Neutral Citation Number: [2022] EAT 115

Case No: EA-2019-001118-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 June 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

1. Mr D Tydeman,
2. Mr S Haynes

Appellants

1. Oyster Yachts Ltd
2. Oyster Marine Holdings Limited (in administration)
3. The Secretary of State for Business, Energy and Industrial Strategy

Respondents

- -
- -

Jesse Crozier (instructed by **Howes Percival LLP)** for the **Appellants**
Peter Linstead (instructed by **Blake Morgan LLP**) for the **Respondents**

Hearing date: 7 & 8 June 2022

- -

JUDGMENT

SUMMARY

Unfair Dismissal

The employment tribunal's determination of issues of principle in relation to compensation for the claimants, who had been dismissed for a reason in connection with a transfer of an undertaking, were insufficiently reasoned and unsafe. The matter was remitted to the same employment tribunal to determine all outstanding remedy issues.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of Employment Judge Rayner, sitting at the Southampton Employment Tribunal from 2 to 5 September 2019. The judgment was signed by the employment judge on 23 October 2019 and sent to the parties on 25 October 2019. There were a number of errors in the judgment that resulted in an application for reconsideration. A judgment on reconsideration and a substantive judgment with corrections were sent to the parties on 19 March 2020.

2. The basic outline facts are taken from the judgment. The second respondent built and sold luxury sailing yachts. The price of the yachts ranged from approximately £1 million to £6 million, depending on the class of yacht and the choices of fit and finish. At the relevant time, turnover was in the order of £40 million per year.

3. Substantial stage payments were provided for under some purchase contracts of up to about £1 million. As a result revenue was received periodically in large lump sums. This could result in cashflow problems. A revolving overdraft facility of up to £2.5 million was in place. There was a linked banking covenant that required the account to be in credit for at least one day per month.

4. The business of the second respondent got into serious financial difficulties, and entered administration on 7 February 2018. The first claimant was at that stage the chief executive officer, having commenced employment on 27 November 2008. The second claimant was the group finance director, having commenced employment on 3 November 2014.

5. It is clear reading the judgment overall that the employment judge concluded that the actions of the first and second claimants had been a significant factor in the financial failure of the second respondent, either through carelessness or deliberate wrongdoing. The extent to which the employment judge found the claimants to be careless or guilty of deliberate wrongdoing, or concluded the respondent would have found that to be the case if the claimants had not been dismissed for a reason relating to the transfer, is of significance in considering this appeal.

6. The first respondent purchased the trade and assets of the business from the second respondent and other entities on 20 March 2018. The employment of the first claimant was terminated on 22 March 2018, and the second claimant on 29 March 2018. The employment tribunal concluded that there had been a transfer of an undertaking from the second to the first respondent, the claimants had been assigned to the undertaking transferred, they were dismissed for a reason connected with the transfer, there was no economic, technical or organisational reason for the dismissals, which were therefore automatically unfair. Those determinations are set out at paragraphs 1 to 4 of the judgment, and are not the subject of this appeal.

7. The remaining paragraphs of the judgment, 5 to 9, determined what would have happened had the claimants been treated fairly after the transfer had taken place. At paragraphs 5 and 7 of the judgment, the employment judge concluded that there was 100 per cent likelihood that they would have been selected for dismissal by reason of redundancy subsequent to the transfer, although no date was given as to when this would have occurred. Paragraphs 6 and 8 set out conclusions that the first claimant and the second claimant would have been dismissed fairly for gross misconduct, and that such dismissals would have taken place at the end of November 2018. In the amended reasons the chance of this occurring was given as 90 per cent. At paragraph 9, the employment judge held that both claimants would have contributed by 70 per cent to their dismissals for gross misconduct by reason of the facts found in her reasons. The claimants appealed these findings.

8. The notice of appeal sets out ten grounds of appeal. Ground 1 asserts that it had not been the first respondent's case that the second claimant would have been summarily dismissed for gross misconduct and, in respect of both of the claimants, that they would have been dismissed by reason of redundancy. Ground 2 asserts that, if redundancy was an issue before the tribunal, the tribunal erred in concluding that the claimants would have been dismissed by reason of redundancy. Grounds 3 and 4 assert that the employment tribunal failed to direct itself properly as to the care that is required before a determination is made of serious misconduct against an individual. Ground 5 contends that there was no reasoning that supported an assessment of contribution of 70 per cent. Ground 6 asserts

that the tribunal had erred in its approach to the claimants' conduct in respect of the banking covenant. Ground 7 asserts that a finding that the build progress of a particular yacht had been falsified was either perverse, or insufficiently reasoned. Ground 8 asserts that the tribunal erred in finding that there had been gross misconduct in relation to the first claimant arranging for a pay rise and bonus to be paid to the second claimant. Ground 9 asserts that the tribunal was perverse, or failed to provide sufficient reasons, in finding that the claimants had provided misleading financial forecasts to the first respondent's bank. Ground 10 has two principal components: firstly, that the tribunal had referred to the annual turnover of the second respondent being in the order of £4 million, whereas it was £40 million and, secondly, that this had infected other findings about the claimants' failure properly to appreciate the financial difficulties the first respondent faced, and to manage them appropriately.

9. The first claimant lodged a claim form on 28 June 2018, and the second claimant on 1 June 2018. The first respondent submitted a joint response in respect of both claims. At paragraph 18, it was pleaded:

> "Further and in the alternative… it is averred that the First Respondent would have been entitled to dismiss the First Claimant without notice as a result of financial mismanagement amounting to gross misconduct."

10. Paragraph 20 asserted:

> "If, which is denied, the Claimants are found to have been unfairly dismissed by the First Respondent… it is submitted that the First Respondent would nevertheless have been entitled to fairly dismiss the Claimants in any event and consequently any losses should be limited to the time it would have taken to effect fair dismissals."

11. Paragraph 18 was clearly focussed on the specific circumstances of the case, whereas paragraph 20 has the feel of a boilerplate pleading. Nonetheless, it put in dispute the issue of whether the claimants might have been dismissed fairly subsequent to their actual dismissals, and the time that it would have taken for such dismissals to be effected.

12. A preliminary hearing for case management was held on 6 November 2018, at which the first respondent was ordered to provide further information, including the economic, technical or organisational reason relied on, and what misconduct was asserted against the second claimant.

13. In response the first respondent asserted of the second claimant that he had breached statutory, contractual and fiduciary duties, as a result of which he would have been dismissed for gross misconduct. It was also asserted, in response to the question about the asserted economic, technical or organisational reason for the dismissal of the claimants, that the second respondent had people in place in equivalent roles and therefore the claimants would have been dismissed as a result and/or because of the manner in which they had conducted the business. It was also stated that the claimants would have been dismissed by reason of redundancy. This was in response to the question about the ETO reason that was asserted had been the actual reason for the dismissals, rather than a question about the grounds upon which the claimants might have been dismissed had they not been unfairly dismissed for a reason connected with the transfer.

14. The progress of the case to the hearing was not all that could have been wished for. The list of issues continued to develop and was only finalised on the last day of the hearing. At paragraph 3 to 5 of the judgment, the employment judge explained that there had been a failure to comply with word limitations for witness statements, that more documentation had been provided than permitted and, therefore, the timetable was extremely tight. The employment judge noted that she was urged to deal with the factual matters that would be relevant to determining whether there was a transfer of an undertaking to which the claimants were assigned and the issues of principle in respect of remedy, particularly the chance that the claimants would have been dismissed in any event. The judge needed to take the first day as a reading day. The employment judge conducted the hearing under considerable pressure of time.

15. At paragraph 29, the employment judge noted that the claimants had not been aware of the precise nature of the misconduct alleged against them until cross-examination. The employment judge also noted at paragraph 36 that lack of clarity in the list of issues had resulted in a request for an updated version to be produced, which was provided on the final day of hearing the evidence.

16. There is a dispute between the parties as to the extent to which the list was finalised. The first respondent sent an email with a general list of issues into which the claimants inserted greater

particularity, including the misconduct alleged against the claimants. At paragraph 8 of the draft it was asserted that the claimants would have been dismissed by reason of their conduct (with specific issues of conduct set out). At paragraph 9 it was asserted that, were the dismissals unfair by virtue of the procedure followed, the claimants would have been dismissed for gross misconduct had a fair procedure been adopted. The specific reference to "gross misconduct" was incorporated into the list of issues set out in the judgment and referred to both claimants.

17. The appeal was submitted on 6 December 2019. The appeal was first considered by Linden J, who sifted it to an appellant-only preliminary hearing. Linden J clearly had some doubts about the underlying merits of the appeal, but considered there might be an issue in respect of the characterisation of the conduct alleged against the claimants.

18. The preliminary hearing was heard by HHJ Auerbach. He permitted grounds 1(a), 1(b), 6, 7, 9 and 10 to proceed. However, he did not permit the remaining grounds, including ground 8, which concerned the award of the pay rise to the second claimant, arranged by the first claimant. Ground 1(a) in respect of gross misconduct was limited:

> This ground challenges the Tribunal's finding that Mr Haynes would (with a 90% chance) have been dismissed for gross misconduct without notice, as opposed to, simply, fairly dismissed for misconduct.
>
> One limb of this challenge was that gross misconduct was not a live part of R1 's case by the time of the hearing. I did not consider this arguable.
>
> However, the Appellants also argue that the Tribunal was wrong to make this finding, as there was no notice money claim before it, and they have reserved their rights to pursue such claims in separate civil claims.
> I was initially doubtful as to this ground, as "gross misconduct" is a notoriously ambiguous term, and might mean no more than that the Tribunal considered (for the purposes of the Polkey issue) that dismissal would have been within the band of reasonable responses as a sanction and/or that there was conduct amounting in its view to contributory conduct.
>
> However, given the Tribunal's reference to the Respondent's procedure, indicating that in a case of gross misconduct dismissal will be without notice, and the Tribunal's specific finding that his dismissal would have been without notice, I was persuaded that this is arguable.

The Law

19. Pursuant to section 21 of the **Employment Tribunals Act 1996**, an appeal lies to the Employment Appeal Tribunal ("EAT") only on a question of law.

20. The approach that the EAT adopts to appeals has been the subject of considerable appellate consideration. In **British Telecommunications Plc v Sheridan** [1990] IRLR 27, the Master of the Rolls held:

> "34. … Any court with the experience of the members of the Employment Appeal Tribunal, and in particular that of the industrial members, will in the nature of things from time to time find themselves disagreeing with or having grave doubts about the decisions of Industrial Tribunals. When that happens, they should proceed with great care. To start with, they do not have the benefit of seeing and hearing the witnesses, but, quite apart from that, Parliament has given the Employment Appeal Tribunal only a limited role. Its jurisdiction is limited to a consideration of questions of law.
>
> 35. On all questions of fact, the Industrial Tribunal is the final and only judge, and to that extent it is like an industrial jury. The Employment Appeal Tribunal can indeed interfere if it is satisfied that the Tribunal has misdirected itself as to the applicable law, or if there is no evidence to support a particular finding of fact, since the absence of evidence to support a finding of fact has always been regarded as a pure question of law. It can also interfere if the decision is perverse, in the sense explained by Lord Justice May in Neale v Hereford & Worcester County Council [1986] ICR 471 at 483."

21. In **Brent London Borough Council v Fuller** [2011] ICR 806, Mummery LJ, with characteristic brevity and clarity, considered the role of the EAT, at paragraphs 28 to 30:

> "28. The appellate body, whether the Employment Appeal Tribunal or this court, must be on its guard against making the very same legal error as the tribunal stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal without committing error of law or reaching a perverse decision on that point.
>
> 29. Other danger zones are present in most appeals against tribunal decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.
>
> 30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then

> overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."

22. More recently, the approach to be adopted by the employment appeal tribunal was considered by the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] IRLR 1016:

> "57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
>
> (1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:
>
> > "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."
>
> This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.
>
> (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant *(Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v Brain* [1981] I.C.R 542 at 551:
>
> > "Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law … their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."

> (3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB v Croucher* [1984] ICR 604 at 609-610:
>
> > "We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd v Day* [1978] ICR 437 and in the recent decision in *Varndell v Kearney & Trecker Marwin Ltd* [1983] ICR 683."
>
> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

23. A potential ground of appeal is perversity. This may be available when there is no evidence to support a particular finding of fact: see **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85 at 92D-G. However, where it is asserted that, on the basis of conflicting evidence, a perverse decision has been reached, the test to establish perversity is especially high, in that it must be concluded that no reasonable tribunal could have arrived at the decision reached: see **Yeboah v Crofton** [2002] IRLR 635 at [93]:

> "Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached'. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal it must proceed with 'great care.'"

24. Often linked with allegations of perversity, are challenges to the sufficiency of the reasons of the employment tribunal. The relevant authorities have recently been considered and helpfully summarised by Cavanagh J in **Frame v The Governing Body of Llangiwg Primary School** UKEAT/0320/19/AT at [42] – [47]:

> "42. The relevant principles were helpfully summarised by the President, Choudhury J, in **Kelly v PGA European Tour** (UKEAT/0157/17/JOJ, unreported). Having referred to rule 62(5), he said:
>
> "19. The scope of the Tribunal's duty in giving reasons is well-established. In **Meek v City of Birmingham District Council** [1987] IRLR 250 (at page 251), Bingham LJ stated that a Tribunal's reasons should:
>
> "8. ... 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 have led them to reach the conclusion which they do 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; …"
>
> 20. In his judgment, Bingham LJ relied on a dictum of Donaldson LJ in **Union of Construction, Allied Trades & Technicians v Brain** [1981] ICR 542 (page 551):
>
> "[Employment] Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law … their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which reasons are given."
>
> 21. In **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409, Lord Phillips MR found (at paragraphs 17 to 22) that the duty to give reasons was a duty to give sufficient reasons so that the parties could understand why they had won or lost and so that the Appellate Tribunal/Court could understand why the Judge had reached the decision which s/he had reached. Lord Philips said:
>
> "16. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.
>
> 17. As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example **Flannery's case [2000]** 1 WLR 377, 382. In **Eagil Trust Co Ltd v Pigott-Brown** [1985] 3 All ER 119, 122, Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support

of his case:

> "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted (see **Sachs LJ in Knight v Clifton** [1971] **Ch 700**, 721)."

18. In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system. A judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment. An appeal is an expensive step in the judicial process and one that makes an exacting claim on judicial resources. For these reasons, permission to appeal is now a nearly universal prerequisite to bringing an appeal. Permission to appeal will not normally be given unless the applicant can make out an arguable case that the judge was wrong. If the judgment does not make it clear why the judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the judge was right or wrong. In that event permission to appeal may be given simply because justice requires that the decision be subjected to the full scrutiny of an appeal.

19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

...

21. When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to

> the judge's decision."'

43. Choudhury J also referred, at paragraph 23, to the following passage from the judgment of Sedley LJ in **Anya v University of Oxford** [2001] ICR 847:

> "26. … The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."

44. In **Tran v Greenwich Vietnam Community** [2002] EWCA Civ 553; [2002] ICR 1101, at paragraph 17, Sedley LJ said that it is not enough for the Tribunal to set out is findings of fact and its conclusion. It is necessary for the Tribunal to explain *how* it got from its findings of fact to its conclusions**.**

45. In **Co-Operative Group v Baddeley** [2014] EWCA Civ 658, the Court of Appeal stressed the importance of the judgment having a coherent structure.

46. However, in **High Table v Horst [1997]** IRLR 513 (CA), at 518, Peter Gibson LJ said that 'whilst [the Tribunal] 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'.

47. The relevant principles can be summarised as follows:

(1) The duty to give reasons is a duty to give sufficient reasons so that the parties can understand why they had won or lost and so that the Appellate Tribunal/Court can understand why the Judge had reached the decision which s/he had reached;

(2) The scope of the obligation to give reasons depends on the nature of the case;

(3) There is no duty on a Judge, in giving his or her reasons, to deal with every argument presented by counsel in support of his case:

(4) The Judge must identify and record those matters which were critical to his decision. It is not possible to provide a template for this process. It need not involve a lengthy judgment;

(5) The judgment must have a coherent structure. The judgment must explain how the Judge got from his or her findings of fact to his or her conclusions;

(6) When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which s/he has accepted or rejected. Provided

> that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question; and
>
> (7) It is not acceptable to use a fine-tooth comb to comb through a set of reasons for hints of error or fragments of mistake, and try to assemble them into a case for oversetting the decision. Nor is it appropriate to use a similar process to try to save a patently deficient decision." (original emphasis)

25. Errors of factual analysis can, on occasion, result in a decision that is unsafe: see the decision of HHJ Eady QC in **Thompson v Ark Schools** [2019] ICR 292 at [42]:

> "... Where an employment tribunal has expressly directed itself as to the relevant legal principles, the appeal tribunal should be slow to infer that it has then failed to apply those principles. Moreover, the appeal tribunal should not finely comb through the employment tribunal's reasoning to find fault or omissions, and should not pick out particular infelicities of expression, or focus on those, when the reasoning as a whole demonstrates that the employment tribunal applied the correct legal test. That said, where an employment tribunal has materially misdirected itself on the facts, that will render the decision unsafe: it will have failed to take into account that which is relevant (the actual facts of the case relevant to the ET's assessment) or it will have had regard to something that is irrelevant (a mistaken view of the facts)."

26. Allegations of serious improper behaviour generally require careful investigation by the employer: see **A v B** [2003] IRLR 405 at [60] – [61]:

> 60. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.
>
> 61. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances."

27. Where a court or tribunal is considering whether a person is guilty of particularly serious conduct, that does not alter the standard of proof that is to be applied in assessing whether the conduct has occurred. However, it is relevant to the extent of analysis that may be required.

28. In **Panama v London Borough of Hackney** [2003] IRLR 278, it was noted that, in considering the hypothetical question of what would have happened to a person had they not been unfairly dismissed, the tribunal will need to take into account the seriousness of the conduct asserted: see paragraph 57:

> "57. The tribunal was asking itself a hypothetical question: what would have happened at the disciplinary hearing? The tribunal answered that question by saying that there was an overwhelming probability that the appellant would have been found guilty of gross misconduct. But that finding depended on a further finding that the appellant would be found at the disciplinary tribunal to have acted fraudulently in sending the letter or letters of 28 May. Although the question which the Tribunal is asking itself is hypothetical, it must still approach the issue bearing in mind s.98 of the Employment Rights Act 1996 and the well-known decision in *British Home Stores Ltd v Burchell* [1978] IRLR 379."

29. In a number of cases, including **JSC BM Bank v Kekhman and Others** [2018] EWHC 791 (Comm) and **Co-operative Group Ltd v Baddeley** [2014] EWCA Civ 658, it has been noted that, when considering conduct of a particularly serious nature such as fraud, a court or tribunal will have regard to the inherent probabilities, including the general inherent improbability of such conduct having occurred. That may give rise to a requirement to explain why a finding of serious misconduct is made.

30. In the employment tribunal, the claim form constitutes the primary pleading: see **Chandhok & Anor v Tirkey** [2015] ICR 527 at [16]:

> "... The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Employment Tribunal Rules of Procedure 2013 …, the claim as set out in the ET1."

31. How the issues develop may depend on the circumstances of the case. Where further information provided in response to a request from the other party fleshes out matters that have been pleaded, it may be appropriate to treat it as forming a component of the pleaded case. Other statements generally will not be treated as part of the pleaded case and may require that there is a

formal application to amend. The fundamental principle of the authorities is that parties in the employment tribunal, just like those in the civil courts, should understand the case that they have to meet.

32. Often the agreement of a list of issues is a significant element of case management. A list of issues can be a useful tool: see **Parekh v London Borough of Brent** [2012] EWCA Civ 1630 at [31]:

> "A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see *Land Rover v Short* Appeal No UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see *Price v Surrey CC* Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in *Hart v English Heritage* [2006] ICR 555 at [31]-[35], case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays."

33. Where a list of issues has been agreed, it will be difficult for a party to depart from it, but some flexibility may be required. If it becomes apparent that the list does not properly reflect the case, it may be necessary for it to be altered. The key documents are the pleadings. If an alteration to a list of issues moves away from the pleaded case, the pleadings generally must be amended.

34. A number of authorities suggest that, as a general rule, where significant criticisms may be made of parties, they should have an opportunity to comment on them in evidence (see **Neale v Hereford & Worcester County Council** [1986] ICR 471 at page 486D-F and **Markem Corporation & Another v Zipher Ltd** [2005] RPC 31 at [60]). What is required depends on the specific circumstances of the case. It is possible that if a matter was obvious, even if it was not specifically put, it may still be open for consideration by the tribunal: see **Judge v Crown Leisure Ltd** [2005] IRLR 823.

35. This appeal concerns the appropriate approach to assessment of compensation for unfair dismissal. It involves consideration of a number of terms that are so familiar to employment lawyers that there is a risk that there could be insufficient focus on their precise meaning and their relevance in the particular case. Here, consideration had to be given to "conduct", "misconduct", "gross misconduct", "contribution" and "**Polkey** reduction". It is important to understand the significance of those terms and the relevance they have to specific assessments conducted by courts and tribunals.

36. In this case in considering what would have occurred absent the unfair dismissal of the claimants for reasons connected with the transfer of an undertaking, any assessment of the likelihood that dismissal would have occurred must also involve consideration of whether such a dismissal would have been fair.

37. The term "conduct" is used in section 98 of the **Employment Rights Act 1996** as a potentially fair reason for dismissal: section 98(2)(b). It is to be noted that the provision refers to conduct, not misconduct, and a reason for dismissal can be potentially fair provided it relates to the conduct of an employee, even if that conduct is not in any way reprehensible: see **JP Morgan Securities Plc v Ktorza** UKEAT/0331/16/JOJ at [42] – [43]. That said, it will be unusual for conduct that does not amount to misconduct to be relied upon by an employer as a reason for dismissal, or that it could be the foundation of a fair dismissal.

38. "Misconduct" denotes conduct that is in some way culpable.

39. "Gross misconduct" is a term of art at common law. It does not appear in the statutory provisions that deal with the assessment of compensation for unfair dismissal. It is a contractual assessment turning on whether an individual has acted in a manner that fundamentally breaches their contract of employment so that the employer is entitled to accept the breach and terminate the contract without being required to rely on a contractual notice provision, and so can dismiss summarily without notice. Typically, gross misconduct involves dishonesty, disobedience or incompetence on the part of the employee: see **Harvey** at [443.04]. It is not always an easy test to apply as there is no rule of law that sets out the degree of misconduct that will justify summary dismissal. The more

recent approach has been to focus on whether there has been an undermining of mutual trust and confidence so that the employer is entitled to dismiss the employee: see **Mbubaegbu v Homerton University Hospital NHS Foundation Trust** UKEAT/0218/17/JOJ, a decision of Choudhury J, in which reliance was placed on the decision in **Neary v Dean of Westminster** [1999] IRLR 288 (see particularly paragraphs 22 and 32–33).

40. The significant point is that to assess what would have happened to the claimants absent any dismissal in connection with the transfer of an undertaking, it was not necessary for the tribunal to apply a test of whether they were guilty of gross misconduct in the common law sense, although it was potentially relevant in a number of respects, to which I shall now turn.

41. It is perhaps unfortunate that the tribunal does not appear to have been directed to, or to have considered, the underlying statutory provisions that determine the award of compensation for unfair dismissal in the employment tribunal. They are commonly overlooked which results on occasions in somewhat sloppy thinking about the various terms that I set out above.

42. Section 122(2) **ERA** provides that:

> "122(1) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

43. If there is conduct of a complainant prior to dismissal that renders it just and equitable to reduce basic award, the tribunal may reduce the compensation by an amount it considers appropriate. The conduct that renders the reduction just and equitable must have occurred prior to the dismissal but need not have been a cause of the dismissal. Sometimes this is referred to as "contributory conduct", although strictly speaking that is not the correct characterisation of such conduct

44. The compensatory award may be reduced pursuant to section 123(1) **ERA**:

> "123(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."

45. Accordingly, there may be a reduction on just and equitable grounds of the compensation payable in so far as is just and equitable in all the circumstances, having regard to the extent to which the loss sustained was attributable to the actions taken by the employer. This can give rise to a reduction in compensation in two ways. Firstly, it may result in what is commonly referred to as a "**Polkey** reduction", where it is assessed that there is a likelihood, or a certainty, that the employee would have been dismissed in any event. The tribunal must assess whether the employer would have dismissed and whether the dismissal would have been fair.

46. In such circumstances, the tribunal is not itself determining the conduct of the claimant, but is assessing whether the respondent could have concluded that the conduct occurred and fairly dismissed as a result: see, for example, **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615 and **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691 at [24]:

> "A '*Polkey* deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

47. Section 123(1) **ERA** may also result in a reduction in compensation on the basis that the actions of the employee, either before or after the dismissal, are such that it would be just and equitable to reduce compensation. This may be conduct that was unknown to the employer at the time of dismissal. Again, this is sometimes referred to as "contributory conduct", but such a description is not entirely accurate. The tribunal is applying the broad just and equitable power to reduce compensation.

48. The term "contributory conduct" is properly applied to a reduction under section 123(6) **ERA**:

> 123(6) Where the tribunal finds that the dismissal was to any extent caused or

> contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

49. Where a reduction is made under section 123(6) **ERA**, it is the dismissal that is the focus, in that the conduct must have contributed to the dismissal as a matter of fact, so must have been based on material that was known to the employer at the time it dismissed. The employment tribunal conducts its own assessment of what is a just and equitable reduction in compensation.

50. An element of assessing a **Polkey** type reduction in compensation will often include a determination of whether the employer would have dismissed with or without notice. It will also be necessary to consider whether the dismissal would have been fair. The term "gross misconduct" is often incorporated into such an analysis, essentially to consider whether the employer would have had a fair reason to dismiss for the conduct, such dismissal being effected without notice. But again, the focus is on what the employer would have done and whether the dismissal would have been fair.

51. A formal finding of gross misconduct is only strictly required in a defence to a claim for notice monies as a common law wrongful dismissal claim.

52. Conduct that would not of itself be serious enough to justify dismissal without notice may, on occasions, in combination with other conduct, be sufficiently serious to justify summary dismissal: see, for example, **Tayeh v Barchester Healthcare Ltd** [2013] EWCA Civ 29 at [34] – [35].

Analysis

53. This leads me to consideration of the specific grounds of appeal. I have considerable sympathy for the employment judge, who was faced with having to determine a complex case in a relatively short time. It is easy at this stage, when only considering the approach that was adopted to the issues of principle arising in respect of assessment of compensation, to overlook the fact that the tribunal had, in addition, to deal with complex issues in respect of a transfer of an undertaking and automatic unfair dismissal.

54. The judgment has a number of typographical errors of the type that suggest that it may have been produced using dictation software. There are a number of passages in which it is fairly obvious

that a word has been inserted where a similar-sounding word must have been the one intended by the employment judge, and where prepositions and connecting words are missed out.

55. The tribunal was not assisted by the manner in which the pleadings and the list of issues had developed. There was insufficient focus on the correct statutory test for assessing compensation and there was a great deal of use of the terms "misconduct" and "gross misconduct" in a manner that was confusing. I consider that is the background to the issues that arise in respect of this judgment.

56. I consider in respect of ground 1(a), as appears to have been accepted by HHJ Auerbach, that the issue of gross misconduct was before the tribunal in respect of both claimants. The original response applied to both claimants. While it was a little misleading in dealing specifically with the first respondent and then providing a generic pleading in respect of the first and second, the further information made it clear that gross misconduct was being asserted against both claimants. More accurately, what was being asserted was that both claimants would have been dismissed without notice at some stage after the date of their actual dismissals. The issue raised by HHJ Auerbach that this issue was not before the tribunal because there was no wrongful dismissal claim is correct in that sense, but it was necessary for the tribunal, in assessing compensation, to determine whether any dismissal would have been with or without notice. That is recorded as being an agreed issue in the judgment, where gross misconduct is referred to. Accordingly, I consider that ground 1(a) fails.

57. Ground 1(b) relates to the determination that the claimants would have been dismissed at some future stage for redundancy. The possibility of a future dismissal by reason of redundancy was not set out in the response form. In the initial brief list of issues at the preliminary hearing for case management, the alternative fair dismissal case was clearly put on the basis of conduct (see paragraph 3.9). I do not consider that the brief reference to redundancy in reply to a question about the actual ETO reason for dismissal meant that it had been properly pleaded. It did not appear within the agreed list of issues for the tribunal. It did not appear in the closing submissions of either party. Accordingly, I do not consider the issue of a potential dismissal by reason of redundancy was properly before the tribunal. It is a matter that the judge herself concluded was a possible reason for a fair dismissal.

58. I also struggle to see where the point goes in circumstances in which the judge also decided that she could not determine what process would have been operated or when the dismissal would have taken place. I cannot see how, if one could not establish what process would have been operated, it was possible to determine that it would have been fair. Be that as it may, I consider that ground 1(b) succeeds on the basis that it was not open to the employment tribunal to conclude that the claimants would, at some stage in the future, have been dismissed by reason of redundancy.

59. I also do not accept the respondent's suggestion that redundancy was in some way a slight mis-statement by the judge for a dismissal for some other substantial reason. The reality of the matter is that the respondent had nailed their flag to the mast. They were asserting that both claimants would have been dismissed at some stage in the future by reason of their conduct through their management of the finances of the respondent and that such dismissal would have been effected without notice and, accordingly, compensation should be reduced on that basis.

60. That leads me on to the specific criticisms in respect of the grounds of misconduct upheld by the employment judge. One aspect that has troubled me is the fact that the ground in respect of the first claimant agreeing a pay rise for the second claimant and the payment of a bonus, albeit having gained approval of the board, is not a matter that is still part of this appeal, the ground of appeal in respect of it having been dismissed. It might well be said that it was inherently such serious conduct that it would have resulted in the dismissal of the claimants absent any other misconduct. However, reading the judgment as a whole, it is difficult to ascertain whether the judge was considering individual acts of misconduct or cumulative misconduct, and on what basis an assessment of the likelihood of dismissal was made, the final assessment being a 90 per cent likelihood of dismissal, once corrected after reconsideration. That probability could have been an assessment of the probability of dismissal for each of a number of items of misconduct. It could alternatively have been the employment tribunal’s assessment that there were a series of acts of misconduct, all of which would have justified dismissal, and any one of them could have resulted in a 90 per cent chance of dismissal. It is simply not possible to ascertain what approach was adopted by the employment judge.

61. Moving on to ground 6, here it is asserted that the claimants had manipulated the banking covenant. The banking covenant required that there be funds in the account on any one day of the year. The covenant was extremely brief and did not explain how it was to be operated. The tribunal considered that common sense suggested that the bank would have put the provision in place on the basis that ordinary trading would result in a positive balance from time to time rather than emergency injections of cash being provided for a very short period. However, there was nothing in the covenant that prevented that from happening and, should the bank have been taking care of its affairs, it would have been clear to the bank that money was paid in, that there was a positive balance for a very short period, and then the money was paid out to the same party that had paid it in.

62. The tribunal considered this issue at a number of points in the judgment. It is first dealt with at paragraphs 104 to 106, where the nature of the covenant is described, then at paragraphs 119 to 122, in which it was suggested that there would be an expectation that normal trading would result in a positive balance from time to time and that it could not have been reasonable to achieve a very brief positive balance on a number of occasions by short-term injections of cash with the sole purpose of ensuring that the covenant was not breached. At paragraphs 128 to 132, the tribunal returned to this issue. The judge suggested that the matter should have raised serious concerns with the claimants and alerted them to the financial difficulties of the respondent. At paragraph 132, the tribunal stated that the claimants did not know or simply refused to accept the reality of the situation.

63. At paragraph 133, the judge, in one of a number of examples of such reasoning, stated that the approach to the covenant at best looked like a desperate attempt to keep the business going despite the writing being on the wall or, at worst, a determined and deliberate effort to conceal the financial realities from investors. Mr Crozier for the claimants suggested that, where there are two possibilities, one of carelessness and one of serious misconduct involving potential dishonesty, it may be appropriate for a judge to set out the two possibilities. However, if it is decided that the mores serious conduct occurred, it is important that the judge gives clear reasoning why that determination has been made.

64. At paragraph 150, the judge referred to the possibility of a failure of both the claimants to realistically assess the financial health of the business. The employment judge suggested, at best, they were blinkered in their approach and, at worst, they were deliberately misleading people. At paragraph 166, the employment judge stated that the approach to the banking covenant could have constituted gross misconduct by the first claimant and potentially misconduct by Mr Haynes, without any explanation for the difference of classification for the two claimants.

65. In the section of the judgment headed, "My conclusions", that seems to have principally set out the employment judge's determinations of fact, which would have gone only to contribution or a just and equitable reduction on the basis of actual improper conduct, as opposed to determining the likelihood the respondent would have fairly dismissed absent the actual dismissals, the employment judge stated that both claimants had committed acts of gross misconduct (see paragraph 192). At 193, it is suggested that the treatment of the banking covenant by the fist claimant was either of itself or cumulatively gross misconduct. Paragraph 194 suggests the same in respect of the second claimant.

66. Overall, the reasoning simply does not set out with sufficient clarity what conduct the employment tribunal found had occurred and/or how it would have been assessed by the first respondent. It was necessary, if the employment judge concluded that there was culpable conduct of a very serious nature by the claimants that would result in a substantial reduction in their compensation on just and equitable grounds pursuant to section 123(1) that the reasoning be set out clearly. Similarly, clarity was required as to the basis on which it was concluded that the claimants would have been dismissed without notice by the respondents as part of an assessment of a **Polkey** reduction. In the end, for reasons I think may be understandable, considering the very great time pressure the judge worked under, the reasoning is insufficient to support the findings in respect of the banking covenant.

67. The suggestion that a stage payment had been deliberately brought forward was considered at paragraphs 170 to 174. There was some evidence to show involvement by senior staff and an email

was produced just before the further particulars had been provided that showed that a boat may have been moved to trigger a stage payment. However, there is insufficient clarity as to precisely what the first claimant's involvement was in this process and the degree of any culpability on his part. Paragraph 172 refers to the possibility of misconduct or gross misconduct. Again, it is unclear how an assessment has been made as to whether there was any error on the part of the first claimant that constituted misconduct or that involved some dishonest action on his part that was serious enough to result in a reduction in compensation under section 123(1) on just and equitable grounds. A similar point is to be made in respect of ground 6. At paragraphs 193 and 194, there is a suggestion in the final factual conclusions of the employment judge that the moving of the boat could constitute gross misconduct. There is insufficient reasoning to explain precisely what the first claimant did that amounted to gross misconduct.

68. In respect of ground 9, this issue is dealt with at paragraphs 150 to 156. Here, the tribunal refers to the possibility of a blinkered approach or deliberate misleading of the shareholders and their banks. This is potentially in respect of injections of cash and more specifically in respect of cash forecasts. At paragraph 150 it is suggested that there may have been an over-optimistic approach. At paragraph 153 it is suggested to be overly optimistic or an exaggeration of what was probable. At paragraph 154, it is suggested that there was no basis for forming a realistic belief that the forecast was showing what were probable receipts. At paragraph 155, it is stated that the claimants were either deluding themselves or were deceiving the banks. It is stated that their assessment was hopeful at best or a significant over-exaggeration at worst. Despite setting out such dichotomies that involved significant difference sin blameworthiness the employment tribunal did not state which the respondent would have found to be the case or, where relevant, how the employment tribunal determined the issue. The employment tribunal stated that the claimants were aware, or ought to have been aware, that the figures were unrealistic. It is said that this could have reasonably been considered to be gross misconduct, but again there is insufficient assessment of what the tribunal held the respondent would have concluded had been done by the claimants so as to result in a fair dismissal at

a later date; or why such conduct should result in a reduction of compensation pursuant to 123(1). Where the employment judge stated at paragraphs 193 and 194 that the claimants actions might be gross misconduct this finding is not supported by sufficient reasoning.

69. Finally, ground 10 concerns the statement in the judgment that the turnover of the business was £4 million whereas it was in the region of £40 million, and whether, more generally, there were failings in the financial management of the claimants that meant that their position with the respondent was untenable. It is not clear to me that the turnover figure is a typographical error. Indeed, the point that seems to be made is that in comparison with this relatively low turnover the stage payments were very large. It may, or may not, in the end be of significance, but I consider that the reasoning is insufficient to explain how the tribunal assessed turnover and the consequences that had for its assessment of the overall financial control that was exercised by the two claimants.

70. Accordingly, I consider that the fundamental failure in this judgment is one of a lack of sufficient reasoning to justify any conclusions that were reached that the claimants had been more than careless in their approach to the finances of the respondent and had potentially been guilty of serious conduct, including misleading the banks and potential dishonesty.

71. I conclude that grounds 1(b), 6, 7, 9 and 10 succeed. This leads on to consideration of the outcome. Firstly, the matter will have to be remitted for further consideration. On remission, it will not be open to the respondent to assert that the claimants would have been fairly dismissed by redundancy. That was not a matter that was properly before the tribunal. However, it will be permissible for the respondent to assert that the claimants would have been fairly dismissed with or, alternatively, without notice at a future point, so as to give rise to a **Polkey** reduction. It will also be open to the respondent to assert that compensation should be reduced under section 122(2) and/or 123(1) on just and equitable grounds. Section 123(6) will not available because a reduction under that provision would require conduct that caused or contributed to the dismissal that did in fact take place which was found to have been by reason of the transfer.

72. The next issue is to whom the case should be remitted having regard to the factors set out in **Sinclair Roche and Temperley and others v Heard** [2004] IRLR 763 at [46]. It is a considerable period since the original hearing. That is a consideration that potentially would weigh against remission to the same tribunal. However, I consider that is outweighed by the fact that there are numerous findings of fact of the tribunal that have not been overturned. The failures that occurred in this case can be, to a large extent, explained by the limited time the judge had to deal with the claim, the unhappy development of the pleadings and the lists of issues, and an insufficient focus on the statutory framework for assessing compensation. I consider that remission to the same judge is likely to result in some saving of costs. I do not consider that it was a totally flawed decision. It was one that involved insufficient reasoning. I consider that there is no issue of bias or partiality and that the tribunal's professionalism can be relied upon to avoid the judge seeking a second bite of the cherry. Accordingly, the claim will be remitted to the same tribunal.

73. What is being remitted are the issues of principle in assessing compensation. There would have had to be a remedy hearing in any event. It will now deal with the issues of general principle as well as calculation of remedy.

74. This is a case where it is likely that early case management will assist. The judge will have to carefully identify with counsel the issues on remission and whether it will be permissible for either party to call further evidence. In advance of a preliminary hearing for case management, the parties should take all reasonable steps to agree the notes of evidence that are relevant to any of the issues of remedy.

75. The conduct issues in respect of the pay rise given by the first claimant to the second claimant will not be open for redetermination on remission as that matter was not permitted to proceed in the appeal.

76. The following structure may be of assistance in analysing the points of principle in respect of compensation on remission, although it will be for the judge to finalise any list of issues with input from counsel.

77. In broad terms, I consider it will be necessary for the tribunal to consider separately for each of the claimants:

> (1) Would or might the respondent have dismissed the claimant at some stage after the transfer of the undertaking for a reason relating to conduct if he had not been unfairly dismissed for a reason relating to the transfer of the undertaking?
>
> (2) What is the specific nature of the conduct that the respondent would have relied upon to dismiss the claimant (including, if there is more than one element of the conduct, the specific nature of each element of the conduct)?
>
> (3) Would the conduct, any element of the conduct or certain elements taken together have been treated by the respondent as constituting gross misconduct such as to entitle them to dismiss without notice?
>
> (4) What specifically about the conduct would have been treated as establishing gross misconduct?
>
> (5) What is the chance that a fair dismissal would have occurred, possibly split into the chance of dismissal with or without notice?
>
> (6) Was the claimant guilty of conduct that makes it just and equitable that the basic or compensatory award be reduced?
>
> (7) If so, what is the specific nature of the conduct (including, if there is more than one element to the conduct, the specific nature of each element of the conduct) that makes a reduction just and equitable and the extent of that reduction?

78. The parties would be well advised to consider where they now stand, what the likelihoods are in respect to the tribunal's findings on remission. They should consider whether there is a prospect of resolving their differences without the costs involved in a further, potentially somewhat lengthy, hearing at the employment tribunal.