Neutral Citation Number: [2022] EAT 18

Case No: EA-2020-000575-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 July 2021

Before :

THE HONOURABLE MRS JUSTICE STACEY DBE

- -

Between :

MR H SHITTU	**Appellant**
- and -	
SOUTH LONDON & MAUDSLEY NHS FOUNDATION TRUST	**Respondent**

- -
- -

Mr E MacDonald (instructed by Bindmans LLP) for the **Appellant**
Ms L Chudleigh (instructed by Capsticks Solicitors) for the **Respondent**

Hearing date: 13 July 2021

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JUDGMENT

SUMMARY

Unfair dismissal, disability discrimination The Appeal Tribunal was asked to consider the Employment Tribunal's approach to the assessment of loss of earnings compensation and remedy for constructive unfair dismissal and disability discrimination dismissal. The issues were firstly whether the Employment Tribunal (ET) had assessed loss on the balance of probabilities or on the basis of the loss of a chance. If it had been the former, the second issue was whether it was entitled to take that approach in a claim of constructive dismissal in light of **Perry v Raleys Solicitors** [2020] AC 352, [2019] UKSC 5.

Held: On a proper reading of the tribunal's judgment it had approached the issue on the basis of a loss of a chance and on the facts of the case was entitled to find that there was a 100% chance that the claimant would have resigned on the same date, absent the fundamental breach of contract by the respondent that had led him to succeed in his unfair constructive and discriminatory dismissal claim. As per **O'Donoghue v Redcar & Cleveland Borough Council** [2001] EWCA Civ 701; [2001] IRLR 615 and **Zebrowski v Concentric Birmingham Limited** UKEAT/0245/16, it is only open to an ET to refuse to award any loss of earnings compensation, or to limit compensation to a period, as opposed to making a percentage deduction where the tribunal is 100% confident that dismissal would have occurred on the same date as dismissal, or the later period it has identified. The ratio of the supreme court in professional negligence claims in **Perry** that counter factual matters which depend upon what a client/claimant would have done absent the tortious act are to be decided on the balance of probabilities, whereas matters which depend upon what a third party would have done are to be assessed on the basis of a loss of a chance [20] does not apply to unfair or discriminatory dismissal claims in the tribunal.

As was said in **Gover v Propertycare Ltd** [2006] EWCA Civ 286, [2006] ICR 1073 and **Zebrowski** the statutory language is open textured and it would be wrong to introduce a complex structure of subsidiary rules which is not supported by the statutory language and which would not assist in the difficult task of accurately and fairly calculating losses. **Perry** does not overturn the development of

50 years of case law on the assessment of counterfactual and future losses in employment claims before the tribunal.

THE HONOURABLE MRS JUSTICE STACEY DBE:

1. The issue before the appeal tribunal concerns the correct approach to the assessment of consequential loss in a remedy hearing where a claimant succeeded in a claim for both constructive unfair dismissal and discriminatory dismissal contrary to the **Equality Act 2010** (EqA 2010). The first issue was whether the tribunal had approached the assessment of a head of claim for loss of earnings as a loss of chance. If on the other hand, the tribunal had considered whether, and if so, for how long the employment relationship would have continued absent the impugned conduct on the balance of probabilities, the question was whether it was entitled to approach the matter in that way.

2. Permission to proceed to a full hearing was given by Cavanagh J on 10 December 2020. A second ground of appeal challenging the tribunal's calculation of the award for injury to feelings was dismissed upon withdrawal.

3. The appellant was the claimant before the tribunal. I shall continue to refer to the parties as they were below.

4. A tribunal hearing before Employment Judge Freer and two members, Ms B Leverton and Mr N Shanks, took place at a hearing over 11 days between January and May 2018, followed by a further 6 days deliberations in chambers in June and September 2018. A reserved judgment was sent to the parties on 15 December 2018.

5. The claimant raised a number of wide-ranging allegations of detriment and dismissal on grounds of discrimination, victimisation and harassment in breach of the **EqA 2010** by reference to the protected characteristic of disability. He also alleged constructive unfair dismissal under section 98 of the **Employment Rights Act 1996** (ERA 1996) – so-called ordinary unfair dismissal - citing a total of either 47 or 54 breaches of contract (depending whether the subparagraphs are included in the overall number) from 4 March 2015 to 26 July 2016. He also alleged automatically unfair dismissal by reason of protected interest disclosure contrary to section 103A **ERA 1996** and, in the alternative, a health and safety reason for dismissal under section 100 **ERA 1996**. In addition he made allegations

of detriment on the grounds both of protected interest disclosure, contrary to section 47B of the **ERA 1996** and also health and safety, together with complaints of unauthorised deductions from wages, and wrongful dismissal.

6. The claim was defended on grounds that there had been no breaches of contract at all, or none sufficient to entitle the claimant to resign in circumstances amounting to constructive dismissal, and in the alternative that he had not resigned in response to any breaches as might be found. The respondent did not advance a positive case on dismissal as an alternative in the sense that they did not put forward a potentially fair reason for dismissal or rely on a s.98(4) compliant procedure. In other words they defended all the unfair dismissal complaints on the ground that there had been no dismissal. The claims brought under **EqA 2010** were also defended on the basis that he had not been subjected to any detriments or dismissed.

7. The claimant's claim was materially successful in respect of one factual allegation only: that the respondent had failed to investigate and deal with his complaint about being subjected to an unlawful deduction of one day's pay on 10 April 2015 when he had been absent from work at a hospital appointment for a post cancer check-up and colonoscopy. The tribunal concluded that it constituted a breach of the implied term of trust and confidence that went to the heart of the contract of employment, that the claimant had resigned partly in response to the breach and that he had been unfairly constructively dismissed contrary to section 98 of the **ERA 1996**. The treatment – namely the deduction of pay for a cancer related check up and failure to investigate and deal with the complaint - was also found to amount to both discrimination arising from disability contrary to section 15 and a failure to make a reasonable adjustment under section 21 of the **EqA 2010**.

8. There was one other allegation of breach of contract that was found by the tribunal to be well founded, but since it was not causative of the claimant's dismissal or connected to the discrimination complaints no remedy flowed from it.

9. All of the other complaints were either dismissed by the tribunal or withdrawn at the outset of the hearing. There is no challenge to the tribunal's findings on liability.

Background Facts and the Tribunal's Liability Decision

10. It is not necessary to recite all the details of the very many allegations made in support of the claimant's various claims, beyond noting that the multiplicity of allegations presented a Herculean task for the tribunal. For example, the indirect disability discrimination complaint alleged 20 separate provisions, criteria or practices that had been applied to the claimant. In relation to the victimisation complaint, there were 9 protected acts relied on and 16 separate detriments.

11. What follows therefore is a brief summary of the case in so far as it is necessary for the purposes of this appeal. The claimant was employed by the respondent NHS Trust from September 2004, initially as a complaints administrator, then from 2013 with the job title of complaints and serious incidents case manager. His employment terminated on 10 August 2016.

12. The claimant was disabled as he had been diagnosed with bowel cancer in 2009. By paragraph 6 of schedule 1 **EqA 2010** cancer is a disability. As explained in the Statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability[1] paragraph A9:

> "A9. The Act states that a person who has cancer, HIV infection or multiple sclerosis (MS) is a disabled person. This means that the person is protected by the Act effectively from the point of diagnosis."

Such a person continues to be considered as a disabled person indefinitely thereafter, whether or not the cancer is successfully treated, or if the patient is in remission, and irrespective of his or her ability to carry out normal day to day activities.

13. Thankfully in the claimant's case the cancer had been successfully treated by 11 April 2011. Thereafter he attended hospital check-ups from time to time to ensure that that remained the case. The tribunal therefore found that the claimant was disabled as a person who had previously been diagnosed with cancer. It also found that his, quite separate, conditions of stress, anxiety and

[1] Issued by the Secretary of State in accordance with his power under s.6(5) EqA 2010 in SI2011/1159

depression also caused him to come within the definition of disability under section 6 of the **EqA 2010** from April 2016.

14. There was a departmental reorganisation in 2013, which appears not to have been entirely successful from both the team members' and management's perspective. In March 2015 Ms Edith Adejobe was appointed as an interim assistant director of serious incidents and complaints. She sought to manage the department more closely and address some longstanding attendance issues and what was perceived by management as non-compliance with sickness and leave absence reporting procedures in the department. The tribunal recorded Ms Adejobe's evidence to the tribunal which gives a flavour of the problems as she perceived them:

> "123. … the approach of employees in her team to sick leave had deteriorated to the extent where, in her view, it was considered an extension of annual leave. … Ms Adejobe also thought there was a problem with annual leave being booked without cover arrangements to the extent that in March 2015 she considered there was not a single day when every team member was at work."

15. Against that background, on Friday 10 April 2015 the claimant attended a hospital appointment for a cancer related check-up and colonoscopy, and did not attend work that day. He did not record the appointment in the respondent's e-roster system. Ms Adejobe and the head of employee relations, Ms Sally Dibben, considered the claimant had not complied with the sickness and hospital appointment reporting procedure and decided to make a deduction of pay for unauthorised absence for that day, in accordance with what they understood to be the contractual terms.

16. The tribunal examined the contractual provisions and found that:

> "112. … there does not appear to be any express authorisation in the Sickness Policy to deduct pay from an employee for not complying with the very few procedural requirements set out in paragraph 14 [a reference to part of the respondent's sickness policy entitled, medical and dental appointments]."

17. The claimant was not informed that his pay would be deducted for that date, although Ms Adejobe had been advised by Ms Dibben that it would be best to inform him that his pay had been stopped, the reason why and that it was in line with the sickness policy.

18. The claimant was due to attend a routine supervision meeting with Ms Adejobe on 14 April 2015 but he was signed off sick with stress by his GP from that date, initially for a period of two weeks but in fact remained off sick for some six months and did not return to work until October 2015.

19. The claimant noted that he was missing one day's pay on 26 May 2015 when he presumably received his pay slip. On 23 June 2015 he raised in writing the missing one day's pay, together with a number of other matters relating to keeping in touch obligations during his sickness absence. Ms Adejobe should have contacted the claimant weekly during his sickness absence but did not do so for the first 8 weeks of his sickness absence. Ms Adejobe replied on 2 July 2015 in relation to the other matters raised and put in place a mechanism for keeping in touch with the claimant during his sickness absence thereafter, but was silent on the 10 April 2015 deduction. The claimant continued to raise a complaint about having lost one day's pay on 10 April 2015 in subsequent correspondence, which the tribunal found was never dealt with and nor was it reinstated in his pay packet.

20. Problems continued during the claimant's sickness absence with an unwillingness from him to engage with Ms Adejobe's weekly contact arrangements so he could update her as to his medical condition. The tribunal found that by mid-July 2015 the claimant was refusing to accept letters sent to him by his employer by recorded delivery.

21. In July 2015, the claimant and three other colleagues submitted a joint complaint concerning alleged bullying and harassment by Ms Adejobe. The respondent conducted an investigation which reported in March 2016 which did not uphold the allegations. In the meantime, the claimant had returned to work on October 2015, by which time Ms Adejobe was no longer his line manager.

22. The claimant sought to appeal the decision rejecting his and his colleagues' complaints of bullying and harassment, but under the respondent's procedure the investigation report was final and there was therefore no route of appeal. The claimant was also concerned that the wrong procedure had been used and there was much to-ing and fro-ing of correspondence on those procedural issues.

23. On 24 March 2016, the claimant sent a lengthy email, repeating his earlier complaints about the issues raised in the original joint complaint as well as other matters widening the scope of his concerns. The tribunal set out an extract in paragraph 194 of its decision which illustrates the scope and style of the claimant's correspondence:

> "As stated in the complaint itself, this is not also limited to bullying staff by EA [Ms Adejobe], as the convoluted and biased report of your investigators would like everyone to believe. It was to highlight unfair practices employed by senior management within the nursing directorate who were abusing their position of authority for self-interest, self-promotion all in the name of "professional relationship" to benefit only themselves to the stress and detriment of junior staff. … I can appreciate that having to deal with the issues we raised shortly before your planned retirement may not be what you wish for. Nevertheless, I believe that there is surely the "need to revisit past events" and I look forward to hearing from you regarding the appeal and a grievance against your investigators within the timeframe set out in the Trust's grievance policy and procedure."

24. The Trust, however, maintained its position that the investigation had been concluded and that there was no appeal against the harassment and bullying complaint which had been dismissed.

25. In April 2016, the claimant commenced a further period of sickness absence for stress and he remained off sick until his resignation on 10 August 2016.

26. Meanwhile, the matter came to the attention of the chief executive of the Trust, Dr Matthew Patrick, when the claimant sent a lengthy email directly to him, followed by a further document on 7 July 2016 entitled "Formal Grievance". Dr Patrick sent what the tribunal considered to be a conciliatory response, which again the tribunal set out verbatim at paragraph 119, suggesting a meeting to consider a way forward and expressing concern that from the claimant's letter it appeared that his health continued to be a problem. Dr Patrick reassured the claimant that he did not wish to take any steps that might exacerbate his current condition, but would like to meet with him along with Louise Hall, the director of human resources, when he was fit to return. In the meantime, Dr Patrick would await the claimant's forthcoming occupational health appointment on 21 July 2016.

27. The offered meeting never took place because the claimant resigned with immediate effect by letter dated 10 August 2016. The resignation letter which covered five pages raised many issues, one

of which was the deduction of one day's pay on 10 April 2015 and the failure to address the claimant's complaint about it.

28. The tribunal analysed the legal issues arising from the 10 April 2015 deduction from pay. It found that the matter could not be raised as a freestanding complaint under Part II **ERA 1996** as it had not been brought within three months of the deduction in question. However, they concluded (paragraph 134) that the respondent had failed to address the claimant's complaint about the deduction from pay and that even though the deduction was a relatively modest amount, the fact that it was connected with his cancer related hospital attendance was, in all the circumstances, conduct without reasonable and proper cause which was likely to have the effect of damaging or seriously destroying the implied term of trust and confidence, and was thus a fundamental breach of contract.

29. The only other complaint in the constructive dismissal allegation that the tribunal found amounted to a breach of contract was allegation (f), that Ms Adejobe had failed to contact the claimant during the first eight weeks of his sickness absence or agree any keeping in touch arrangements. The tribunal found that Ms Adejobe had acted without reasonable and proper cause (paragraph 148). Although the tribunal concluded that Ms Adejobe's inaction was not calculated to seriously damage trust and confidence, the tribunal found that it was likely to do so.

30. Having made conclusions on each allegation as a standalone complaint of a breach of the implied term of mutual trust and confidence, the tribunal then stood back to consider the allegations as a whole (see paragraphs 277 to 285 of the liability decision). In paragraph 283 they concluded that the issue in relation to the deduction of pay on 10 April 2015 was extant at the time of the claimant's resignation and formed part of the reason for his leaving employment, as set out in his resignation letter. The tribunal concluded that the claimant had not affirmed the breach as it had found as a fact that he had raised it expressly and repeatedly throughout his bullying and harassment complaint.

31. On the second breach of contract found by the tribunal (allegation (f)), it concluded that although the eight-week delay before Ms Adejobe contacted the claimant amounted to a fundamental breach of the implied term, it did not however form part of the reason for the claimant leaving his

employment. In any event, by the time of his resignation, the claimant had affirmed that particular breach by continuing in his employment for a period of over a year after she had put in place weekly contact arrangements.

32. It was the tribunal's conclusion that the claimant resigned partly in response to the fundamental breach of the implied term of trust and confidence to deal with complaints, which was underpinned by an express contractual and statutory right not to be subjected to unlawful deductions of wages. However the tribunal considered that the series of events and allegations of fundamental breach of contract both individually and as a whole did not amount to a fundamental breach of contract.

> "283. The Tribunal concludes that the issue relating to the deduction of pay on 10 April 2015 was extant at the time of the Claimant's resignation and formed part of the reason for the Claimant leaving his employment as set out in his resignation letter. The Tribunal concludes that the Claimant had not affirmed the breach as he had raised it expressly throughout his bullying and harassment complaint."

33. As already noted, the respondent had not advanced a potentially fair reason for the dismissal and the tribunal therefore found the claimant's constructive dismissal was unfair.

34. The tribunal also found that the failure to address the claimant's concern in relation to the deduction of one day's pay constituted two forms of disability discrimination: a failure to make reasonable adjustments, contrary to section 21 of the **EqA 2010** (paragraphs 295 to 296 of the liability reasons), and discrimination arising from disability, contrary to section 15 in relation to the same matter (paragraph 365).

35. There is no appeal from the liability decision.

Remedy Hearing and Judgment

36. The matter then came before the same tribunal for a further five days on the remedy hearing: 25 to 27 November 2019 for the hearing and in chambers on 17 and 21 February 2020. A reserved judgment was sent to the parties on 26 May 2020.

37. The claimant was awarded a basic award in respect of his unfair dismissal claim of £5,748, loss of statutory rights of £500, injury to feelings of £5,000 and interest of £997.26, making a total of

£12,245.26. He was not awarded any compensatory award under the unfair dismissal claim nor any loss of earnings damages under the discrimination claims. Although not expressly stated in the judgment, it is apparent from the tribunal's reasons that only the basic award was made in respect of the unfair dismissal claim and the other heads of damage were awarded under the **EqA 2010** claim.

38. The appeal concerns the refusal of the tribunal to make any compensatory award for loss of earnings in respect of the unfair dismissal claim, or any loss of earnings compensation in respect of the **EqA 2010** claims. I was informed today that the loss – which cannot be awarded twice in respect of the same loss by virtue of s. 126 **ERA 1996** - was claimed in the first place under the discrimination cause of action and in the alternative as part of the unfair dismissal compensatory award, in order to avoid the statutory cap limiting the amount of compensation that may be awarded in an unfair dismissal complaint which does not apply to a discrimination complaint. However it is a distinction which makes no difference on the facts of this case. The schedule of loss was not in the bundle before me.

39. It was common ground that the tribunal gave itself the following direction as to the issues on remedy at paragraphs 4 to 20 of the judgment:

> "4. The statutory provisions relating to remedy for unfair dismissal are set out in sections 112 to 127 of the Employment Rights Act 1996.
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> 5. It is well-established law that the principle contained in **Polkey -v- A E Dayton Services Ltd** [1987] IRLR 503, HL, applies to the consideration of the just and equitable element of the Compensatory Award. A Tribunal may reduce the Compensatory Award where an unfairly dismissed employee may have been dismissed fairly at a later date or if a proper procedure had been followed.
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> 6. There is no need for an 'all or nothing' decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.
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> 7. In **Software 2000 Ltd -v- Andrews** [2007] IRLR 568, the EAT reviewed the authorities and set out some guidance, such as:
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> > "If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all

> the evidence when making that assessment, including any evidence from the employee himself."

8. By combination of Section 207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 124A of the Employment Rights Act 1996, where a claim by an employee is made under any of the jurisdictions listed in Schedule A2 of the 1992 Act and is also one to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies, where a party has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or decrease any compensatory award by no more than 25%.

9. Such an adjustment shall be applied immediately before any reduction for contributory fault and any adjustment under section 38 of the Employment Act 2002 for a failure to provide employment particulars.

10. By virtue of section 122(2), a Tribunal may reduce the basic award where the conduct of the employee before the dismissal was such that it would be just and equitable to do so. Also, by virtue of section 123(6), the Tribunal may reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the employee.

11. The remedy provisions in discrimination claims at the Employment Tribunal are set out in section 124 of the Equality Act 2010.

12. A Tribunal is not obliged to actually make an order for compensation if it doesn't consider it to be just and equitable to do so, but once it has decided to make an order for compensation, it must adopt the usual measure of damages in the same way as damages for a statutory tort.

13. The claimant is to be put into the financial position they would have been 'but for' the unlawful conduct of the employer. (see **Ministry of Defence -v- Cannock** [1994] ICR 918)

14. It is the Claimant's personal loss, or estimated loss, which is important and not any hypothetical loss calculated on the basis of how a 'reasonable employer' might have behaved.

15. The loss must be attributable to the specific act that has been held to constitute discrimination, and compensation should not be awarded in respect of other acts either inferring discrimination or showing discrimination that is not part of the pleaded claim.

16. Where loss has been caused by a combination of factors, of which some factors are not the unlawful discrimination, the compensation awarded can be discounted by a percentage to reflect that circumstance.

17. The EAT in **Thaine -v- London School of Economics** [2010] ICR 1422 held that: "The test for causation when more than one event causes the harm is to ask whether the conduct for which the defendant is liable materially contributed to the harm. … But the extent of its liability is another matter entirely. [The Respondent] is liable only to the extent of that contribution."

> 18. However, focus should be on the relative apportionment of the harm and not on the causative contribution to the discrimination as found. The assessment is of the particular part of the loss that is due to the wrong (see **BAE Operating Systems Ltd -v- Conczak** [2017] EWCA Civ. 1188).
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> 19. There is no requirement for the loss suffered to be 'reasonably foreseeable'. Compensation is awarded in respect of all harm that arises naturally and directly from the act of discrimination (see **Essa -v- Laing** [2004] ICR 746; and **Chagger -v- Abbey National plc** [2010] IRLR 47).
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> 20. The Tribunal must take into account the chance that the Respondent might have caused the same damage lawfully if it had not done so on discriminatory grounds. Which effectively means applying a similar approach to the *Polkey* principle in unfair dismissal cases and assess what would have happened if there had not been the discriminatory conduct."

40. Mr MacDonald acknowledges that if the tribunal followed its own direction, his appeal must fail. His argument, however, is that they did not.

41. As a supplementary point, he argues that there were inadequate reasons for the tribunal judgment which is therefore not **Meek**-compliant as an additional ground of appeal.

42. The tribunal then made the following observations:

> "42. The Tribunal concludes on balance that the deduction from pay in April 2015 [the deduction of one day's pay] was only one very small part of the overall problem. If that deduction had not occurred the Claimant would have been off work in any event. The Claimant had returned to work in October 2015 for six months and the events in April 2016 were not materially due to the 10 April 2015 deduction. There were significantly more unrelated matters occurring. The Tribunal concludes that the Claimant's pay would have reduced to half pay in any event.
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> 43. The Tribunal also concludes that although no detriment of dismissal was relied upon as part of the discrimination arising from disability and failure to make reasonable adjustment claims, those circumstances did form part of the Claimant's reason for leaving his employment and therefore loss of earnings may arise from the dismissal in respect of those claims and requires consideration.
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> 44. The Tribunal refers to paragraphs 84 and 85 of the Claimant's submission which accepts, quite correctly, that a *Polkey* reduction does not apply in discrimination claims, but considers that factors relevant to a *Polkey* deduction are likely to be relevant to the discrimination context and states the Claimant's position that he would not have resigned 'but for' the disability discrimination."

43. The tribunal then considered carefully "the extent to which the 10 April 2015 deduction and the complaint made on 23 June 2015 had a part in the circumstances" by reference to the evidence.

44. The tribunal rejected the claimant's assertion that the respondent's failure to address the deduction of one day's pay on 10 April 2015 had been constantly on his mind and was a seam that ran through his complaints, the "golden thread" running throughout the claimant's issues, as he had put it in his oral evidence (paragraph 55). It was not consistent with the contemporaneous documentation, the history of his complaints and grievances both prior to his discovery of the deduction of 1 day's pay in June 2015 and thereafter up to his resignation in August the following year, nor the medical records, and a number of expert medical and psychiatric reports that had been commissioned by the parties.

45. The tribunal found as a fact that the claimant's concerns about the pay deduction on 10 April 2015 had formed a very small part of a large series of allegations of both discrimination and breach of contract and various other breaches of employment rights that were not well-founded as there were significantly more unrelated matters occurring which caused his lengthy absences for stress and the source of his unhappiness at work.

46. The tribunal concluded at paragraph 85:

> "85. Therefore although the Claimant gave in evidence, both written and oral, his account of the effects that the deduction and the complaint had on him, the Tribunal concludes that this needs to be approached with particular caution given the very limited success in his proceedings at the Tribunal and the surrounding evidence."

47. Ms Chudleigh submits that it is implicit in the tribunal's findings that they found the claimant to be a liar. I would not go so far, it is also possible that he had misremembered and the tribunal has not identified the reason for the claimant's inaccuracy. I draw no conclusions that he was thought to be dishonest and put that suggestion immediately out of my mind. The important point is that his evidence was not accepted. In relation to the discrimination complaint the tribunal concluded in paragraph 86:

> "86. When all matters are considered, in particular the medical evidence, the Tribunal is led to the conclusion that had [the] 10 April 2015 deduction and the 23 June 2015 complaint not happened the remainder of the events would have occurred, the Claimant would not have been in any materially different position and would have resigned."

48. In paragraph 87:

> "87. The Tribunal therefore concludes that there is no loss of earnings that arises from the Claimant's discrimination complaints attributable to the acts of discrimination as found."

49. It reaches a similar conclusion in paragraph 121, addressing a compensatory award and an assessment of a **Polkey** deduction:

> "121. For the reasons given above relating to the discrimination claims, when considering the *Polkey* principle the Tribunal inevitably reaches the unanimous conclusion that the Claimant would have resigned in any event absent the deduction from wages and consequent complaint issue arising in April 2015 and accordingly no loss of earnings arise."

He therefore received no loss of earnings compensation for either discrimination or constructive unfair dismissal.

50. Under the separate headings of "Psychiatric Injury" and also "Injury to feelings" in the discrimination complaints, the tribunal made separate findings.

> "108. The Tribunal repeats its conclusions above that had the 10 April 2015 deduction and the consequential complaint not occurred, on balance, the same events would likely have happened, on the same timings and the same psychiatric health issues would have arisen."

And in paragraph 117 the tribunal made its conclusions on the injury to feelings head of claim:

> "117. … the Tribunal finds on balance that the Claimant would have resigned in any event, … [and] having regard to all the evidence above that an award of £5,000 is appropriate. …"

Although an appeal to the tribunal's injury to feelings award was withdrawn by the claimant, Mr MacDonald submits that by stating that it is "repeating its conclusions" about the consequences of the pay deduction and then stating "on balance" in paragraphs 108 and 117, it is implicit that the tribunal also decided the loss of earnings point on balance of probabilities and thus failed to follow its own self-direction as to the correct approach to the assessment of damages for discrimination.

Grounds of Appeal

51. The claimant argues that the tribunal had irrationally and erroneously moved from a finding that the claimant would have resigned in any event, which had been made on the balance of probabilities, to a 100% **Polkey** reduction. Mr MacDonald advanced a number of propositions.

52. **Polkey** calls for a predictive exercise, asking what the chances were that the employer would have dismissed fairly in the circumstances, and requiring a focus on the employer's likely thought processes: **Grantchester Construction (Eastern) Ltd v Attrill** [UKEAT/0327/12] at [10]. It is therefore not right to move from an assessment of 50 per cent chance to a conclusion that the employer inevitably would have dismissed: **Grantchester** at [25]. The tribunal may apply a percentage reduction, or limit losses to a fixed period: **Zebrowski v Concentric Birmingham Limited** UKEAT/0245/16 at [50], [53], [54].

53. For a tribunal to decide that an employee would have been dismissed after a specific period the tribunal must be certain (i.e. find a 100% chance) that the employee would have been dismissed (or resigned) at that point: **Zebrowski** at [34]. It therefore follows that to conclude that the employment would have ended on the same date as the unfair dismissal is to make a strong finding that there was no chance that the employment would have continued: **Hamer v Kaltz Ltd** UKEAT/0502/13.

54. The tribunal must consider all the relevant facts and circumstances: **Frew v Springboig St John's School** UKEAT/0052/10 at [26].

55. The burden is on the employer, not to prove any fact on the balance of probabilities, but to satisfy the tribunal that a future chance would have happened: **Grayson v Paycare** UKEAT/0248/15 per Kerr J at [17], [32], [46 – 48], [51].

56. Similarly in the Equality Act claims, in assessing loss flowing from discrimination, the correct approach is not to speculate as to what would have happened as if it involved questions of fact, to be decided on the balance of probabilities – but rather to assess matters of chance in a broad and sensible manner: **Ministry of Defence v Cannock** [1994] ICR 918, 930E-F, 937F-H, 938A-B per Morison J. the tribunal therefore erred by deciding the matter on the balance of probabilities, thus leaving the claimant with nothing.

57. In the alternative, he argues that the decision was not adequately reasoned and is not **Meek**-complaint.

58. The appeal is resisted by Ms Chudleigh for the respondent NHS Trust on the basis that either the tribunal made a finding in paragraphs 86 and 121 that there was a 100% loss of chance. But even if the tribunal had in fact approached the matter on the balance of probabilities, it was permissible for it to do so. There was no contradiction between the finding in the liability judgment that the claimant had been unfairly constructively dismissed following his pay deduction and failure to deal with his complaint and the finding that he would have resigned anyway and was therefore not entitled to any loss of earnings compensation (see **Wright v North Ayrshire Council** [2014] ICR 77).

59. She referred to the case of **BMI Healthcare Ltd v Shoukrey** UKEAT/0336/19 which had referred a case back to the tribunal to consider "whether there were matters, other than the unlawful protected disclosure detriments, that led the Claimant to resign that either broke the chain of causation, or should result in compensation [being reduced]."

60. Ms Chudleigh submitted that in this case, the tribunal had avoided the error in **Shoukrey** and had considered the matter correctly.

61. But in the alternative she argued that **Chagger v Abbey National and Hopkins** [2010] IRLR 47 is good authority for the proposition that it is not always necessary to adopt a loss of a chance approach for **Polkey** purposes following a discriminatory dismissal, especially where the case is that the claimant would have resigned, citing paragraph 67 of Elias LJ's judgment:

> "Similarly, there may be circumstances – although in practice they will be rare – where the evidence is that the employee would voluntarily have left in the near future in any event, whether or not he had another job to go to. This could occur, for example, if the employee is dismissed shortly before he was due to retire, or if he had already given notice of resignation when the discriminatory dismissal occurred. It would be wrong to award compensation beyond the point when he would have left because there would be no loss with respect to any subsequent period of employment."

62. There are two further strands to her argument. The first is that since the case concerned the question of whether the claimant would have resigned anyway, the tribunal's decision on consequential loss concerned what the claimant himself would have done, not what the respondent employer, a third party, would have done. Whilst it is well established that instead of the all or nothing balance of probabilities approach, the loss of a chance approach is appropriate where the question of

what would have happened in hypothetical circumstances depends upon the actions of a third party, (see for example the solicitor negligence case of **Allied Maples Group Ltd v Simmons and Simmons (a Firm)** [1995] 1WLR 1602), Ms Chudleigh submitted that a distinction can be drawn where it is not the actions of a third party under consideration but an analysis of what the claimant would have done, relying on another professional negligence claim case, **Perry v Raleys Solicitors** [2019] UKSC 5 per Lord Briggs JSC at paragraph 20:

> "For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

63. Her second argument was that the tribunal was deciding on a past event in this case, rather than a future one, which was inherently less speculative, relying on the speech of Lord Diplock **Mallett v McMonagle** [1970] AC 166.

64. Finally she relied on the observation in **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615 that "it cannot be said that to refuse to assess on a percentage risk is necessarily wrong in principle" [51] and whether it was appropriate to assess the chance in percentage terms will depend on all the circumstances. She also noted that in that case the Court of Appeal had inferred from the tribunal's judgment that it had concluded that there was a 100% chance that there would have been a fair dismissal in any event.

The Law

65. The relevant statutory provisions are contained in sections 123 of the **ERA 1996** and section 119 of the **EqA 2010**.

> **Employment Rights Act s. 123. Compensatory award**
>
> (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant

in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

Equality Act 2010 s.119. Remedies

(1) This section applies if the county court or the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

(2) The county court has power to grant any remedy which could be granted by the High Court—

(a) in proceedings in tort;

(b) on a claim for judicial review.

…….

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)."

66. It is agreed that on the facts of this case, the approach to the assessment of compensation in the discrimination and unfair dismissal complaints will be materially identical notwithstanding the different wording of s.123 **ERA 1996** and s.119 **EqA 2010**.

67. Since the early days of the introduction of the statutory right unfair dismissal compensation has routinely been calculated on the percentage chance of an unfairly dismissed employee not having been dismissed had a fair dismissal procedure been followed,– see for example **Winterhalter Gastronom Ltd v Webb** [1973] ICR 245 and **Vokes v Bear** [1974] ICR 1.

68. In the landmark case of **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 Lord Bridge of Harwich endorsed the percentage chance approach. He noted that if it is held that taking the appropriate steps which the employer failed to take before dismissing the employee would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation. He cited with approval the judgment of Browne-Wilkinson J in **Sillifant v. Powell Duffryn Timber Ltd** [1983] IRLR. 91 at p. 96:

"There is no need for an 'all or nothing' decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

69. Since then, a number of authorities have considered when a tribunal has been correct to assess compensation on the basis of loss of a chance, how they have assessed that percentage and whether there are circumstances in which a balance of probabilities approach is more appropriate.

70. In **O'Donoghue v Redcar & Cleveland Borough Council** [2001] EWCA CIV 701, [2001] IRLR 615, an unfair dismissal and discrimination claim, the tribunal decided not to reduce compensation by a percentage, but instead concluded that the claimant would have been fairly dismissed within 6 months of her actual, unfair dismissal and thus awarded her 6 months loss of earnings and no more. The Court of Appeal rejected the appellant's challenge that where an ET finds a dismissal substantively unfair it is bound to assess the percentage chance that the employment would have continued and it is not open to it to reduce compensation on the grounds that at a later date the employee would have been dismissed fairly.

> "44. While we acknowledge its exceptional nature, we do not think that the exercise undertaken by the industrial tribunal which led to decision (4) is necessarily impermissible. An industrial tribunal must award such compensation as is "just and equitable". If the facts are such that an industrial tribunal, while finding that an employee/applicant has been dismissed unfairly (whether substantively or procedurally), concludes that, but for the dismissal, the applicant would have been bound soon thereafter to be dismissed (fairly) by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that the compensation for the unfair dismissal should be awarded on that basis. We do not read **Polkey** or **King v Eaton Ltd** [(No.2) [1998] IRLR 686] as precluding such an analysis by an industrial tribunal and we do not think that the exercise which they performed was self-evidently incorrect given the adverse view which they had formed of this particular appellant (see further at paragraphs 56-58 below). It follows that we are unable to accept Ms Gill's first submission."

And at paragraph 53:

> "Where the appellant was in the estimation of the industrial tribunal on an inevitable course towards dismissal, it was legitimate to avoid the complicated problem of some sliding scale percentage estimate of her chances of dismissal as time progressed, by assessing a safe date by which the tribunal were certain (if it felt able to be certain) that dismissal would have taken place and making an award of full compensation in respect of the period prior thereto (ignoring any question of 'interim' percentages)."

71. Mrs Justice Laing (as she then was) conducted a helpful review of the authorities in the unreported case of **Zebrowksi** including **O'Donoghue** about which she said as follows:

> "In other words, in my judgment, the approach of the Court of Appeal in O'Donoghue, properly understood, is that it is only open to an ET to limit compensation to a period as opposed to making a percentage deduction where the ET is 100 per cent confident that dismissal would have occurred within that period." [54]

72. She went on to conclude that the same considerations apply in cases of both constructive and actual dismissal. Where a claimant has been unfairly constructively dismissed it is open to the tribunal to apply a **Polkey** reduction, just as it may in a case of actual dismissal and that "the courts should not create a complex structure of subsidiary rules from the open language of the statutory provisions" [49].

73. It is a theme of the authorities that the appeal tribunal should be reluctant "it would introduce some very technical and verbally sophisticated rules into a decision-making process that should be a matter for the common sense, practical experience and sense of justice of the ET sitting as an industrial jury" (**Gover v Propertycare Ltd** [2006] EWCA Civ 286, [2006] ICR 1073, para 14). Or as Morison J described it in **Ministry of Defence v Cannock** [1994] ICR 918 in assessing loss flowing from discrimination, the correct approach is not to speculate as to what would have happened as if it involved questions of fact, to be decided on the balance of probabilities, but rather to assess matters of chance in a broad and sensible manner.

74. In **Software 2000 Ltd v Andrews and others** [2007] ICR 825, [2007] IRLR 568 Elias P summarised the following principles from a thorough review of the case law as follows:

> "54. … (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal

> may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
> (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
> (5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
> (6) ….[2]
> (7) Having considered the evidence, the Tribunal may determine
> (a) ….[3]
> (b) That there was a chance of dismissal……..[4] in which case compensation should be reduced accordingly.
> (c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.
> (d) Employment would have continued indefinitely.
> However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

75. The claim in **Perry** concerned an allegation of solicitor's negligence in failing to advice their client of the possibility of applying for a claim for a services award (similar to a special damages claim in a personal injury claim) in addition to a general award in a statutory scheme that had been introduced to compensate miners who had contracted vibration white finger (VWF) to enable large numbers of similar claims to be presented, examined and resolved both effectively and at proportionate cost. An applicant would need to show that they were unable to do various routine household tasks because of VWF rather than some other medical condition. The judge at first instance found that the solicitors had not provided competent advice to Mr Perry by failing to mention the services award element of the VWF scheme. The judge then went on to conduct a trial of the question of whether Mr Perry would or could have brought an honest claim for a services award and found that he could not and awarded him no damages. He found that if Mr

[2] when s. 98A(2) ERA 1996 was in force, but which has since been repealed. Deleted to reflect the repeal of s.98A(2) ERA 1996, see **George v LB Brent (No. 2)** UKEAT/0233/15/DM
[3] f/n 2 supra
[4] f/n 2 supra

Perry and his family member witnesses had given honest evidence as to Mr Perry's condition and manual dexterity, he would not have been entitled to or received a services award since to the extent that he was unable to do the routine domestic tasks against which the service award was assessed, it was due to other medical issues, unconnected with VWF. Mr Perry successfully appealed the County Court judgment to the Court of Appeal on the basis that the first instance judge should have considered the matter on the basis of the loss of a chance and not conducted a trial within a trial on the balance of probabilities thus creating an all or nothing result. On the defendant's further appeal the Supreme Court overturned the Court of Appeal judgment and restored the judgment at first instance. The Supreme Court reviewed the law of causation and loss in professional negligence cases and found that there was no error in the approach of the judge at first instance. To the extent that the question whether negligent advice had caused a claimant's loss depended on what the claimant would have done upon receipt of competent advice, this had to be proved by the claimant upon the balance of probabilities, but to the extent that the question depended on what others would have done it would be determined on a loss of chance evaluation. In Mr Perry's case, the supposed beneficial outcome depended entirely on what Mr Perry would, and could honestly have done, if Raleys solicitors had advised him that the VWF scheme included a services award as well as the general award akin to a pain and suffering and loss of amenity award in a personal injury claim. The judge therefore approached the matter correctly in deciding the issue on the balance of probabilities.

Discussion and conclusions

1. Did the tribunal assess compensation on the balance of probabilities or loss of a chance?

76. The first issue to decide is whether, as submitted by Mr MacDonald, there is an inconsistency or contradiction between the tribunal's liability and remedy findings such as to undermine the remedy findings. The tribunal well understood that for the purposes of its liability decision a fundamental breach of contract need not be the principal reason for the resignation for there to be a constructive

dismissal: it only need play a part in line with settled authority, such as **Nottinghamshire County Council v Meikle** [2005] ICR 1 where Keene LJ held:

> "33……. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

77. The issue was also addressed in **Wright** by Langstaff P who indicated that once a repudiatory breach by the employer of the employment contract has been established in a constructive dismissal complaint, where there is more than one reason why an employee resigned, the correct approach is to examine whether any of them was a response to the breach, not to see which amongst them was the effective cause:

> "…where there is a variety of reasons for a resignation but only one of them is a response to repudiatory conduct the compensation to which a successful claimant will be entitled will necessarily be limited to the extent that the response is not the principal reason. A tribunal may wish to evaluate whether in any event the claimant would have left employment and adjust an award accordingly. This does not affect the principle to be applied in deciding breach: it is merely to recognise that the facts have a considerable part to play in determining appropriate compensation" [32]

78. In this case the tribunal found the respondent's failure to address the complaint concerning the pay deduction was sufficient to form part of the claimant's decision to resign (paragraph 283 liability judgment). For the purposes of liability nothing further was required. But when it came to assessing compensation, the tribunal's task was different. The tribunal was required to disaggregate the reason(s) for resignation that were in response to a repudiatory breach by the respondent from reasons for resignation that were for other reasons.

79. The tribunal was therefore correct to seek to identify what losses were attributable to unlawful conduct – whether discrimination or unfair dismissal – and what were not.

80. The loss of a chance approach is traditionally adopted in the assessment of loss of earnings in an unfair dismissal case as per the classic, oft-repeated words in **Mallett v McMonagle** [1970] AC 166, 176 of Lord Diplock:

> "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or what would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that the particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

81. If the tribunal had conducted such an exercise Mr MacDonald accepts that the appeal must fail.

82. Mr MacDonald understandably places much reliance on the case of **Grayson v Paycare** UKEAT/0248/15, Kerr J, where the tribunal, as here, made no order under a compensatory award and concluded that the claimant would have been dismissed in any event by the same date had a fair procedure been followed. In that case the (actual) dismissal was unfair was because of the absence of a fair procedure. Kerr J concluded:

> "46. I am concerned that the Tribunal's decision that there should be a 100 per cent Polkey reduction looks suspiciously like a finding that, on the balance of probabilities, the Claimant would have been fairly dismissed by the same date as his actual dismissal if a fair consultation process had taken place. …"

83. However this case can be distinguished from that of **Grayson**, as although in that case, as here, the tribunal had given itself an accurate self-direction as to the correct approach to loss of earnings compensation, it did not follow its direction and appeared to place the burden on the claimant to prove that he would not have been dismissed. As Kerr J noted:

> "It is not apt to describe this as a burden of proof. A burden of proof is an evidential burden to prove a fact on the balance of probabilities. In a Polkey situation, the burden on the employer is not to prove any fact on the balance of probabilities, but to satisfy the Tribunal that a future chance would have happened …" [32]

84. Nor had the tribunal in **Grayson** analysed the evidence sufficiently to make a strong finding that there was no chance that the employment would have continued, and as Mr MacDonald correctly

observes, a strong finding is required (see **Hamer v Kaltz Ltd** UKEAT/0502/13). In the case before me, the evidence and tribunal's detailed findings of fact were very compelling and the tribunal has analysed all the relevant circumstances and facts with conspicuous care (**Frew v Springboig St John's School** UKEATS/0052/10) to reach its overall conclusion.

85. The difficulty for Mr MacDonald is that it is implicit that the tribunal's conclusions in paragraphs 86 and 121 concerning discrimination and unfair dismissal respectively, that the claimant would have resigned anyway when he did, even if he had not been subjected to the deduction of 1 day's pay a year earlier and even if the respondent had dealt with his grievance about it, were not made on the balance of probabilities, but on the basis that there was a 100% chance that the claimant would have resigned anyway on 8 August 2016.

86. I reach that conclusion for a number of reasons. Firstly because that is the direction they have given themselves and said that they will follow. Secondly because the words used "when all matters are considered…the tribunal is led to the conclusion" [86] implies a test other than the balance of probabilities, which is in marked contrast to the wording used in paragraphs 86 and 121 which state that the conclusions have been reached "on balance." Thirdly, the evidence and factual findings support a conclusion that there was a 100% chance that the claimant would have resigned then anyway. He was extremely disgruntled and had very many other dissatisfactions and sources of unhappiness at work independent of the issues concerning the docking of 1 day's pay in April the previous year. It is also relevant that the tribunal noted that that his resignation coincided with the exhaustion of his contractual sick pay entitlement.

87. The tribunal has engaged in detail with all the many complaints that the claimant was raising in order to understand the full context and circumstances and reach its conclusions which it has amply set out. It is apparent from the tribunal's judgment that the reason why the tribunal concluded that there was a 100% chance that the claimant would have resigned then anyway was because of all his very many other dissatisfactions and unhappiness at work and the ending of his sick pay entitlement, all of which were matters going on independently to the issues concerning the docking of 1 day's pay

in April the previous year. It follows that this is a **Meek**-compliant adequately reasoned decision and that ground of appeal too must fail.

2. The impact of *Perry v Raley Solicitors* on compensation in constructive unfair and discriminatory dismissal claims: could or should the tribunal have assessed compensation on the balance of probabilities?

88. It follows from my conclusion that since the tribunal approached the calculation of loss of earnings compensation on the basis of the loss of a chance, the appeal must fail. However I shall consider the matter in the alternative in any event in light of Ms Chudleigh's submission that it is open to a tribunal to decide the matter on the balance of probabilities to reach an "all or nothing" conclusion in all cases, but specifically in a claim for constructive unfair dismissal. The logic of her argument perhaps goes further: in light of **Perry** is a tribunal now required to approach future and counterfactual losses in a constructive dismissal claims on the balance of probabilities? Both parties had taken the trouble to take me through all the relevant authorities and I have taken the chance to consider the potential impact of **Perry** which is a task which the parties understand has not yet been undertaken by the appeal tribunal and is likely to arise in other constructive dismissal cases.

89. In **Zebrowksi,** an important case which pre-dates **Perry**, Laing J (as she then was) conducted a helpful review of the authorities and considered the **Polkey** question specifically in the context of constructive dismissal unhesitatingly to conclude that it is open to a tribunal to apply a **Polkey** deduction in a constructive dismissal case:

> "49. The first issue is whether it was open to the ET to apply a Polkey deduction at all in a case where the employee has been unfairly constructively dismissed. I have already referred to the relevant authorities on this issue, and I respectfully agree with the principle that the courts should not create a complex structure of subsidiary rules from the open language of the statutory provisions. In any event, it was not disputed by Mr Dixon that it was open to the ET in this case, where it had held that the Claimant was constructively unfairly dismissed, for it to apply a Polkey deduction to his compensation."

90. I agree that it is essential to bear in mind the statutory wording and the guidance from the court of appeal to avoid introducing "some very technical and verbally sophisticated rules into a decision-making process that should be a matter for the common sense, practical experience and sense

of justice of the employment tribunal sitting as an industrial jury" (**Gover v Propertycare Ltd** [2006] EWCA Civ 286, [2006] ICR 1073).

91. As Cox J noted in **Brown v Baxter (t/a Careham Hall)** UKEAT/0354/09 s.123 **ERA 1996** poses three simple questions:

a. Was the loss occasioned as a consequence of the dismissal?

b. Was the loss attributable to the conduct of the employer?

c. If so was it just and equitable to award compensation?

92. Similar questions arise in applying common law tortious principles to discrimination complaints.

93. As noted above, since the introduction of the statutory right not to be unfairly dismissed, tribunals have discharged the task of assessing the counterfactual situation of what might have happened had an employee not been unfairly dismissed by applying a percentage loss approach. Therefore, if the tribunal is satisfied that there was a 100% chance that the employee would have been dismissed anyway on the same date or is able to reach any other conclusions with equal certainty (for example that the employee had a 100% chance of not being dismissed for a particular period of time, such as the length of time it would take for a fair procedure to be followed by the employer) compensation will be reduced accordingly. Similarly it may conclude that there is no chance that the employment would have ended absent the unfair dismissal and make no percentage deduction. In either scenario it will result in an "all or nothing" award under that head of damages, but have done so by applying a loss of a chance analysis.

94. As explained in **Zebrowski**

> "54……the approach of the Court of Appeal in O'Donoghue, properly understood, is that it is only open to an ET to limit compensation to a period as opposed to making a percentage deduction where the ET is 100 per cent confident that dismissal would have occurred within that period"

95. There can therefore be an "all or nothing" result, but it will be because the tribunal is 100% satisfied that a future chance would or would not have happened. In practice there are a number of

possibilities, three of which were identified in **Software 2000** at [54(7)]: (1) there was a less than 100% chance of indefinite continued employment in which case the tribunal must assess the percentage chance and apply that percentage reduction; (2) the tribunal is satisfied on the evidence there was a 100% chance that the employment would have ended anyway by a certain time or at the same time as the dismissal, in which case compensation is limited to that period and the claimant is awarded 100% of whatever that period is (or receives nothing for loss of earnings if it was the same date as the dismissal occurred); (3) employment would have continued indefinitely in which case there is no percentage reduction applied. There is a fourth possibility identified in **Zebrowski** and **O'Donoghue** where there was a 100% chance that the employment would have continued for a certain period followed by a lesser percentage chance thereafter. There may be other possible categories. But in each category the exercise is the same – the assessment from 0 to 100 of the percentage chance of what might have been or what will be.

96. Ms Chudleigh's argument that the tribunal was considering past events that were less speculative was not persuasive. **Mallett v McMonagle** does not distinguish between the counterfactual and the future – the what might have been and the what will be, both are inherently speculative as they did not or have not yet happened and it would be confusing to draw a distinction between the two. Ms Chudleigh is right to observe that many of the relevant circumstances could be described as past events – the many other sources of the claimant's dissatisfaction at work on which the tribunal has been able to make findings of fact. But the consequence of the tribunal being able to draw such a clear picture meant that they could be 100% satisfied of what would have happened.

97. How does **Perry** affect the orthodoxy? **Perry** restates a number of principles concerning the assessment of causation in professional negligence claims:

> "The Law about Causation in Professional Negligence cases
> 15. The assessment of causation and loss in cases of professional negligence has given rise to difficult conceptual and practical issues which have troubled the courts on many occasions. The most recent example at the level of this court is Gregg v Scott [2005] UKHL 2; [2005] 2 AC 176 in which the House of Lords had to wrestle with the intractable question whether negligent medical advice, which reduced the patient's prospects of long-

term survival from cancer from 42% to 25%, sounded in damages when, probably, he would have died anyway, even if competently treated.

16. Commonly, the main difficulty arises from the fact that the court is required to assess what if any financial or other benefit the client would have obtained in a counter-factual world, the doorway into which assumes that the professional person had complied with, rather than committed a breach of, his duty of care. The everyday task of the court is to determine what, in fact, happened in the real world rather than what probably would have happened in a what-if scenario generally labelled the counter-factual. Similar difficulties arise where the question of causation or assessment of damage depends upon the court forming a view about the likelihood of a future rather than past event.

17. In both those types of situation (that is the future and the counter-factual) the court occasionally departs from the ordinary burden on a claimant to prove facts on the balance or probabilities by having recourse to the concept of loss of opportunity or loss of a chance. Sometimes the court makes such a departure where the strict application of the balance of probability test would produce an absurd result, for example where what has been lost through negligence is a claim with substantial but uncertain prospects of success, where it would be absurd to decide the negligence claim on an all or nothing basis, giving nothing if the prospects of success were 49%, but full damages if they were 51%: see Hanif v Middleweeks (a firm) [2000] Lloyd's Rep PN 920 per Mance LJ at para 17. A further reason why this is a generally unrealistic approach is that most claims with evenly balanced prospects of success or failure are turned into money by being settled, rather than pursued to an all or nothing trial.

18. Sometimes it is simply unfair to visit upon the client the same burden of proving the facts in the underlying (lost) claim as part of his claim against the negligent professional. This may be because of the passage of time following the occasion when, with competent advice, the underlying claim would have been pursued. Sometimes it is because it is simply impracticable to prove, in proceedings against the professional, facts which would ordinarily be provable in proceedings against the third party who would be the defendant to the underlying claim. Disclosure and production of relevant documents might be impossible, and the obtaining of relevant evidence from witnesses might be impracticable. The same departure from the practicable likelihood that the underlying claim would have been settled rather than tried is inherent in any such process of trial within a trial.

19. But none of this means that the common law has simply abandoned the basic requirement that a claim in negligence requires proof that loss has been caused by the breach of duty, still less erected as a self-standing principle that it is always wrong in a professional negligence claim to investigate, with all the adversarial rigour of a trial, facts relevant to the claim that the client has been caused loss by the breach, which it is fair that the client should have to prove.

20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

98. It is noteworthy that Lord Briggs is careful to restrict the scope of his observations to professional negligence claims in the judgment: more than a clue is in the subtitle. None of the cases analysed and discussed in **Perry** are outside the arena of professional negligence. Whilst it is fair to say that many of the principles apply equally to other torts and have more general applicability. However and I cannot accept Ms Chudleigh's argument that the distinction between what the client of a solicitor can prove s/he would have done and what is dependent on actions of a third party is a distinction has direct application in a constructive dismissal employment claim. It does not follow that in the context of discrimination or unfair dismissal claims a claimant who is constructively dismissed must prove post dismissal loss of earnings on the balance of probabilities, but the losses of those who are unfairly dismissed by termination by their employer are to be assessed on the basis of the percentage loss of a chance.

99. Whilst in professional negligence claims the distinction between matters which a claimant must prove, and those matters that are not down to what a claimant would have done in the counterfactual or future world, but depend on actions of third parties, is a fair and sensible dividing line between what a claimant must prove on the balance of probabilities and what falls to be assessed as a loss of a chance, it does not readily translate to the possibility of the termination of an employment relationship absent the discriminatory or unfair dismissal.

100. In a professional negligence case it may be possible to identify with certainty which counterfactual matters the client/claimant must prove from those which would be dependent on the actions of third parties. But it is much less easy in employment cases. The nature of a professional negligence claim is entirely different to a dispute about the ending of an employment relationship. The ending of an employment relationship does not usually involve third parties and is brought about by either the employer or the employee who are the parties to the claim. Imagining the counterfactual world in an employment case absent the unfair or discriminatory dismissal usually depends on the behaviour and actions of both the employee and the employer and how they respond and react to each other's behaviour, as well as other possible extraneous events or actions of third parties.

101. The task of the tribunal is to assess as accurately as it reasonably can, the losses flowing from a dismissal and to answer the answers to the three questions identified by Cox J in **Brown** which is the same task whether the dismissal was actual or constructive. There is no need to introduce an additional stage in the decision making process by the tribunal to require it to identify matters which depend on the claimant and those dependent on third parties and then apply a different set of rules for each category. It would hideously overcomplicate the exercise, introduce an additional unnecessary layer in the decision making process and be unlikely to improve the accuracy of what is a speculative exercise which is a "decision making process that should be a matter for the common sense, practical experience and sense of justice of the employment tribunal" (**O'Donoghue** at [14]). Here all the relevant evidence and circumstances enabled the tribunal to make a strong finding to conclude it was 100% certain that the claimant would have resigned on the same date anyway and therefore awarded no compensation for loss of earnings. Where, as here, the heart of the dispute between the parties concerns what the claimant (as opposed to the respondent) would have done it may well be that a tribunal will be able to be 100% satisfied that something would or would not have happened. But they have not reached their all or nothing conclusion from assessing the matter on the balance of probabilities, even if the same outcome would have been achieved if they had.

102. It does not follow from **Perry** that an employee who has been constructively dismissed must prove their counterfactual loss on the balance of probabilities, whereas a loss of a chance evaluation applies in cases of actual unfair or discriminatory dismissal. As was said in **Zebrowski** and **Gover** the statutory language is open textured and it would be wrong to introduce a complex structure of subsidiary rules which is not supported by the statutory language and which would not assist in the difficult task of accurately and fairly calculating losses. **Perry** does not overturn the development of 50 years of case law on the assessment of counterfactual and future losses in employment claims before the tribunal that is to be approached on the evaluation of the loss of a chance.

103. For the above reasons, the appeal is dismissed.