Ground in turn.

Ground 1

Submissions

18. The Appellant is represented today by Mr Powell of Counsel, as he was below. Mr Powell submits that the decision to dismiss the Claimant from his long-term employment in relation to his only invention was a more serious and weighty one, given that it effectively ended his career and divorced him from his life's work. As such, it was a case in which detailed reasoning was required from the Tribunal to explain the decision reached. Mr Powell submits that the Claimant made numerous complaints about the fairness of the Respondent's actions in detailed written submissions lodged on his behalf. These allegations included the failure to give the Claimant any prior notice to deal with issues relating to his competence; failure to undertake any sort of investigation; failure to provide the Claimant with any of the documentary evidence that the

Respondent relied upon; the decision to allow one or more of the directors to be decision-makers in circumstances where they were witnesses and/or had been pressing for the Claimant's dismissal prior to the commencement of the disciplinary process; and the failure to consider any of the mitigating factors put forward on the Claimant's behalf. Mr Powell submits that none of these matters were considered by the Tribunal or, if they were, no explanation for finding against the Claimant is apparent from the decision as to why these matters were rejected. He referred me to the case of **High Table Ltd v Horst** [1997] IRLR 513, in which the Court of Appeal held as follows:

> **"24. …I turn to the second issue. The Employment Appeal Tribunal found that the reasons given by the Industrial Tribunal were inadequate, leaving all the members with a feeling of uneasiness. There can be no doubt but that the statutory duty to give reasons carries with it the obligation to give adequate reasons intelligibly. As was stated by Bingham L.J. in Meek v City of Birmingham District Council [1987] IRLR 250 at p.251:**
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> > **"It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which led them to reach the conclusion which they did on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance to both employers and trade unions as to practices which should or should not be adopted."**
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> **However in considering whether the reasons given by an Industrial Tribunal comply with its statutory obligation, it is very important to keep in mind the issues which the Industrial Tribunal was dealing with. It has, of course, to reach conclusions on the issues which the statute raises, viz. in the present case, have the Employers established that the reason for the dismissals was redundancy and, if so, did they act reasonably in treating the redundancy as a sufficient reason for dismissing the Employees? But whilst it must consider all that is relevant it need only deal with the points which were seen to be in controversy relating to those issues, and then only with the principal important controversial points (compare what is required in planning decisions : Bolton Metropolitan District Council v Secretary of State for the Environment (1995) 71 P. & C.R. 309). The Employers claimed that the reason for dismissal was redundancy, and I have already expressed my view that that was not disputed by the Employees before the Industrial Tribunal. The dispute lay in whether the Employers acted reasonably in the circumstances in treating the redundancy as a sufficient reason for dismissing the Employees, a familiar question for the industrial jury which the Tribunal is…"**

19. Mr Powell submits that, as in **Horst**, there were issues here which involved matters of controversy and which ought to have been dealt with by the Tribunal. Instead, he submits, the

A Tribunal jumped from a consideration of the commencement of the procedure in disciplining the Claimant to the appeal stage without making any findings as to anything in between. He also says that the reasons do not satisfy the requirements of Rule 62 (5) of the **Employment Tribunal Rules of Procedure 2013**.

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20. I was taken to some of the evidential material that was placed before the Tribunal, mainly with a view, it appears, to demonstrating that, contrary to what the Tribunal had concluded, there was a settled view on the part of the directors that the Claimant had to go even prior to the meeting on 18th May. Particular reliance is placed upon an e-mail dated 7th May 2018 in which one of the non-executive directors (who had previously pressed for a different approach than going straight to termination) had appeared to come around to the view of two directors who had been pressing for termination.

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21. Mr Stilitz, who appears for the Respondent as he also did below, submits that the fact that the Tribunal did not deal with every point raised by the parties during the hearing does not amount to an error of law. He reminds me that the Claimant's submissions below extended to over 300 paragraphs, over 40 pages, and it would have been disproportionate for the Tribunal to have to deal with each and every one in turn. He, too, relies upon the decision in **Horst** and the passage, in particular, from the extract above which states as follows:

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> **"Whilst the Tribunal must consider all that is relevant, it need only deal with the points which seem to be in controversy relating to those issues and then only with the principal important controversial points."**

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22. As it was, the main specific procedural complaint developed in any detail in closing submissions was the absence of an appeal, which is something the Tribunal dealt with in some detail. As to the other allegations of unfairness, Mr Stilitz submits that the Tribunal plainly addressed the principal questions in that regard and found against the Claimant on each of them.

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In any case, this is not a case, he says, in which the primary facts were substantially in dispute; the Claimant did not deny much of what was said against him but sought, instead, to justify his conduct. The Board, on the other hand, regarded the Claimant's conduct as serious, culpable and a threat to the business and the Tribunal did not err in law in upholding the dismissal as fair in those circumstances.

Discussion

23. Mr Powell's main point on this Ground is that, in failing to address specific aspects of the Respondent's actions which are said to be unfair, the Tribunal had failed to approach the matter by reference to s.98(4) of the **Employment Rights Act 1996** ("the 1996 Act"). Insofar as it might be being said that the Tribunal did not have s.98 (4) in mind, that cannot be correct: s98 is expressly mentioned by the Tribunal at various points in the Judgment: see paras. 109, 122, 123 and 131. It is also referred to indirectly elsewhere when the Tribunal refers to Part 10 of the 1996 Act. The real question is whether, despite those references, the Tribunal erred in law in its application of s98 (4). Having carefully considered Mr Powell's submissions in this regard, I have come to the conclusion that it did not.

24. Mr Powell's main point this morning on this ground was that there was a failure to address the issues raised in relation to the question of predetermination and the evidence, which suggested that, far from 'pushing back' against dismissal, one of the non-executive directors who had been 'pushing back' against dismissal had, by 7th May 2018, come to the settled view that there had to be a termination. The difficulty with that submission is that it really amounts, in effect, to a challenge to a clear finding of fact on the part of the Tribunal that there was some 'push back' and that there was no predetermination.

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25. Mr Stilitz pointed to a summary of some of the oral evidence given by at least two of the non-executive directors below, which makes it clear that, whilst there was an expectation that dismissal would be an outcome, it was not a foregone conclusion. It was also said that, if the Claimant had shown himself to be contrite and accepted some of the criticisms made of him, and if he had not attended the hearing with the unrepentant stance that he did, the outcome might have been different. It seems to me that, in the light of that evidence, it was certainly open to the Tribunal to conclude as it did in terms of predetermination. The fact that the Tribunal did not deal with every item of evidence that might have gone the other way does not undermine that conclusion.

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26. In his Skeleton Argument, Mr Powell identified ten points which he says were not addressed by the Tribunal but which ought to have been. Some of these were developed in oral submissions, but not all of them were. I deal with each in turn, in any event.

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27. First, it is said that the Tribunal failed to take account of the fact that the Claimant was not informed that there were competence issues. Given that the Claimant now accepts that the reason for dismissal was conduct and not competence, the significance of this rather falls away. Insofar as the complaint is that the Claimant was not given the opportunity to address shortcomings in conduct about which the Board was concerned or shortcomings in performance, the Tribunal did note that, at the off-site, the Claimant and Mr Jones were both given what was, effectively, a final chance to improve relations and were warned to avoid "politics and finger pointing". These were the matters that were of concern to the Board and the Tribunal rightly took those into account in determining whether the Respondent's actions were fair.

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28. Second, it was said that there was a failure to provide training or advice to the Claimant about his under-performance. Once again, this might be said to be more relevant had the reason for dismissal been performance-related. The Claimant, as a member of the Board and a senior employee would not need, ordinarily, to be told that there were shortcomings in performance. He himself had admitted at the off-site that neither he nor Mr Jones had got on top of "either business performance or, in particular, the relationship between them" (see para. 40). In any case, whatever had transpired prior to the off-site in terms of performance, the employer was entitled to say to a senior director at the off-site that this was a last chance, and that is something that the Tribunal expressly took into account.

29. Third, Mr Powell says that there was no proper investigation. Of course, the extent and reasonableness of any investigation would depend on the circumstances; where the facts are largely not in dispute, then the scope for investigation may, justifiably, be more limited. Here the Claimant did not dispute what was said to Mr Vinokur; that being the primary allegation relied upon by the Respondent, and his e-mail to Mr Mosscrop (which was another matter of importance) was a matter of record. It is not clear what further investigation would have achieved in these circumstances.

30. Fourth, it is said that there was a failure to provide the Claimant with any of the documentary evidence taken into account by the Respondent. Once again, in the absence of any real dispute on the key facts, it is difficult to see where this gets the Claimant. He was able, with the material he did have, to produce a detailed response to the allegations and was not hampered, it seems, by the lack of specific documents. Before me, there was no identification of any specific documents which might have assisted the Claimant in any way.

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31. Fifth, it is said the Tribunal determined culpability on grounds not disclosed to him. Whilst it is correct that the dismissal letter did not refer to the reasons for termination, it is perhaps implicit that the reasons were those set out in the letter inviting the Claimant to the hearing, and there is no doubt that the Claimant was aware of those issues and had had an opportunity to respond to them. As I mentioned before, the Claimant did not seek reasons following receipt of the termination letter.

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32. The sixth point made by Mr Powell is that the Tribunal failed to consider the unreasonableness of the Respondent's conclusions on culpability. As to this matter, the Tribunal specifically considered the three most serious allegations, as it saw them, and explained why that amounted to serious misconduct at paras. 94 to 97 of the Judgment. It is implicit in the Tribunal's findings about these matters that it concluded that the Respondent's response to the Claimant's conduct did fall within the band of reasonable responses.

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33. Seventh, it is submitted that it was inappropriate to permit two Board members to participate in the decision when they had already been pressing for dismissal. I have already dealt with this above.

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34. Eighth, Mr Powell submits that three of the directors were probably misled by the fourth. It was not clear to me in what way the others were misled. Mr Powell was invited to provide an explanation of that this morning. It seems to me that this gives rise to no more than a small point of detail which would not have affected the outcome of the Tribunal's conclusions overall.

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35. The ninth contention is that the dismissal was predetermined. I have already dealt with that above.

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36. Finally, it was said that the mitigating factors relied upon were not considered by the Tribunal. As to this, I agree with Mr Stilitz's submissions that, insofar as any of these factors are specific to this case, and were not general mitigation factors applicable to any long-serving employee, most (if not all) of them were dealt with by the Tribunal in the course of its Judgment. Some of the matters amounted to responses to the allegations, which were set out in the letter inviting the Claimant to the disciplinary hearing, and were not strictly points of mitigation. But insofar as a rebuttal of the allegations can diminish the seriousness of the allegations, it is relevant to note that the three principal allegations which were dealt with by the Tribunal at paras. 94 to 97 were considered serious and nothing the Claimant had said in response to those allegations affected the Tribunal's conclusions thereon. It is also noteworthy in the particular circumstances of this case, that some of the mitigating factors relied upon, such as the Claimant's devotion to his product and to the company were, arguably, the very things now considered to be a destructive force within the organisation. It was his inability to "let go of the reins" that is the source of much of the friction that has led the parties to the point of dismissal.

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37. For all these reasons Ground 1 of the Appeal fails and is dismissed.

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Ground 2

Submissions

38. Mr Powell submits that the Tribunal erred in its application of the **Jefferson** case in that this was not one in which a further meeting or appeal hearing would have been "truly pointless". **Jefferson** was a decision of the EAT, Langstaff P presiding, in which there had been a mutual breakdown in trust and confidence between the employer and the employee and the issue was whether the employment tribunal was right to consider that it was unfair for the employer not to hold a further hearing before moving to termination. Langstaff P held as follows:

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> **"23. The first question for us is to decide what the Tribunal were saying in paragraph 123 was the reason for its conclusion that the employer had not acted reasonably. We accept that it was saying that it was unreasonable not to have a further meeting or further discussion. Mr Shaw points out that discussion falls short of meeting but does involve some constructive communication between the parties.**
>
> **24. The need for a further meeting and why a further meeting should be an essential aspect of fairness in the present case is, however, not spelt out by the Tribunal. By using the words: "There was no further meeting, no further discussion and that cannot be a fair dismissal", the Tribunal appears to be stating a proposition of law. If so it was wrong to do so. The law is contained in section 98(4). Section 98(4) does in terms require a given or any procedure involving further meetings. That is not to say that in most contexts a decision would not be unfair if there were no such meetings. It is plain that what is unreasonable or reasonable may often depend upon such a meeting or meetings, but as we have already pointed out, all depends upon the particular circumstances of the case to which section 98 makes explicit reference.**
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> **25. As it was put during the argument the expression of opinion here looks rather like a knee-jerk reaction by a Tribunal. Here it was requisite that the Tribunal should have considered what purpose in fairness such a further meeting would have had. The Tribunal does not explain that. It says that there were no further meetings with the Claimant:**
>
> **"At which he had an opportunity to put forward his position."**
>
> **But his position had already been to state that he would not return to work and that he had totally lost confidence in the employer. The Judgment is to the effect that there had been a mutual and irreparable breakdown of confidence. To have a further meeting to restate that position, which on the findings of fact would be all it could achieve, would be to require the parties to go through a meaningless charade simply for the sake of it. It is no part of a fair procedure to be conducted for the sake of it if the procedure is truly pointless.**
>
> **…**
>
> **28. This was, therefore, simply a case in which there had been a recognised complete breakdown of trust and confidence between the parties. We cannot for ourselves see, and the Tribunal does not say anything to enlighten us, what the purpose of having a further meeting in these particular circumstances would be; Mr Shaw cannot help. We would simply emphasise that section 98(4) has to be applied sensibly and with regard to the substance of the case. It should never result in a Tribunal applying a standard approach to a case, certainly without considering whether that case fully and properly justifies such an approach. It invites the Tribunal to consider the circumstances of each case, which inevitably differ."**

39. Mr Powell says that this is not a case in which the employer had decided at the time that a further hearing would be futile, as is apparent from the various written reasons given before the Tribunal for not granting an appeal. These included that it would take too long for the appeal process to be concluded and that it was based on undisclosed legal advice. As such, says Mr

A Powell, the Respondent's case did not satisfy the requirements for fair procedure as set out by Lord Bridge in **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344.

B 40. Insofar as the Tribunal based its conclusions on futility on the loss of trust and confidence, Mr Powell invites me to note that only two Board members had expressed a loss of trust and confidence in the Claimant prior to the dismissal, the other two had not. The Tribunal's reliance on **Jefferson** was misplaced because that was a case in which there was a mutual breakdown in trust and confidence, whereas in the present case there was no such finding; indeed, the Claimant's conduct, submits Mr Powell, was such that he wished to continue to serve the company to sell the product which had become his life's work. Furthermore, it is wrong in principle, says Mr Powell, to rely on the absence of trust and confidence as providing any sort of justification for the absence of an appeal. Any gross misconduct dismissal will involve a loss of trust and confidence, and yet the absence of an appeal against such dismissals will only be justified in exceptional cases.

41. Mr Stilitz submits that, given the Claimant's own role in the destruction of trust and confidence and the relatively small size of the company, this was an exceptional case in which an appeal would have been "truly pointless". There was, in any case, no-one more senior to whom he could appeal. The futility of an appeal was highlighted by the wholly unrepentant stance of the Claimant, which showed no signs of abating even after the dismissal.

42. Both Counsel referred me to the case of **Perkin v St George's Healthcare NHS Trust** [2006] ICR 617.

> **"60. I did not understand Mr. Langstaff to argue that in a given case a breakdown in confidence between an employer and one of its senior executives; (a) for which the latter was responsible; and (b) which actually or potentially damaged the operations of the employer's organisation (or which rendered it impossible for the senior executives to work together as a team) was outwith**

section 98 as SOSR and therefore could not result in an employer fairly dismissing the employee whom the employer deemed responsible for that state of affairs. Indeed, I think Mr. Langstaff was minded to accept that the facts found by the Tribunal could have amounted to SOSR. In my judgment, that concession was both correct, and realistic. Standing outside the case for a moment, it seems to me that it must be possible for an employer fairly to dismiss an employee in the circumstances set out in the earlier part of this paragraph, provided always the terms of section 98(4) are satisfied.

61. The real thrust of Mr. Langstaff's argument, as I understood it, was that the Tribunal erred fundamentally by treating the case as being one of conduct within section 98(2)(b). Mr. Perkin had been summarily dismissed, when his behaviour manifestly was not capable of being described as gross misconduct. Secondly, the Tribunal's treatment of the case as one of conduct had led it to adopt the wrong approach to fairness, and into error both on the issue of the *Polkey* reduction and contributory fault.

62. The success of the first limb of Mr. Langstaff's argument seems to me to depend critically on whether Tribunal was wrong to categorise the reason for dismissal as conduct as opposed to SOSR. Whilst it is, of course, important that an employee should know clearly why he or she has been dismissed, and whilst I see the force of Mr. Langstaff's criticism of the "conduct" analysis, particularly in relation to the question of what constitutes gross misconduct or otherwise warrants summary dismissal, I find myself on this part of the case in complete agreement with the reasons given by Sedley LJ when refusing permission to appeal on paper, and do not think I can better his succinct way of expressing them:

> **It is a fair criticism of the ET that in the course of 65 pages of reasons they appear in certain respects to have lost sight of the wood for the trees. But their findings seem to me to make the *Polkey* answer ineluctable.**
>
> **Although capability might have been an appropriate statutory category for their findings, it was not the only one. Before the proceedings were initiated, Mr. Perkin had conducted himself unacceptably towards colleagues and others. I accept that if all that was at issue was his aggressive reaction to the proceedings, the decision might be unsustainable. But the reaction amounted to corroboration of the accusation that he had already shown himself near-impossible to work with (rather than for).**
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> **For my part, however, I would think this was an "other substantial reason" case: an employee in a senior position who could not or would not work harmoniously with colleagues and outsiders with whom a harmonious relationship was essential.**
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> **While the absence of a warning and guidance is relied on only, as I understand it, on the premise that this was a conduct case, I would have thought it capable of having a bearing on both of the two grounds founded on by the ET. But their view, and that of the EAT, was evidently that Mr. Perkin was too entrenched in his attitude to respond positively…..."**

Mr Stilitz submits that the circumstances of this case are 'on all fours' with those described in **Perkin**.

Discussion

43. Section 98(4) of the 1996 Act provides that whether a dismissal is fair or unfair depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acts reasonably or unreasonably treating it as a sufficient reason for dismissing the employee. Although an appeal will *normally* be part of a fair procedure, that will not invariably be so, as to take that fixed approach would be to disregard the clear terms of the statute, which dictate that the circumstances are to be taken into account. Here, the relevant circumstances included the fact that the Claimant was a board-level director and employee; that the Respondent was a relatively small organisation with no higher level of management; that the Tribunal had found that the Claimant himself had brought about an "irreparable breakdown" in trust and confidence (para. 125); that this was considered to be "destructive", destabilising and a "drag-factor" for the company (para. 114); that he was unrepentant about his conduct and attitude (para. 127); and that he had not shown any sign that he was likely to change (para. 128).

44. In my judgment, it was open to the Tribunal to conclude, in these circumstances, that an appeal would have been futile; this was not the kind of organisation where the Claimant's shortcomings and the consequent threat to the Respondent's future could be addressed through some sort of re-training programme, or where different managers might be found to work with him more effectively. In fact, the conclusion of the independent reviewer, Mr Bicket, was that the Claimant would "sabotage any CEO coming into the business" (see para. 39). The fact that the loss of trust and confidence was only manifest in *two* of the directors at the time of dismissal does not advance Mr Powell's case; it is clear that by the time of the decision to dismiss, four of the directors had come to that view, with only the Claimant dissenting. The loss of trust and confidence amongst his fellow directors was, therefore, complete.

45. In any case, the decision in **Jefferson** is not to be read as providing a checklist of items that must be present before dismissal without an appeal can be regarded as fair. That, too, would be an approach that disregards the plain statutory imperative to consider the particular circumstances of each case. Thus, it is nothing to the point that, unlike the situation in **Jefferson**, the Claimant in this case had not himself lost trust and confidence in the employer. An appeal might be futile even where the loss of trust and confidence only resides in the employer. Mr Powell's reliance on the opinion of Lord Bridge in **Polkey** is also, it seems to me, misplaced. The passage on which he relied made it clear that the steps set out were those that one would "normally" expect to see in a fair procedure. The House of Lords was not thereby seeking to dictate what must apply in every case, and nor could it have done so as that would be, once again, to disregard the plain terms of s 98 (4).

46. Mr Powell's further argument is that the loss of trust and confidence cannot justify an absence of an appeal because that would mean that an employer could deny the right of appeal in any dismissal for gross misconduct where loss of trust and confidence is inevitable. Once again, it all depends on the circumstances. In a different context, if a finding of gross misconduct is overturned on appeal to a higher level of management, there may well be scope for rebuilding trust and confidence. That possibility was not present here, given the seniority of the Claimant; his stated intransigence; and the nature of the misconduct in question.

47. The Tribunal here expressly did something that the tribunal in **Jefferson** did not; it explored whether an appeal would serve any purpose. There was no "knee-jerk" response to the absence or presence of the step that is normally found in most dismissal procedures. Instead there was detailed consideration, over a number of paragraphs, as to whether this was one of those cases in which the Respondent would be acting reasonably in not providing an appeal. In

concluding that the Respondent did act reasonably, the Tribunal did not err in law. Ground 2 therefore fails and is dismissed.

Ground 3

48. Mr Powell submits that the Tribunal failed to take account of the Claimant's Supplemental Witness Statement, in which he explains why he would have exercised his right of appeal. Furthermore, he submits that the Tribunal's reason for concluding that the Claimant would not have appealed (namely, the fact that he did not appeal against the grievance decision) is misplaced because the grievance decision came over a month after he had presented a claim to the Tribunal and the situations were not comparable.

49. As Mr Stilitz points out, this Ground of Appeal is concerned with a finding that is, in effect, *obiter*, given that the Tribunal did go on to decide that the absence of an appeal did not render the dismissal unfair. In any event, it seems to me that the finding that the Claimant was unlikely to have exercised the right of appeal was one that the Tribunal was entitled to reach. As a senior employee of the Respondent he could be expected to pursue an appeal if that was his choice, notwithstanding the absence of any reference to an appeal in the termination letter. The letter did not expressly exclude such a right. The Claimant's failure to be proactive about an appeal provides some support for the Tribunal's conclusion that he would have been unlikely to appeal even if it had been mentioned in the dismissal letter. The Claimant's Supplementary Statement provides that he could have responded to the dismissal with an appeal if he had been given reasons for dismissal. However, that does not provide unequivocal evidence as to what he would have done in the circumstances.

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50. The main point made by the Claimant in the statement, so far as is relevant to this Ground of Appeal, is that if he had had a right of appeal, he would have made it clear that he would have accepted a lower-ranked position, if that meant he could have stayed in the organisation. Whilst the Tribunal did not address that item of evidence expressly, it clearly did not accept that the Claimant was capable of changing in that way. The fact that he still referred to the Respondent as "my company", even after being removed as CEO and was found to have been unable to "let go of the reins", supports that observation. Ground 3 of the Appeal therefore fails and is dismissed.

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Ground 4

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51. This Ground and also Ground 5 would only arise if the Claimant had succeeded on Grounds 1 to 3. As he has not done so, I can deal with these Grounds very briefly. The submission here is that the Tribunal failed to direct itself in accordance with the case of **Andrews v Software 2000 Ltd** [2007] IRLR 569. In particular, it is said that the Tribunal failed to consider evidence in the Claimant's Statement that he would have accepted demotion rather than lose his employment. Had that evidence been taken into account, submits Mr Powell, the Tribunal could not reasonably have concluded that dismissal was inevitable, such that a 100% **Polkey** reduction was appropriate. He also submits that there is no indication from the Judgment that the judge gave any consideration to the numerous allegations of procedural and substantive flaws and all we have is an unreasoned conclusion without any real explanation. Furthermore, it is said that the Tribunal did not appear to have in mind the fact that the burden of establishing a **Polkey** reduction lies with the employer.

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52. I do not accept those submissions. As I have already mentioned, the Tribunal made a clear finding about the Claimant's unrepentant stance and the lack of likelihood of change on his part. That does not bode well for the Claimant's continued employment, given the reasons for the breakdown in relations. This is not a case that involves analysis of complex or subtle issues of fact which might have a bearing on the likely outcome had a different procedure been followed. The situation here is one of an irreparable breakdown in relations and an unrepentant employee. In those circumstances, it seems to me that the Tribunal could reach the conclusion that it did without having to reiterate in terms the particular factors which led it to that decision.

53. As to the issue about the burden of proof, it is clear that the Tribunal accepted the evidence put forward by the Respondent as to the Claimant's conduct and the consequences that had for the relationships within the business and on the business itself. The Tribunal does not need to refer to the burden of proof in terms to be satisfied that it has been discharged by the employer in this case.

Ground 5

54. This is concerned with contributory fault. The contention is that the Tribunal failed to make findings of primary fact to support its conclusions of contributory fault, and, insofar as it rejected the Claimant's evidence in rebutting the Respondent's allegations, there is no explanation or reasoning for that. I was referred to the case of **Flannery v Halifax Estate Agencies Ltd** [2001] All E.R. 373, which, in a different context, dealt with the obligation to give reasons. The Court of Appeal said as follows at 378C-E:

> **"(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather**

> **than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases."**

55. The submission is that, as in that case, there was a dispute on a matter amounting to an intellectual exchange, not on a matter of credibility and, in those circumstances, the Tribunal ought to have set out its reasons in full. Once again, I cannot accept those submissions. If one reads the Judgment as a whole and not by isolating specific paragraphs dealing with the conclusions on contributory conduct, it is apparent why the Tribunal came to the reasoned conclusions that it did. Paras. 82, 86, 94 to 97 and 109 all make serious findings as to the Claimant's conduct. The conclusion that the breakdown in relations was the Claimant's fault is explained by the Tribunal's finding that the Respondent and, in particular, the Claimant's fellow directors were "willing to make a go of it".

56. Unfortunately, as events transpired, it was clear that the Claimant was the one unwilling or unable to heed the warnings or make the necessary changes. His intransigent and unrepentant approach to the allegations against him, and the continued reference to the company as *his* when he knew that was problematic, all support that conclusion. Furthermore, it is not clear to me to what extent or on what basis it is said that the Respondent ought to have been held responsible for the breakdown in relations. Mr Powell's submissions focus not so much on the breakdown in relations but on other matters of conduct which gave rise to the specific allegations. However, given that the Tribunal's conclusions on contributory fault are squarely based on the breakdown in relations aspect (which, I accept, may have some relation to the conduct issues), means that those submissions carry less force than they might otherwise have done. Ground 5 therefore fails and is dismissed.

Ground 6

57. Ground 6 is a **Meek** ground. Mr Powell rightly dealt with this in the course of his submissions on Ground 1. Although the Tribunal's Judgment cannot be described as a model of clarity, it explains adequate reasoning to explain to the Claimant why he lost and why the dismissal was fair. The Tribunal did not deal with every evidential point raised, but it was not required to do so. This ground is also dismissed.

Conclusion

58. For these reasons, and notwithstanding Mr Powell's helpful submissions, this Appeal fails and is dismissed. No doubt this will come as a bitter disappointment to the Claimant, who has invested a large part of his working life to this product and, latterly, to the company. However, for all its shortcomings, the Judgment of the Tribunal dealt with the issues it needed to adequately and I do not consider there to have been an error of law. It just remains for me to thank both Counsel for their submissions.